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Warszawa, 30 listopada 2022 r.
KL/486/244/ET/2022

Pan
Tomasz Chróstny
Prezes
Urząd Ochrony Konkurencji i Konsumentów

Szanowny Panie Prezesie,

W związku z pracami związanymi z Rozporządzeniem Parlamentu Europejskiego i Rady w sprawie ogólnego bezpieczeństwa produktów, zmieniającego rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1025/2012 oraz uchylającego dyrektywę Rady 87/357/EWG i dyrektywę 2001/95/WE Parlamentu Europejskiego i Rady, Konfederacja Lewiatan przesyła uwagi w sprawie niniejszego tekstu.

Z poważaniem,

Maciej Witucki
Prezydent Konfederacji Lewiatan

Załącznik: Stanowisko Konfederacji Lewiatan w sprawie *Rozporządzenia Parlamentu Europejskiego i Rady w sprawie ogólnego bezpieczeństwa produktów, zmieniającego rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1025/2012 oraz uchylającego dyrektywę Rady 87/357/EWG i dyrektywę 2001/95/WE Parlamentu Europejskiego i Rady.*

Do wiadomości:
- Pani **Katarzyna Bednarz**, Dyrektorka Departamentu Nadzoru Rynku, Urząd Ochrony Konkurencji i Konsumentów
- Pani **Aleksandra Frelek-Dębecka**, Dyrektorka Departamentu Spraw Europejskich, Ministerstwo Rozwoju i Technologii
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Comments on a stay down obligation for marketplaces
(Art 20(2a/2b) and corresponding Recital 33a of the GPSR)

The EP's and Council's amendments in Art 20(2a/2b) of the GPSR seek to impose a stay down obligation on online marketplaces. As currently drafted, this would considerably hinder the free movement of goods , be impossible to implement for companies and limit consumer's choice, leading to strong legal uncertainties with no proven positive outcomes on the dissemination of illegal content online. A general "stay-down obligation" in the wide and uncertain terms proposed goes against several court rulings prohibiting tech companies from scanning all of the content uploaded and circulating on their platforms. Only where providers have specific knowledge of illegal content must they take action and delete/block/take down such content. Further clarification of the duty is required, and the duty needs to be qualified by reasonableness, as explained further below.

1) Serious risk of over blocking (alleged) illegal content

As a result of the lack of clarity in the proposed provisions as explained below, there is a serious risk of over blocking (alleged) illegal content with the consequence for traders of not being able to sell their products which would impede the free movement of goods and lead to more limited choice for consumers in the EU.

2) GPSR is not the appropriate legislative act to introduce a generalized stay down obligation and it has been rejected in the recently adopted DSA as well

A generalized stay down obligation has already been extensively discussed during the legislative procedure of the recently adopted Digital Services Act (DSA). In the end, the EU legislator has refrained from introducing such an obligation in the DSA by expressly stating in its Recital 28[1] that a general monitoring obligation for service providers does not exist. This applies all the more to the GPSR which is – different to the DSA – not a legislative act intended just for service providers. A general stay down obligation for illegal content online does so far not exist in any other EU legislation.

3) A stay down obligation in product safety law involves different considerations to those matters addressed in CJEU case law

Thirdly, the CJEU decisions[2] pertaining to the issue of general monitoring obligations of online platforms that these proposals refer to have different subject matters (i.e. defamatory statements, copyright protected music) and relate primarily to the protection of intellectual property rights and the freedom of expression. The determinations made in existing case law with regards to intellectual property rights

[1] Recital 28 of the DSA: „Providers of intermediary services should not be, neither de jure, nor de facto, subject to a monitoring obligation with respect to obligations of a general nature. This does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation, in compliance with Union law, as interpreted by the Court of Justice of the European Union, and in accordance with the conditions established in this Regulation. Nothing in this Regulation should be construed as an imposition of a general monitoring obligation or active fact-finding obligation, or as a general obligation for providers to take proactive measures to relation to illegal content.

[2] E.g. Decision of 3 October 2019, Case No. C-18/18, Glawischnig-Piesczek/Facebook Ireland Limited; Decision of 26 April 2022, Case No. C-401/19, Republic of Poland/European Parliament and Council of the European Union.

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cannot purely be transferred to product safety law as their mechanisms function completely different. In the Facebook case[3], the Court stated that a monitoring obligation is only allowed in "specific cases" and with very clear qualifiers such as stay-down only for identical illegal content; search for the content concerned is limited to the information identified in the order; no independent assessment of that content; search can be carried out by reliable and automated search tools. Whilst the proposals for Art 20(2)(a)/2(b) have sought to include these qualifiers, and this is important and to be welcomed, in the context of online sale of products, the proposed qualifiers do not go far enough in order to make Art 20(2) workable in practice. Even when taking into account "traceability and product safety information displayed by the traders" as suggested in Recital 33a – which would go beyond the CJEU's ruling – the search for products is very different to the search for defamatory statements and IP infringements for the following reasons:

Searching for identical illegal products is technically extremely difficult to do without an "independent assessment of the content" by the service provider and with only "automated search tools". Unfortunately, a 100% success rate cannot be achieved by any platform provider. Platform providers should not be held accountable for every single instance in which a dangerous product resurfaces on the marketplace, and this remains a possibility even with the currently proposed wording.

