

Warszawa, 8 lutego 2022 r.
KL/38/22/ED/2022

Pan
Janusz Cieszyński
Sekretarz Stanu ds. Cyfryzacji
Pełnomocnik Rządu ds. Cyberbezpieczeństwa
Kancelaria Prezesa Rady Ministrów

Szanowny Panie Ministrze,

W związku z rozpoczęciem trilogów dotyczących projektu rozporządzenia w sprawie jednolitego rynku usług cyfrowych (akt o usługach cyfrowych) i zmieniającego dyrektywę 2000/31/WE Konfederacja Lewiatan, w załączeniu, przesyła uwagi do dokumentu kolumnowego.

Z poważaniem,



Maciej Witucki
Prezydent Konfederacji Lewiatan

Do wiadomości:

Pani **Justyna Romanowska** - Kierownik referatu cyfryzacji, attaché ds. cyfrowych, Stałe Przedstawicielstwo RP przy Unii Europejskiej

Pan **Michał Pukaluk** – Dyrektor Departamentu Polityki Cyfrowej, Kancelaria Prezesa Rady Ministrów

Załącznik: Uwagi Konfederacji Lewiatan do projektu rozporządzenia w sprawie jednolitego rynku usług cyfrowych (akt o usługach cyfrowych) i zmieniającego dyrektywę 2000/31/WE (*tekst kolumnowy*)

Uwagi Konfederacji Lewiatan do projektu rozporządzenia w sprawie jednolitego rynku usług cyfrowych (akt o usługach cyfrowych) i zmieniającego dyrektywę 2000/31/WE (tekst kolumnowy)

Abbreviations used:

EP – European parliament

EC- European Commission

Recital 9 and art. 1a (4) – EP proposal

Regarding the EP's proposal on EC guidelines- it is not the role of the European Commission to interpret possible problems in the understanding and application of EU law and the relations between various acts of *lex specialis* vs DSA as the *lex generalis*. This should be left to the Court of Justice of the European Union. Commission guidelines are not binding law and they would not contribute to legal certainty, especially in matters as complicated as those within the scope of the DSA.

Recital 11

We opt for the Council version of the text, where 3 directives related to copyright law are explicitly stated, instead of just the latest directive 2019/790, which is the case in the EP text. Alternatively, the EC version with general reference to copyright law is also acceptable.

Recital 12

The EP version, which elaborates on the concept of illegal content, seems to be the most appropriate.

Recital 18

The preferable versions are those of the Council and EC (which are almost identical).

Recital 20

We support the EP's text which is most flexible and specific enough.

Recital 21

The preferable versions are those of the Council and EC (which are almost identical).

Recital 22

The EC's and/or EP's texts seem to be most suitable to reflect the general principles of the e-commerce directive.

Recital 27a and article 4

The addition of this new recital both in the Council's and the EP's texts and the Council changes to Art. 4 disregard the existing liability regime in the e-commerce directive, the rulings of the European Court of Justice and the objectives of the DSA regarding reducing the scale of illegal content on-line and strengthening accountability of internet intermediaries. As a result, search engines would be excluded from the obligation to respect the notice and action procedure, which should not be the case as it would shelter them from taking responsibility for illegal content. The goal of increasing the accountability of

search engines should be achieved through the introduction of effective due diligence obligations on this category of online intermediaries, not by making them beneficiaries of a broad and unjustified “safe harbour” exemptions.

Recital 28 and art. 7

As for lack of general monitoring obligations, the Council’s text seems to best fit the DSA’s goals. The EP’s proposal is not in line with European case law and introduces legally unclear concepts.

Recital 32

We support the EP’s text which makes an important point regarding personal data and privacy protection and freedom of media.

Recital 35

The EC’s and EP’s texts reflect the goals of the DSA, whereas the Council proposal, in which complying with due diligence obligations would be independent from the liability of intermediaries, is against the principles of the e-commerce directive and would be a step backwards in fighting the presence of illegal content on-line. Case law has proved that courts use diligent behaviour as a criterion for assessing if liability exemptions should be applied. Accordingly, the Council version should not be accepted.

Recital 40

In our opinion the Council’s text is the most appropriate of addressing the DSA’s goals.

Recital 46a; article 1(2) point b; art. 2 first paragraph point (r); art. 19a and other articles where reference to accessibility is made

The new text proposed by the EP refers to ensuring accessibility in recital 46a and further articles. We believe that the DSA is not the appropriate legal act to address such requirements, especially in view of the existence of the European Accessibility Act.

Art. 2 first paragraph point (g).

We believe the definition of illegal content as proposed by the Council is most adequate.

Art. 2 first paragraph point (ka)

We believe the definition of „trusted flagger” should be added to the text, as proposed by the EP.

Art. 2 first paragraph point (p)

We support both EP’s and Council’s version of the text as being more specific.

We believe the Council’s version of the text is most balanced and gives appropriate grounds for effectively issuing orders.

Art. 8(4a)

We support the addition of this text by the EP. It is especially important for countries such as Poland, which have not implemented art. 8.3 of the info-soc directive (Directive 2001/29).

Art. 13a (1) point (e)

We perceive as very dangerous to the whole internet ecosystem and its value chain the EP's proposal expressed in point (e) which practically imposes a particular technology approach favouring browsers, operating systems and other similar technology in the consent management system. It would disable publishers and many other providers operating in the internet from interacting with the user to obtain consent. It would also be strongly anticompetitive as a result.

Art. 14(2) point (b)

We support the EP's text as the most futureproof, flexible and technology neutral. The EC's version is too technology centred.

Art.14 (3)

The Council's text is most balanced, we support this version.

Art. 14(3a)

Art.14 (3a) should be removed as it undermines the conditions of Article 5. "Actual knowledge" and "acting expeditiously" should remain the only criteria for assessment of liability under Article 5. Art.14(3a) would practically make effective enforcement impossible, as malicious players could keep notified illegal content up for some time (regardless of the harm it causes) while "assessing" the legality of the notice. Hosting providers who do not want to be compliant would be fully protected by this provision.

Art. 14(6)

We do not support the EP's version as it could negatively impact the effectiveness of handling notices, where some providers would be tempted to handing over the notice to another provider of their random choice.

Art. 19(2)

The trusted flagger status should be available to all entities with expertise and a track record of accurate notices and definitely not dependent on the representation of "collective interests". For this reason, we support the Council's text in this matter.

Art. 24

Regarding online advertising transparency, we support the Council's version of the text, as the most proportionate and balanced.