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From:	NL Delegation
To:	Working Party on Competitiveness and Growth (Internal Market)
Subject:	The Netherlands' drafting suggestion for Article 12 of the Platform-to-Business Regulation Proposal

Drafting suggestions
Presidency Compromise
Proposal (No. 2018/002 COD)

Regulation Online Platforms

October 10, 2018

The Netherlands supports a level playing field between online platforms and businesses. It also recognizes the importance of a fair predictable, sustainable and trusted business environment in the online economy. The Regulation Online Platforms offers a broad and stable basis to ensure a healthy relationship between platforms and businesses.

In general, the Netherlands is supportive of the Regulation. However, before we are able to give our full support to the draft, one key concern should be addressed. We are wary that the current wording of article 12 of the Regulation is not fit for purpose.

The Netherlands has one of the most efficient and effective systems of collective redress. This is supported by findings from the European Commission (European Commission, DG SANCO, 26 August 2008, Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union) study into collective redress from 2008, which showed that, of all the systems of collective redress examined, the Dutch system of collective redress has achieved:

"The most positive experiences from a consumer viewpoint are reported from [.. the Netherlands [...]."

"The assessment of consumer detriment indicates a very limited reduction in consumer detriment resulting from the mechanisms evaluated [...] the notable exception being the Dutch mechanism provided so far higher direct benefit to affected consumers."

One of the key elements of our system is that it offers one, horizontal, solution to all organizations and associations representing businesses and/or consumers in collective proceedings, either in a procedure for damages or injunction proceedings. Currently, we have a bill pending in Parliament which will introduce the possibility to claim damages collectively. The Netherlands already has a system in place which offers the possibility to conclude a collective settlement. This bill has received broad support of business and consumers organisations, because it addresses the key issues which can arise in collective proceedings, whether it is a collective claim for damages or an injunction procedure. These are the coordination of different collective proceedings with regard to the same facts or legal questions, the quality criteria for entities which represent business and consumers in these proceedings, and the question whether a judgment in a collective proceeding is binding for all consumers and/or businesses represented by a representative organization or association in the proceedings.

Unfortunately the current wording of article 12 of the Regulation Online Platforms does not resolve any of these issues. Moreover:

- The system introduced in this Regulation differs from the system in the proposed Directive on representative actions (2018/0089 (COD). This will create a legislative jigsaw for (European) collective redress which will not benefit consumers and businesses in Europe.
- The system proposed in this Regulation will lead to a *race to the bottom* as Member States or judges cannot apply their national criteria for assessing the quality and integrity to representative organisations which are established under the law of another Member State.

Therefore, we would propose to **align the Regulation and the proposed Directive** by introducing **a cross reference** to the existing Injunctions Directive 2009/22/EC and **to amend** the current article to clarify that Member States can apply stricter national admissibility criteria to representative organisations from other Member States if they are not listed as a qualified entity. Qualified entities can only make use of this possibility in cross border cases. Possible amendments are attached.

Replace consideration 27a 27b by a new consideration 27a, 27b and 27c

27a. Notwithstanding the effective application of this Regulation Member States should have the possibility to assess, in accordance with the rules of the Member States in which the action is brought, whether an organisation or association, which has a legitimate interest in representing business users or corporate website users, has not frivolously started a collective proceeding against an online platform. Therefore, it is necessary that a Member State or its courts can assess whether these organisations or associations have a suitable governance, sufficient transparency about funding and distribution of funds as well qualified representation before the courts.

27b. However qualified entities listed in Annex I of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests should have the possibility to have standing before the courts of another Member States if there is a cross border infringement, as stipulated in Article 4 of this Directive.

27c. Appointed public authorities should also have the possibility to start judicial proceedings against online platforms. Therefore, the Regulation gives Member States the possibility to designate the competent authority in article 5 of Regulation EU 2017/ 2394 of the European Parliament and of the Council as the public authority which can start a representative action representing business users or corporate website users.

Article 12

Judicial proceedings by representative organisations or associations and by public bodies qualified entities

1. Organisations and associations that have a legitimate interest in representing business users or in representing corporate website users, as well as public bodies set up in Member States, shall have the right to take action before national courts in the Union, in accordance with the rules of the law of the Member State where the action is brought, to stop or prohibit any non-compliance by providers of online intermediation services or by providers of online search engines with the relevant requirements laid down in this Regulation.

