LEWIATAN

Warszawa, 7 maja 2021 r.
KL/201/146/ED/2021

Marek Zagórski
Sekretarz Stanu
Pełnomocnik Rządu ds. Cyberbezpieczeństwa
Kancelaria Prezesa Rady Ministrów

Szanowny Panie Ministrze,

w nawiązaniu do zaproszenia Kancelarii Prezesa Rady Ministrów do zgłaszania uwag do rozdziałów 4 oraz 5 wraz z towarzyszącymi motywami projektu unijnego rozporządzenia: Akt prawny o usługach cyfrowych (*Digital Services Act)* (dokument COM(2020) 825), Konfederacja Lewiatan, w załączeniu, przedstawia uwagi do projektu.

Z poważaniem,

Maciej Witucki
Prezydent Konfederacji Lewiatan

Do wiadomości:
Pan Michał Pukaluk - Dyrektor Departamentu Polityki Cyfrowej - Kancelaria Prezesa Rady Ministrów

W załączeniu:
Uwagi Konfederacji Lewiatan do rozdziałów 4 i 5 oraz towarzyszących motywów projektu unijnego rozporządzenia: Akt prawny o usługach cyfrowych (*Digital Services Act)* (dokument COM(2020) 825)

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Article 40 – Jurisdiction (specific questions)

Art. 40(1): What if an intermediary has several establishments in the Union but none of them qualifies as 'main' establishment for the Union?
Art. 40(2): What if an intermediary without the EU establishment offers services only in some Member States – should all DSCs still have jurisdiction or just those of Member States where the service is offered?

Article 41 - Powers of Digital Services Coordinators
The exercise of regulatory powers should be proportionate to the objectives of the DSA. We have three recommendations in this regard:

I The DSA proposal includes different standards for the exercise of oversight powers, between national competent authorities and the Commission. We would recommend aligning their projected competences, so that they would not overlap and are relevant to the fulfilment of tasks and objectives.

II In support of the proportionate exercise of oversight powers we would also recommend an approach similar to that of the EECC, where the DSA regime is underpinned by a harmonised set of objectives and tasks for national competent authorities and the Commission.

III We would welcome clarity that the powers of national competent authorities, DSCs and the Commission exercised in relation to individual content moderation decisions is additionally safeguarded by judicial oversight.

We would also support clarifying under Art. 41(2)(a), and in line with the approach in EU antitrust law, that where a commitment decision is adopted, no fine will be imposed.

Art. 41(3)(b):

Digital Services Coordinator, not only the judicial authority of Member State, should be empowered to order the temporary restriction of access of recipients of the service concerned by the infringement or to the online interface of the provider of intermediary services on which the infringement takes place.

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The parties involved should have the right to redress against the decision of Digital Services Coordinator before a judicial authority of the Member State.

Digital Services Coordinator should be empowered to order the temporary restriction of access of recipients of the service concerned by the infringement or to the online interface of the provider of intermediary services on which the infringement takes place not only when infringement "*causes serious harm*" and "*infringement entails a serious criminal offence involving a threat to the life or safety of persons*" – non-compliance with Digital Services Act should empower Digital Services Coordinator to order the temporary restriction of access, having regard to Article 41 paragraph 5, but not limited to serious harm/serious criminal offence;

Digital Services Coordinator shall have also at least the following enforcement powers:

a) the power to remove content or to restrict access to an online interface or to order the explicit display of a warning to recipients when they access an online interface;

b) the power to order a hosting service provider to remove, disable or restrict access to an online interface;

c) the power to order domain registries or registrars to delete a fully qualified domain name and to allow the competent authority concerned to register it; including by requesting a third party or other public authority to implement such measures.

Digital Services Coordinators shall have the enforcement powers mentioned above in particular in order to ensure compliance with Art. 11 (Legal representatives) by providers of intermediary services which do not have an establishment in the Union but which offer services in the Union. Digital Services Coordinator should have the possibility to take effective measures in particular when legal representatives are not established according to Art. 11 and there are no effective means to contact 3rd country service providers.