This may be different with regard to the search for defamatory expressions of opinion or for breaches of intellectual property rights. For example, the service provider can with regards to defamatory statements search for the exact same keywords (e.g. "The Minister is xyz") and with regards to IP breaches search for the exact brand name (e.g. "Gucci") and possibly similar (known) wrong-spellings ("Guci" or "Guccy"). However, descriptions of products on their listings vary and are at the sole discretion of the seller. The name for a no-name product could be changed (e.g. replacing the dangerous product with the name "Beautiful nails" by "Fresh nails", "Nails in good shape", "Glossy nails for you", "Nail love"). The product's name could also be easily altered by the same or another seller of the same product (e.g. the dangerous "Nail's kit" changed to "Nail's set", "Manicure set", "Beautifying nails equipment" ….). These variations are endless and therefore almost impossible to detect.

Equally, images of a dangerous product could be easily altered and image recognition research programs are technically not (yet) able to detect images for which the underlying image ID numeric coding has been changed (e.g. product is shown from a different angle, in a different color or with a different brand name). With minimal effort, an offer of a dangerous product could thereby be modified to make it undetectable for automated search tools, simply by using a slightly different photograph. This raises two issues: first, are offers of dangerous products using slightly different images still "identical" within the meaning of the GPSR? Second, if they are, what degree of similarity is sufficient to make them subject to the stay down obligation? These considerations are not addressed in the recitals or the provision itself.

Therefore, for each and every listing that has been picked up by automated search tools as "dangerous" a manual review will be necessary to avoid overblocking of (alleged) illegal content.

[3] Decision of 3 October 2019, Case No. C-18/18, Glawischnig-Pieszczek/Facebook Ireland Limited.

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4) Provision lacks clarity, especially a clear definition of "identical" product

The provision as currently drafted lacks clarity as to i) whether or not a stay down order would apply when the same product was placed on the website by different traders; ii) the preciseness of the take-down order to still be considered a "specific case", i.e. the definition of an "identical" product (Does this relate purely to the outward appearance of the product?; Are all models/versions/designs encompassed?; Is a product still identical if its outward appearance is different, but its internal functionality is the same?). The answers to these questions are especially pertinent when considering the qualifier which stipulates that the search for identical content must not require the provider to carry out an independent assessment of the situation. The provision is also lacking a clear reference to an URL of the product(s) concerned.

It cannot be the intention of the EU legislator to encumber service providers with the assessment of whether or not a product is identical to another (or just "similar"). Typically, the third-party manufacturer has carried out a proper risk analysis before corrective action is taken. Sometimes a product may look the same from the outside or may even have been produced in the same factory but does not have the same defect (e.g. produced in a different line than the dangerous product). It is on the manufacturer/importer (or the authorities) to decide for which products what kind of corrective action needs to be taken. Due to its intermediary role in the supply chain, the online marketplace is not in the position to step into these seller's duties.

For the above-mentioned reasons, a stay down obligation in product safety law in the terms presently proposed brings a significant risk of overblocking of (allegedly) illegal content, given the lack of clarity as to what is meant by "identical" in this context and leaves online marketplaces exposed to allegations of breach of stay down orders even though they have used reasonable efforts to comply, simply because of the vagueness of the proposed concept of "identical" and the limitations of automatic searching techniques. .

5) Compromise proposal

To address the above legal and technical issues and uncertainties, it is strongly recommended that Art 20(2) should as a minimum be clearly expressed as a due diligence obligation, more in line with the "reasonable efforts"-clause in Art 24d of the DSA:

"2a. Orders issued pursuant to paragraph 2 and on the condition that such order contains one or more exact uniform resource locators (URL) to identify and locate the offer of a dangerous product may require the provider of online marketplace to make reasonable efforts to remove from its online interface all identical content referring to offers of a dangerous product, to disable access to it or to display an explicit warning, provided that the search for the content concerned is limited to the information clearly and precisely specified ~~identified~~ in the order and does not require the provider to carry out an independent assessment of that content, and that it can be carried out by reliable automated search tools.".

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Additionally, the following subparagraph pertaining to the distribution of risks and the burden of proof, should be included:

"As far as the provider of an online marketplace has undertaken reasonable efforts to abide with the obligations set out in the first subparagraph above, it shall not be held liable for identical content referring to offers of a dangerous product which is nevertheless published on their interface by a trader. Where it is ambiguous whether content is identical, the market surveillance authority must provide appropriate proof that the order encompasses this content as well."

6) Stipulating a "trial period" for a potential stay down obligation

The ramifications of the proposed stay down obligation are at this time unforeseeable. Especially, as it fails to specify beyond doubt what type of "identical" content will fall into its ambit. For this reason, it is worth considering including this paragraph only on a trial basis.

If this paragraph of the GPSR were initially to apply for a period of e.g. two years, market surveillance authorities and service providers could both explore the actual extent of the new tasks during this time and optimize the response strategy.

Consideration should also be given to mitigating the legal consequences of unintentional non-compliance during this time. For example, where identical offers are overlooked because the deployed IT programs are still in the process of learning how to deal with this new challenge, more lenient penalties could be awarded to online marketplaces during this transitional period.

After the pre-determined period runs out, the effectiveness and practicality of the obligation could be discussed and either abolished, extended or amended as required.

7) Article 20 of General Product Safety Regulation proposed by Spain, France, Germany, Netherlands, Denmark, and Portugal

We are strongly concerned about recent proposal on Article 20 GPSR made by by Spain, France, Germany, Netherlands, Denmark, and Portugal on November 11, 2022.

The proposed revised Article 20 would introduce a problematic interpretation that could undermine the ban on general monitoring under the Digital Services Act. As this GPSR revision (recital 32) would seek to establish "*reasonable efforts to randomly check before and after a product is offered on the online marketplace*" and if the product has been identified as dangerous with databases such as safety gate. In our view this would create ex-ante random checks which would need to be fulfilled for the marketplace to benefit from the DSAs liability exemption. Furthermore, this proposal is incompatible with the obligation laid down in Article 31 sec. 3 of Digital Services Act (compliance by design).

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