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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

16. oktober 2018

18/10703-67

mbo-KFST

Danish amendments to PRES CA no. WK 11805/2018 INIT

DK would like to thank the PRES on the work on the P2B regulation, which DK believes in certain areas are moving in the right direction. Especially DK would like to thank the PRES to take on board the provision of enforcement in article 12a.

As stated on the WP the 11.-12. October we find article 1 of great and vital importance, since it sets the scope of this regulation. We find it important to clearly stress that this regulation is directly applicable and has precedence within its scope. And as stated on the WP meeting we support the proposal from Slovakia on article 1.

Further, we find it important that the wording in article 2 on the definition on online intermediary service does not exempt platforms from this regulation as seem to be the case with the current wording. In article 3 on when T&C's are to be non-binding, we find that the current two proposed options may lead to uncertainty for the business users and weaken their legal position. Lastly on article 4, we suggest an additional exemption for the 10 days notification period, stressing that the platform has a right to act if the business user violates the policy laid down in the T&C's.

Regarding DK comments on recital 5, 6, 17, 20, 24 and article 1, 5. 8 and 9 we refer to our previous written comments.

We set out below the DK's comments to PRES amendments WK 11805/2018 INIT on recital 16a, 27b and article 2,3,4, 12 and 12a.. DK reserves the right to submit further comments on this proposal and its further amendments.

PRES CA no. WK 11805/2018 INIT	DK amendments
(16a) The period of 10 days should not apply 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 with immediate or almost immediate effect 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 (1) (b) of Directive 2000/31/EC. Similarly, where a statutory provision or a general legal principle of a Member State grants a provider of online intermediation services the right to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user with immediate effect, the period of 10 days should not apply. Nonetheless, the provider of online intermediation services should provide the business user concerned with a statement of reasons on a durable medium that should contain a reference to the specific facts or circumstances that led to the decision or necessitated the course of action taken.	(16a) The period of 10 days should not apply if the business user violates the specifications laid down by the online intermediary service provider in the terms and conditions; 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 with immediate or almost immediate effect 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 (1) (b) of Directive 2000/31/EC. Similarly, where a statutory provision or a general legal principle of a Member State grants a provider of online intermediation services the right to suspend or terminate, in whole or in part, the provision of its online intermediation services to a given business user with immediate effect, the period of 10 days should not apply. Nonetheless, the provider of online intermediation services should provide the business user concerned with a statement of reasons on a durable medium that should contain a reference to the specific facts or circumstances that led to the decision or necessitated the course of action taken. <i>Justification</i> DK support the original text “without undue delay”. We believe the 10 day period is an unnecessary burden, especially for small enterprises to provide a

	business user with a decision of suspension or termination. Further, a 10 days notification 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. Even when a business user contradicts the platforms policy, then the OIS is forced to sell the business users products in 10 more days. This is also why we propose to include an additional exemption for the notification period of 10 days, stressing that the platform has the right to act if the business user violates the policy laid down in the terms and conditions. One of many examples is if a platform has a policy on selling ecological clothes. Clearly it would be unfair to the platform and to the detriment of consumers, if such a platform could not suspend a business user that sells non-ecological products. We find it of great importance to preserve the platforms right to do business. This is of great importance for the consumers as well in order for them to trust what is being sold on the platform. Further, we question whether the wording of the general legal principle will create the necessary clarity. Will it i.e. be if member states has specific legal requirements on environmental standards, product safety, etc.? We believe this exemption might be too vague and could create legal fragmentation if and so far the legal principle is to be understood as
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	different national legal requirements.
(27b) Member States should lay down the rules for civil, such as interim measures and injunctions, or administrative sanctions applicable to infringements of this Regulation and should ensure that they are implemented. Those sanctions should be effective, proportionate and dissuasive. Different enforcement systems already exist in Member States, which should not be obliged to set up new national enforcement bodies. Member States should have the option appoint existing authorities, including courts, with the enforcement of this Regulation.	(27b) Member States should lay down the rules setting out measures applicable to infringements of the provisions of this regulation civil, such as interim measures and injunctions, or administrative sanctions applicable to infringements of this Regulation and should ensure that they are implemented. Those sanctions measures should be effective, proportionate and dissuasive. Different enforcement systems already exist in Member States, which should not be obliged to set up new national enforcement bodies. Member States should have the option appoint existing authorities, including courts, with the enforcement of this Regulation. <i>Justification</i> It is of great importance to DK, that sanctions are replaced with measures, since sanctions are often related to fines. Further, injunctions, prohibition and interim measures should also be part of the enforcement body's tool box Alternatively, the recital on enforcement from the geoblocking regulation could be used: <i>“ Member States should designate one or more bodies to be responsible for taking effective action to ensure compliance with this Regulation. Those bodies, which could include courts or administrative authorities, should have the necessary powers to order the trader to comply with this Regulation.</i>