Specific questions to Art. 41:

Art. 41(1)(a)-(c): What is the legal basis for granting such wide ranging investigation powers without a court order?" Are the investigative powers of DSCs subject to full judicial review?

Art. 41(2)(e): What are interim measures that a DSC would be entitled to take to avoid the risk of 'serious harm' (to what interests?)?

Article 42 - Penalties

We urge policymakers to be more specific about how fines are to be calculated.

Specific questions to Art. 42:

Art. 42(1) / (2): Why are penalties not limited to intentional / negligent infringement, in order to be in line with **Art. 59?**

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Art. 42(3): Why is the wording for calculating penalties different here ('annual income or turnover') and in **Art 59** ('total turnover in the preceding financial year'), is that intentional or an oversight? Why are 'income' and 'turnover' used interchangeably, given they are not the same?

Article 43 - Right to lodge a complaint

Draft DSA limits the right to lodge a complaint against providers of intermediary services to recipients of these services. Such a mechanism reduces the potential for the enforcement of compliance with DSA. The recipient of the service might not be best placed to identify or take action against infringements. For example, the right holders whose rights are infringed may be interested in and have a legitimate interest in lodging the complaint. It is therefore essential that other parties with a legitimate interest can also lodge complaints.

Article 43
Right to lodge a complaint

Recipients of the service, **representative organisations and other parties with a legitimate interest,** shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient resides or is established. The Digital Services Coordinator shall assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator of establishment. Where the complaint falls under the responsibility of another competent authority in its Member State, the Digital Service Coordinator receiving the complaint shall transmit it to that authority.

Proposed change to recital 81

(81) In order to ensure effective enforcement of this Regulation, individuals or representative organisations **and parties with a legitimate interest** should be able to lodge any complaint related to compliance with this Regulation with the Digital Services Coordinator in the territory where they received the service, without prejudice to this Regulation's rules on jurisdiction. Complaints should provide a faithful overview of concerns related to a particular intermediary service provider's compliance and could also inform the Digital Services Coordinator of any more cross-cutting issues. The Digital Services Coordinator should involve other national competent authorities as well as the Digital Services Coordinator of another Member State, and in particular the one of the Member State where the provider of intermediary services concerned is established, if the issue requires cross-border cooperation.

A specific question to Art. 43:

Shall the recipient of the service be obliged to seek a resolution first through the internal complaints handling system/out of court dispute resolution?

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Article 44 – Activity reports (a specific question):

Art. 44(2): How is information flow for reporting guaranteed, given that under **Articles 8 and 9**, the intermediary must inform the authority issuing the order about the effect given to it, but not the DSC of that Member State?

Article 45 - Cross border cooperation among Digital Services Coordinators

We appreciate the importance of cross-border coordination to support an effective regulatory framework that protects users across the EU, but the DSA must also facilitate greater legal certainty for platforms and users, and support coherent and robust enforcement strategies from DSCs and national competent authorities.

As regards requests to the Digital Services Coordinator of establishment to investigate a suspected infringement (Article 45), we would welcome clarification on this mechanism. Furthermore, additional clarity is needed in order to avoid DSC going past the Country of Origin principles in their day-to-day activities.

Article 46 - Joint investigations and requests for Commission intervention

We would suggest clarifications on the processes and procedural safeguards for joint investigations, and, given the oversight responsibility of the country of establishment, also on the expected nature of actions resulting from any joint investigations.

Specific questions to Art. 46:

Art. 46(1): Does 'operating in' several Member States mean the same as 'offering services' as per **Art 2(d)?**

Art. 46(2): Could a DSC hand over investigations to the Commission at its own discretion in any circumstances and without specific reasons? If so, what is the remaining relevance of a DSC for the supervision of VLOPs?

Article 49 - Tasks of the Board

We would support clarification on the role given to the European Board for Digital Services to support competent authorities in the analysis of reports and results of audits of VLOPs.

Article 50 - Enhanced supervision for very large online platforms

Oversight powers of the Commission :

Specifying the tasks of regulatory bodies and a harmonised set of objectives and principles to underpin their work can support consistent application and coherence in regulatory strategy, whether within

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Member States or across the EU. It can also support the proportionate and robust exercise of investigation and enforcement powers.

