

Warszawa, dnia 7 maja 2021 r.

**Kancelaria Prezesa Rady Ministrów
Departament Polityki Cyfrowej**

STANOWISKO

ZWIĄZKU PRACODAWCÓW BRANŻY INTERNETOWEJ INTERACTIVE ADVERTISING BUREAU (IAB POLSKA) W/S PROJEKTU ROZPORZĄDZENIA PARLAMENTU EUROPEJSKIEGO I RADY Z DNIA 15 GRUDNIA 2020 R. W SPRAWIE JEDNOLITEGO RYNKU USŁUG CYFROWYCH „DIGITAL SERVICES ACT” 2020/0361 (COD)

Szanowni Państwo,

dziękujemy za włączenie IAB Polska do dalszych prac nad projektem rozporządzenia w sprawie jednolitego rynku usług cyfrowych tzw. Digital Services Act (dalej jako: „**Projekt DSA**”).

Na Państwa prośbę poniżej przedstawiamy uszczegółowione stanowisko dotyczące rozdziałów IV i V Projektu DSA obejmującego zarówno uwagi kierunkowe jak i propozycje konkretnych zmian do wybranych artykułów. Wszelkie zmiany w stosunku do brzmienia tekstu oryginalnego są zaznaczone czerwoną czcionką oraz zostały przedstawione w języku angielskim.

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I. Article 41 - Powers of Digital Services Coordinators

The exercise of regulatory powers should be proportionate to the objectives of the Digital Services Act (DSA). We have three recommendations in this regard.

- **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.
- In support of the proportionate exercise of oversight powers we would also

recommend an approach similar to that of the European Electronic Communications Code, where **the DSA regime is underpinned by a harmonized set of objectives and tasks for national competent authorities and the Commission.**

- We would recommend that **one of these objectives is focused on the systemic nature of oversight functions. We would welcome clarity that the powers of national competent authorities, Digital Services Coordinators (DSC) and the Commission exercised in relation to individual content moderation decisions are based under judicial oversight.**

We would also support clarifying under Article 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.**

Detailed remarks regarding to **Article 41 (3 (b))** - which does not reflect the opinion of all IAB's members:

1. 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. Providers should have the right to redress against the decision of Digital Services Coordinator before a judicial authority of the Member State;
2. 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;
3. 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.

Justification:

Digital Services Coordinators shall have the enforcement powers mentioned above in particular in order to ensure compliance with Article 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 Article 11 and there are no effective means to contact 3rd country service providers.

II. Article 42 - Penalties

In order to ensure legal certainty, we would welcome a clarification that fining powers of DSCs may apply only to *systematic or gross* violations of *specific* due diligence obligations. We also urge policymakers to be more specific about how fines are to be calculated.

III. Article 43 - Right to lodge a complaint and recital (81) – redrafting proposed

Article 43 Right to lodge a complaint

Recipients of the service, **representative organizations and other parties with a legitimate interest addressed by the decisions referred to in Article 17(1)**, 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.

And proposed change to related recital (81):

(81) In order to ensure effective enforcement of this Regulation, individuals or representative organisations **and parties with a legitimate interest addressed by the decisions referred to in Article 17(1)** 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.

Justification:

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.

IV. 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) additional clarity is needed in order to avoid DSC going past the Country of Origin principles in their day-to-day activities.

V. 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.

VI. 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.

VII. 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 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 Articles 3 and 4 on objectives, and Article 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 Article 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.

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.

VIII. 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.

- **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 fulfillment of tasks and objectives. We support activities aiming at harmonization of the oversight powers.
- 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.
- We would recommend that one of these objectives is focused on the systemic nature of oversight functions; **we would welcome clarity that the powers of national competent authorities, DSCs and the Commission exercised in relation to individual content moderation decisions are based under judicial oversight.**

IX. Article 57 - Monitoring actions

We are concerned about the lack of any safeguards in Article 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.

X. Article 58 - Non-compliance

The Commission should be empowered to:

1. order, in the decision pursuant to Article 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 Article 55/commitments made binding pursuant to Article 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.

Justification:

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

XI. Article 59 - Fines

In order to ensure legal certainty, we urge policymakers to be more specific about how fines are to be calculated.

XII. Article 68 - Representation

We recommend introducing more safeguards for representative entities (in line with “Qualified Entities” under the Representative Actions Directive) 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.

XIII. Article 74 - Entry into force and application

We recommend a longer period for application of the DSA; the one-year period seems to be appropriate.

Article 74

Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the 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.

Justification:

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.

Z poważaniem,

A handwritten signature in black ink, appearing to read 'W. Schmidt', with a long, sweeping horizontal stroke extending to the right.

Włodzimierz Schmidt
Prezes Zarządu