	<i>Member States should also ensure that effective, proportionate and dissuasive measures can be taken against traders in the event of any breach of this Regulation.”</i>
Article 2 Definitions For the purposes of this Regulation, the following definitions shall apply: (1) 'business user' means any natural or legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession; (2) 'online intermediation services' means services which meet all of the following requirements: (a) they constitute information society services within the meaning of Article 1(1)(b) of Directive (EU) No 2015/1535 of the European Parliament and of the Council¹⁰; (b) they their primary purpose is to allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; (c) they are provided to business users on the basis of contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users, which offer goods and services to consumers and the consumers to which those	Article 2 Definitions For the purposes of this Regulation, the following definitions shall apply: (1) 'business user' means any natural or legal person which through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession; (2) 'online intermediation services' means services which meet all of the following requirements: (a) they constitute information society services within the meaning of Article 1(1)(b) of Directive (EU) No 2015/1535 of the European Parliament and of the Council¹⁰; (b) they their primary purpose is to allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded; (c) they are provided to business users on the basis of contractual relationships between, on the one hand, the provider of those services and, on the other hand, both those business users, which offer goods and services to consumers and the consumers to which those

business users offer goods or services; [...] (10) 'terms and conditions' means all terms, and conditions, clauses and other information or specifications, irrespective of their name or form, which govern the contractual relationship between the provider of online intermediation services and their business users and are unilaterally determined by the provider of online intermediation services.	business users offer goods or services; [...] (10) 'terms and conditions' means all terms, and conditions, clauses and other information or specifications, irrespective of their name or form, which govern the contractual relationship between the provider of online intermediation services and their business users and are unilaterally determined by the provider of online intermediation services. <i>Justification</i> We want to reinstate the original wording. We believe the amendment creates more uncertainty in defining an OIS, since primary purpose might end up being a matter of interpretation. In example some booking platforms use two kinds of business models. A Merchant Model, where hotels sell rooms to the platform in bulk at discounted or wholesale prices. The platform then sell them to customers at a markup price. And an Agent Model, which is a commission-based model wherein hotels give the platforms commissions based on business bought. In this model, the hotels list their services, and the platforms don't have to buy anything up front. We believe the new wording might lead to, that i.e. booking platforms will be exempted from this regulation. Further, in 2.2.c we suggest to define business users as business that
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	sell goods and services to consumers in order to avoid misunderstandings. Lastly in 2.10 we want to keep the wording “and are unilaterally determined by the provider of online intermediation services”, since it should not include individually negotiated contracts between the platform and the business user and wideness the scope.
<i>Article 3</i> 3. Modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 3 shall be null and void. Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 as well as modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 2 shall be non-binding. [Opt. 1] Terms and conditions, or specific provisions thereof, which do not comply with the transparency requirements of point (a) of paragraph 1 shall be interpreted to the detriment of the provider of online intermediation services. Terms and conditions, or specific provisions thereof, which do not comply with the transparency requirements of points (b) and (c) of paragraph 1, as well as modifications to terms and conditions implemented by	<i>Article 3</i> 3. Modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 3 shall be null and void. Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 as well as modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 2 shall be non-binding. [Opt. 1] Terms and conditions, or specific provisions thereof, which do not comply with the transparency requirements of point (a) of paragraph 1 shall be interpreted to the detriment of the provider of online intermediation services. Terms and conditions, or specific provisions thereof, which do not comply with the transparency requirements of points (b) and (c) of paragraph 1, as well as modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of the second

a provider of online intermediation services contrary to the provisions of the second subparagraph of paragraph 2 shall be non-binding on the business user concerned, unless their non-binding nature is to the detriment of the business user. [Opt. 2] Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 as well as modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 2 shall be non-binding.	subparagraph of paragraph 2 shall be non-binding on the business user concerned, unless their non-binding nature is to the detriment of the business user. [Opt. 2] Terms and conditions, or specific provisions thereof, which do not comply with the requirements of paragraph 1 as well as modifications to terms and conditions implemented by a provider of online intermediation services contrary to the provisions of paragraph 2 shall be non-binding. <i>Justification</i> Regarding the two options and lack of transparency in the terms and conditions, we prefer having the original text. The original text focuses on what happens if modifications to terms and conditions don't comply with the rules of article 3. The new proposal from the PRES concerns the terms and conditions as such. If we go back to the original wording, the concerns stressed below would be solved. If terms and conditions that do not comply with the transparency requirements are to be non-binding, this may lead to uncertainty for the business users, since it is unclear which other term and conditions that applies between the platform and business user. It will normally then be national law that applies, which is not uniform. We fear it may weaken the legal position of the business user. If for instance the lack of transparency regards terms and conditions on price, then the business user may face uncertainty in what rules
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	applies. This might actually lead to a higher price for the business user. And what regards to suspension, then a platform is able to suspend a business user without given grounds for the platforms decision, as stated in 3.1.c. The fact that T&C are non-binding may lead to detrimental effects for the business users. Thus, we prefer the original wording from the Commission, and then letting a designated body to enforce the rules laid down in this article.
<i>Article 4</i> Suspension and termination 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 provide the business user concerned, at least 10 days before that decision enters into effect without undue delay, with a statement of reasons for that decision on a durable medium in a verifiable manner. 3. The period referred to in paragraph 1 shall not apply where a provider of online intermediation services (a) is required to suspend or terminate, in whole or in part, the provision of its services with immediate effect under a regulatory obligation pursuant to national or Union law or, where applicable, in order to benefit from the liability exemption as laid down in Article 14(1)(b) of Directive 2000/31/EC;	<i>Article 4</i> Suspension and termination 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 provide the business user concerned, at least 10 days before that decision enters into effect without undue delay, with a statement of reasons for that decision on a durable medium in a verifiable manner. 3. The period referred to in paragraph 1 shall not apply where a provider of online intermediation services (a new) has specifications laid down in the terms and conditions, which the business user violates (a) is required to suspend or terminate, in whole or in part, the provision of its services with immediate effect under a regulatory obligation pursuant to national or Union law or, where applicable, in order to benefit from the liability