For example, the European Electronic Communications Code (EECC) achieves this in Art. 3 and 4 on objectives, and Art. 5 EECC includes a list of specific tasks for the national regulatory and other competent authorities. Indeed, the benefit of specifying tasks in this way may be seen in Art. 49, in which the DSA identifies the tasks of the European Board for Digital Services.

We would therefore recommend that the DSA specify the tasks and objectives of the Commission when it is performing oversight activities under Section 3. A provision to this effect could be added at the beginning of Section 3.

Triggers for ad hoc, voluntary audits (Art. 50(3)): Given the range of obligations on VLOPs under Section 4 of Chapter 3, we would recommend clarification on the circumstances in which the DSA may request an ad hoc audit of the action plan under Art. 50(3). We would suggest that this may only be triggered when there is a justification provided for such activity.

The voluntary nature of Codes of Conduct:
We would welcome clarification on the power of competent authorities and the Commission to take into account the participation of a VLOP in a Code of Conduct in determining whether that intermediary has infringed its obligations under the DSA (recital 68). We are concerned that Codes of Conduct may become mandatory in practice for VLOPs.

A specific question to Art. 50:
Art. 50(2): Based on what experience and impact assessment data is 1-month period considered to be appropriate to react to a decision? Would the deadline be extendable on reasoned request?

Article 51 - Intervention by the Commission and opening of proceedings
The exercise of regulatory powers should be proportionate to the objectives of the DSA. We have three recommendations in this regard:
I The DSA proposal includes different standards for the exercise of oversight powers, between national competent authorities and the Commission. We would recommend aligning this standard, so that it is one of necessity for the performance of relevant tasks and objectives. We support activities aiming at harmonization of the oversight powers.

II In support of the proportionate exercise of oversight powers we would also recommend an approach similar to that of the EECC, where the DSA regime is underpinned by a harmonised set of objectives and

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tasks for national competent authorities and the Commission.

III We would welcome clarity that the powers of national competent authorities, DSCs and the Commission exercised in relation to individual content moderation decisions is safeguarded by judicial oversight.

A specific question to Art. 51:
Art. 51(1)(a): Considering the similar debate on the Commission's enforcement powers in the early stages of the **General Data Protection Regulation 2016/679** legislation process, how does the DSA guarantee the independence of the DSCs set out in **Art 39(2)** when at the same time, their decisions can be overruled by COM?

Article 52 – Requests for information (a specific question)
Art. 52(1): What is the reason for differentiating between a 'simple request' and a 'decision' – in which circumstances would one or the other be more appropriate? Are auditors subject to confidentiality privileges, both for audits under **Art 28** (where the VLOP commissions the audit, and thus there is a client relationship with the auditor) and under **Art 50(3)**, where the DSC instructs the audit and may also appoint the auditor of its choice? If not, how do we safeguard the trust in the relationship between the auditor and the VLOP? Could 'other persons' be anyone who is working for/with a VLOP?

Article 54 – Power to conduct on-site inspections (specific questions)
Art. 54(1)-(4): What is the justification and legal basis for granting such powers without a court order, and without additional requirements (such as prior insufficient supply of documents)?
Art. 54(3): How is it ensured that trade-secret protected information, e.g. relating to IT systems and algorithms, is exclusively used in the relationship between COM and the VLOP?

Article 55 – Interim measures (specific questions)
Art. 55(1): What is the intended interplay between **Art 55(1)** and **Art 58(1),** given that the reference made by the former to the latter is circular - **Art 55(1)** refers to a decision pursuant to **Art 58(1)**, which in turn refers to a decision under **Art 55(1)?**
What is a 'risk of serious damage to the recipients of the service'? Is this intended to mean the same as 'risk of serious harm' as per **Art 41(1)(m),** which does not include the limitation to harm arising to the recipients of the service?

