

Warszawa, 18 stycznia 2022r.  
KL/14/8/ED/2022

**Pan Adam Bielan**  
Poseł do Parlamentu Europejskiego  
Komisja IMCO

*Szanowny Panie Pośle,*

W związku z głosowaniem podczas najbliższego posiedzenia plenarnego Parlamentu Europejskiego nad projektem rozporządzenia Parlamentu Europejskiego i Rady w sprawie jednolitego rynku usług cyfrowych (akt o usługach cyfrowych) i zmieniającego dyrektywę 2000/31/WE, Konfederacja Lewiatan przesyła uzupełniające uwagi do sprawozdania Komisji IMCO dotyczącego projektu.

Z poważaniem,



Maciej Witucki  
Prezydent Konfederacji Lewiatan

Załącznik: Dodatkowe uwagi Konfederacji Lewiatan do sprawozdania Komisji IMCO dotyczącego projektu rozporządzenia Parlamentu Europejskiego i Rady w sprawie jednolitego rynku usług cyfrowych (akt o usługach cyfrowych) i zmieniającego dyrektywę 2000/31/WE



**Additional remarks of the Polish Confederation Lewiatan concerning the amendments proposed by the IMCO Committee to the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (*Digital Services Act*) and amending Directive 2000/31/EC**

**Liability of search engines – no caching**

The IMCO Commission's amendments go far in excluding liability of internet service providers for content distributed through them. The added Recital 27a recognizes that a search engine may act as a "caching" service with respect to the results of a query. Juxtaposing this with the text adopted by the Council of the European Union, which in the General Approach of November 25, 2021 explicitly mandates the application of the liability exemption rules for "caching" service providers to *online search engines*, the concern arises that this paves the way for a new liability exemption created specifically for search engines.

The approach taken is in complete contradiction to the existing understanding of "caching". There is certainly no need for a detailed description of what caching is. Suffice it to say that caching is a purely automatic, technical and passive process. Meanwhile, the very process of indexation, which is after all the pillar of functioning of search engines, but also particular expositions of selected some search results, **unambiguously excludes qualification of functioning of search engines as caching.**

So if it comes to a vote on Amendment 24 to Recital 27a, we recommend:

1. part: "A single webpage or website may include elements that qualify differently between 'mere conduit', 'caching' or hosting services and the rules for exemptions from liability should apply to each accordingly." **[FOR]**
2. part: "For example, a search engine could act solely as a 'caching' service as to information included in the results of an inquiry. Elements displayed alongside those results, such as online advertisements, would however still qualify as a hosting service." **[AGAINST]**.

**Ban on lawful content - the risk of media censorship**

Pursuant to Article 12 para 1 of the DSA, internet platforms would have the ability to block and remove various types of content, acting only on the basis of their internal acts: regulations and terms of use.

In order to secure the fundamental values stemming from, inter alia, the Charter of Fundamental Rights, as well as to strengthen the position of a free and independent press, it is necessary to supplement the wording of Art. 12. This should be supplemented by minimum safeguards for the fundamental rights enshrined in the Charter, including freedom of the press and media, freedom of speech and freedom of expression. This proposal is a compromise and seeks to link the regulations of internet platforms to the fundamental rights enshrined in the Charter, and thus provides a guarantee against the removal of such content that is legal. One



cannot accept a situation in which a platform blocks or removes content that is lawful in the offline world. This would be censorship.

For these reasons, it is appropriate to expand the content of Article 12(1) and recital 38:

Article 12(1): "Providers of intermediary services shall *use fair, non-discriminatory and transparent* terms and conditions. *Providers of intermediary services shall draft those terms and conditions in clear, plain user friendly, and unambiguous language and shall make them publicly available in an easily accessible and machine-readable format in the languages of the Member State towards which the service is directed. In their terms and conditions, providers of intermediary services shall respect the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms, as enshrined in the Charter as well as the rules applicable to the media in the Union*"

Recital 38: "Whilst the freedom of contract of providers of intermediary services should in principle be respected, it is appropriate to set certain rules on the content, application and enforcement of the terms and conditions of those providers in the interests of *protecting fundamental rights, in particular freedom of expression and of information*, transparency, the protection of recipients of the service, **including their legitimate interests**, and the avoidance of *discriminatory, unfair or arbitrary outcomes. This implies that intermediary service providers should pay utmost regard to relevant rules applicable to the media and put in place specific procedures, ensuring that the media are promptly informed and have the possibility to challenge any content moderation measure before its implementation. Terms and conditions should not restrict freedom and pluralism of the media as enshrined in Article 11 of the Charter. In particular, it is equally important to ensure that terms and conditions are drafted in a clear and unambiguous language in line with applicable Union and national law. The terms and conditions should include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making, human review, as well as on the right to terminate the use of the service. Providers of intermediary services should also provide recipients of services with a concise and easily readable summary of the main elements of the terms and conditions, including the remedies available, using, where appropriate graphical elements, such as icons.*"

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