(b) decides to suspend or terminate, in whole or in part, the provision of its services with immediate effect on the basis of a general legal principle or a statutory provision of a Member State, which is in accordance with Union law. The provider of online intermediation services shall nonetheless provide the business user concerned with a statement of reasons without undue delay that shall contain a reference to the specific facts or circumstances that led to the decision or necessitated the course of action taken on a durable medium.	exemption as laid down in Article 14(1)(b) of Directive 2000/31/EC; (b) decides to suspend or terminate, in whole or in part, the provision of its services with immediate effect on the basis of a general legal principle or a statutory provision of a Member State, which is in accordance with Union law. The provider of online intermediation services shall nonetheless provide the business user concerned with a statement of reasons without undue delay that shall contain a reference to the specific facts or circumstances that led to the decision or necessitated the course of action taken on a durable medium. <u>Justification</u> DK support the original text “without undue delay”. We believe the 10 day period is an unnecessary burden, especially for small enterprises to provide a business user with a decision of suspension or termination. Further, a 10 days notification 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. Even when a business user contradicts the platforms policy, then the OIS is forced to sell the business users products in 10 more days. This is also why we propose to include an additional exemption in 3.3.a (new) for the notification period of 10 days, stressing that the platform has the right to act if the business user violates the policy
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	laid down in the terms and conditions. One of many examples is if a platform has a policy on selling ecological clothes. Clearly it would be unfair to the platform and to the detriment of consumers, if such a platform could not suspend a business user that sells non-ecological products. We find it of great importance to preserve the platforms right to do business. This is of great importance for the consumers as well in order for them to trust what is being sold on the platform. Regarding 3.b, we question whether the wording of the general legal principle will create the necessary clarity. Will it i.e. be if member states has specific legal requirements on environmental standards, product safety, etc.? We believe this exemption might be too vague and could create legal fragmentation if and so far the legal principle is to be understood as different national legal requirements.
<i>Article 12</i> Judicial proceedings by representative organisations or associations and by public bodies Qualified entities 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	<i>Article 12</i> Judicial proceedings by representative organisations or associations and by public bodies Qualified entities 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. Member States shall designate qualified entities to the Commission. 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; (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 such public bodies have been set up, those public bodies shall have the right referred to in paragraph 1, where they are charged with defending the collective interests of business users or corporate website users or with ensuring compliance with the requirements laid	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. Member States shall designate qualified entities to the Commission. 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; (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 such public bodies have been set up, those public bodies shall have the right referred to in paragraph 1, where they are charged with defending the collective interests of business users or corporate website users or with ensuring compliance with the requirements laid
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down in this Regulation, in accordance with the national law of the Member State concerned. 2b. Member States may designate communicate to the Commission (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 <i>Official Journal of the European Union</i>; 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	down in this Regulation, in accordance with the national law of the Member State concerned. 2b. Member States may designate communicate to the Commission (b) 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 <i>Official Journal of the European Union</i>; 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
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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.	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. <u>Justification</u>
	<i>Article 12a</i> Sanctions Enforcement [Opt. 1] 1. Each Member State shall designate a body or bodies responsible for adequate and effective enforcement of this Regulation. 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. 3. The measures referred to in paragraph 2 shall be communicated

	to the Commission and made publicly available on the Commission's website.” [Opt. 2] Member States shall lay down the rules on the sanctions measures applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The measures sanctions provided for shall be effective, proportionate and dissuasive. <i>Justification</i> We want to amend the title to enforcement rather than sanctions. The geoblocking regulation has the same heading. Further, we prefer option 1 but can support option 2 if sanctions are replaced with measures. From our point of view sanctions refers to fines. And we believe injunctions, prohibition and interim measures should also be part of the enforcement body's tool box.
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