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Article 57 - Monitoring actions

We are concerned about the lack of any safeguards in Art. 57, given this relates to highly commercially sensitive information. Providing explanations over databases and algorithms in response to information requests by the Commission would be more proportionate than granting direct access. In addition, such information requests should only be directed to online platforms in clearly defined circumstances and under strict confidentiality safeguards.

Specific questions to Art. 57:

Art. 57(1): Why does the Commission have more rights re access to data than the DSCs, considering that COM only steps in for specific investigations when requested or when the DSC fails to act?

For which purposes does COM need extra powers for continuous monitoring, and is the exercise of those powers limited in time in any way? How are the powers under **Art 57(1)** different to those already granted to COM under **Art 52 and 54(1)**?

Article 58 – Non-compliance

The Commission should be empowered to:

1) order, in the decision pursuant to Art. 58, the temporary restriction of access of recipients of the service or to the online interface of the very large online platform where it finds that the very large online platform concerned does not comply with the relevant provisions of this Regulation/interim measures ordered pursuant to Art. 55/commitments made binding pursuant to Art. 56;

2) the power to remove content or to restrict access to an online interface or to order the explicit display of a warning to recipients when they access an online interface;

3) the power to order a hosting service provider to remove, disable or restrict access to an online interface;

4) the power to order domain registries or registrars to delete a fully qualified domain name and to allow the competent authority concerned to register it; including by requesting a third party or other public authority to implement such measures.

There is a need to align enforcement provisions concerning VLOPs with provisions of Art. 41.

Article 59 - Fines

We urge policymakers to be more specific about how fines are to be calculated.

Specific questions to Art. 59:

Art. 59(1): How can distortion of competition with corresponding offline services be avoided in the light of such fines?

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Why does the DSA not provide for a flexible set of criteria for defining the amount of proportional fines, as done in the **Omnibus Directive 2019/2161 , Art 1 (3)** (negligence, intensity of breach, etc.)?
Since the wording does not expressly reference the territorial scope of turnover - does 'total turnover' mean 'total turnover in the EU', in line with the approach under the **Omnibus Directive 2019/2161**?
How does the DSA take into account the possibility of double-sanctioning, given that in the context of illegal content affected right holders and other parties can, and typically will, also bring infringement claims for damages, and where authorities requesting the takedown of content also have a set of sanctions for non-compliance at their disposal?

Article 60 – Periodic penalty payments (specific questions)
Art. 60(1) / 59(2): Can the Commission impose both periodic penalties and the penalty envisaged for e.g. alleged incomplete information under **Article 59(2)**? If so, would the periodic penalty be deducted from the final penalty?

Article 68 - Representation
We recommend introducing more safeguards for representative entities (in line with "Qualified Entities" under the Representative Actions Directive): (i) in addition to being non-for-profit, entities should demonstrate at least 12 months of activity in protecting users' interest prior to their request to be appointed.

Article 68 – Representation (a specific question)
Does this refer to the Directive 2020/1828 on representative collective actions for consumers?

Article 74 - Entry into force and application
We are concerned about the extremely short period of time proposed for industry to comply with the requirements of the DSA. The activities required to adapt internal systems will necessitate significant design and engineering work. The DSA currently envisages application of its provisions only three months after its entry into force. This extremely short time period is not appropriate to achieve the aims of the DSA.

In contrast, for example, the GDPR gave companies more than two years to prepare for compliance (see Article 99 GDPR). The DSA must give firms of all sizes the time needed to design and implement solutions that support compliance.

We recommend a longer period for application of the DSA. One year seems to be appropriate
1. This Regulation shall enter into force on the twentieth day following that of its publication in the

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Official Journal of the European Union.

2. It shall apply from [date - twelve months after its entry into force]. This Regulation shall be binding in its entirety and directly applicable in all Member States.

Due to the need to introduce many new solutions and improvements that require a number of technical and organizational adjustments, we propose extending the period between the entry into force and the application of the new provisions - from three months to twelve months.

Article 74 – Entry into force and application (a specific question)
Art. 74(2): How is it considered realistic, based on actual market experience and impact assessments, that the obligations on intermediaries shall become effective 3 months after its publication, while at the same time Member States are given 2 months to appoint DSCs under **Art 38(3)?**

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