2. Organisations or associations shall have the right referred to in paragraph 1 only where, at the time of bringing the action, they meet all of the following requirements:

(a) they are properly constituted according to the law of a Member State **in which the action is brought**;

(b) they pursue objectives that are in the collective interest of the group of business users or corporate website users that they represent on a sustained basis;

(c) they are of a non-profit making character, ~~their members are not granted any unusual benefits from the organisation's or association's assets and their staff are not granted any unreasonably high remunerations;~~

~~(d) they disclose fully and publicly information on the membership, governance structure, personnel and finances.~~

~~2a. In Member States where~~ **may designate such a competent public bodies, as designated in article 5 of Regulation EU 2017/2394** ~~have been set up, those public bodies shall to have the right referred to in paragraph 1, where they are charged with to defending the collective interests of business users or corporate website users or with ensuring compliance with the requirements laid down in this Regulation, in accordance with the national law of the Member State concerned.~~

2b. In case of Unionwide infringements, Member States shall take the measures necessary to ensure that, in the event of an infringement originating in that Member State, any qualified entity from another Member State where the interests protected by that qualified entity are affected by the infringement, may apply to the court or administrative authority, **if this qualified entity complies with the conditions set out in Directive 2009/22/EC and has been placed on the list in the Annex of this Regulation. The list in the Annex of this Regulation shall be drawn up by the Commission in accordance with article 4 of Directive 2009/22/EC.**

~~(a) organisations or associations located established in their Member State that meet at least the requirements of paragraph 2 upon their request;~~

~~(b) public bodies set up in their Member State that meet the requirements of paragraph 2a that are granted the right referred to in paragraph 1 and shall communicate to the Commission their name and purpose.~~

~~2c. The Commission shall draw up a list of the organisations, associations and public bodies according to paragraph 2b, with the specification of their purpose. This list shall be published in the Official Journal of the European Union; changes to this list shall be published without delay and the updated list shall be published every six months. Member States shall communicate the name and purpose of these designated entities to the Commission. The Commission will draw up a list of the qualified entities referred to in paragraph 2 and publish it in the Official Journal of the European Union.~~

~~2d. The courts or administrative authorities shall accept this list as proof of the legal capacity of the organisation, association or public body, without prejudice to their right to examine whether the purpose of the claimant justifies its taking action in a specific case. If a Member State or the Commission raises concerns regarding the compliance by an organisation or association with the criteria laid down in paragraph 2, the Member State that designated that organisation or association shall investigate the concerns and, where appropriate, revoke the designation if one or more of the criteria are not complied with.~~

~~3. The right referred to in paragraph 1 shall be without prejudice to the rights of business users and corporate website users to individually take action before competent national courts, in accordance with the rules of the law of the Member State where the action is brought, to address any non-compliance by providers of online intermediation services with the relevant requirements laid down in this Regulation.~~

Explanation

The system introduced in this Regulation differs from the system in the proposed Directive on representative actions. This will create a legislative jigsaw for (European) collective redress which does not benefit consumers and businesses in Europe. For example, it is not clear whether a class of consumers and businesses which are represented by a representative organisation in a case against an online platform are covered by the rules of the Directive or the rules of the Regulation. What are for example the rules of admissibility in such a case? Those of the Directive or those of the Regulation? Such a legislative jigsaw will only be beneficial for lawyers.

Further, if we understand the Commission's answers on our questions correctly the Regulation does create a legal loophole to avoid stringent admissibility criteria for representative organisations. For example, if a country has strict rules on governance, transparency and third party litigation funding these rules can be easily circumvented by establishing a representative organisation in a Member State which does not have such rules. Under the Regulation these representative organisations have to be admitted to a collective proceeding in another Member State, even if they do not fulfill the national admissibility criteria. They might even have the possibility to claim damages, if such a possibility is available under national law. The European legal framework for collective redress is currently not sufficiently harmonized in order to have such a mutual recognition system.

Therefore we propose that article 12 will follow the rules of Directive 2009/22/EC. This will prevent a legislative jigsaw as this Directive is currently replaced by the new Directive on representative actions and therefore any future amendments to this Directive will also be passed through in the Regulation. Further, by restricting the cross border access to collective proceedings of other Member States to representative organisations and associations which have already been identified by the Commission in the existing Annex of this Directive, the possibilities for abuse will be minimized. Lastly, public authorities which have been designated as competent authorities under Regulation 2017/395 are best placed to start collective proceedings on behalf of these businesses.