

## **Non-paper of the Government of the Republic of Poland concerning the Digital Services Act (DSA)**

Deepening the single market for digital services should foster Europe's digital sovereignty and competitiveness, unlock our digital potential and provide equal opportunities. Furthermore certain actors, such as large online platform companies acting as gatekeepers, play an increasingly important role, therefore they should have special responsibilities in countering the risk of fragmentation of the digital single market. The forthcoming Digital Services Act package may contribute to achieving this goal. We believe it will facilitate smooth functioning of the increasingly growing platform-based ecosystem where good ruled-based interactions between its players will benefit all. To this end in our contribution to DSA package we would like to focus on the following three pillars – revision of the e-Commerce Directive, ex ante rules and disinformation.

### **1) Revision of the e-Commerce Directive**

- A new legislative instrument should **derive from the acquis case-law and experiences gained over the 20-year application of the Directive on electronic commerce<sup>1</sup>**.
- In particular, we support maintaining the following principles: **the country-of-origin principle** (Article 3 of the Directive); **the principle of liability exemption for intermediary service providers** (Article 12 of the Directive), and **no general monitoring obligation for providers** (Article 15 of the Directive).
- However time has come to **review provisions relating to removal of illegal content from the Internet and to content moderation by intermediary service providers**.
- **Cloud and domain name system (DNS) providers** that have no access to content or no impact on what and how it is displayed to platform users, **should be exempted from these provisions**.
- In addition maintaining **proportionality in the imposition of regulatory burdens** and making sure that regulations do not create market barriers for new entities is crucial. Proportionality should take into account the **size of a given entity**, i.e. the number of customers that benefit from services provided on a given platform and the degree of the platform's exposure to illegal content.
- Furthermore, it would be valuable to **introduce harmonised notice-and-action mechanisms throughout the EU**. We are calling for clear and user-friendly procedures, reasonable time limits, safeguards, obligation for service providers to verify the content reported and possibility of appeal from the decision.
- **The principle of limited liability of intermediary service providers (liability exceptions) should remain in place**. We would also be in favour of **abandoning**

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<sup>1</sup> Directive 2000/31/WE of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

**the distinction between active/passive hosting**, which nowadays is no longer relevant. Simultaneously, the DSA should set forth penalties for service providers that notoriously fail to react to notifications of illegal content.

- New solutions should reward the proactivity of platforms in searching for and removing any illegal content. **Therefore, a “Good Samaritan” clause should be included in the DSA.**
- **Furthermore, mechanisms for users that prevent content from being removed or blocked without justification should be established.** It is also important to ensure the right of users to appeal any platform's decision to block or remove the content they have uploaded. In 2018 the **Polish Minister of Digital Affairs and representatives of Facebook concluded an agreement**, on the basis of which Facebook users in Poland were given the opportunity to verify the refusal to appeal against any decision blocking their account or posted content. This solution proved successful, as by 27 July 2020 the portal positively verified 1/3 of requests (unblocked content and profiles).
- We are in favour of **maintaining the rule that that there should be no general obligation for providers to monitor content.** At the same time, we believe that all **systems for content monitoring should be supervised** to avoid censorship or privacy violations. This is important especially in cases when platforms decide to use automated content detection mechanisms, which are not always accurate and require human control.
- **In order to strengthen transparency we propose imposition, upon platforms, of a reporting obligation regarding their content management activities.** Such reports should be standardized and only concern large digital platforms. Reporting obligation should result from the need to monitor the obligations imposed on the platforms under the new legislation (e.g. the efficiency of the procedure for removing of illegal content, or information on the use of algorithms supporting content moderation). For smaller entities reporting should be optional and treated as a form of good practices. In order to monitor the market and provide transparency the concept of a periodic *Scoreboard Platform* could be explored.
- Social network users should also have a practical possibility to transfer their personal data to other providers and services, in accordance with the power granted them upon the General Data Protection Regulation, and in accordance with the principle that natural persons should have control of their own personal data.
- The new rules should aim at improving cooperation between Internet platforms and competent authorities in the Member States, as well as ensuring closer cross-border cooperation between the countries themselves.
- Moreover, the DSA should include provisions regarding **advertising: monitoring, transparency, preferential treatment, use of algorithms and consumer profiling** .

- The **new regulations should apply to entities from third countries that offer their services and goods to EU consumers**. There is also a need to ensure that these rules will be respected.
- Finally, the optimal approach seems a **hybrid model of regulatory supervision, comprising both national and EU regulators**, with the former having ability to react more quickly and knowledge of regional specificities and the latter being able to ensure uniformity of rules applied within the single market.

## 2) Ex ante regulation for large online platform companies acting as gatekeepers

- In order to safeguard competition on the digital single market EU institutions should undertake actions **both within the framework of competition policy and complementary regulatory initiatives**, such as the *ex ante* regulation or the new competition tool.
- That is why there is a need to enact a **regulation aimed at large online platform companies acting as gatekeepers**, which will define specific obligations imposed upon such entities.
- In this respect, a **precise definition of large online platform companies acting as gatekeepers** will have to be adopted. The definition should take into account and be consistent with the EU legislation in force, including tax law and the recently enacted Platform2Business Regulation<sup>2</sup> (it might be considered necessary to perhaps change / clarify the definition of platforms in the P2B Regulation).
- The definition of such platforms should be primarily based on business/economic criteria:
  - **Cross-border activity:** for example based on the number of users in a country, advertising directed at users in another country, or services offered in the language of a given country;
  - **Turnover:** for example threshold of EUR 50 million of the capital group's annual turnover for the provision of digital services in the EU and EUR 750 million of global turnover for the provision of digital services or general services worldwide;
  - **Number of users:** 2 million users in the EU in a given year.
- **The cumulative fulfilment of at least two of the above criteria**, with one of the criteria being the cross-border activity, **would automatically qualify such entity as a large online platform acting as gatekeeper**, bound by the *ex ante* obligations.
- In addition, we propose to introduce a **discretionary criterion** concerning the position of a given platform on the EU market (including its role as unavoidable

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<sup>2</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting equity and transparency for business users using online mediation services.

trading partner), which would still be subject to regulator's control, when it does not meet the mandatory economic criteria.

- The new *ex ante* legal framework could include:
  - general obligations and prohibitions applicable to all large online platform companies acting as gatekeepers, e.g. a narrow **catalogue of black-listed practices, covering only most harmful practices**. Here **we are calling upon the European Commission to perform an in-depth assessment and enter into dialogue with Member States** when composing the list of such practices.
  - obligations and prohibitions applicable to a designated entity in a given situation.
- There is also a need to include, in the *ex ante* regulation, **specific obligations** for large online platforms acting as gatekeepers, pertaining to more data access, non-discrimination, transparency requirements (e.g. transparency of algorithms, comprehensive and unchanging terms of services), contact with users, appeal procedures and interoperability.
- The supervision of large online platforms acting as gatekeepers should be strengthened within the EU in order to ensure more effective law enforcement. At the same time, we agree with the need for a comprehensive adaptation of a competition law to the challenges of the digital age, which also applies to the institutional system. As a result of these changes, relevant online platforms acting as gatekeepers and their activities should be subject to special surveillance.
- Consideration could be given to setting up an advisory body that brings together competent national authorities and gives its opinion on regulatory solutions planned at EU level. Such an approach would ensure that the principle of subsidiarity and harmonisation of law in the EU is maintained.
- The establishment of an effective *ex-ante* regulatory oversight mechanism for digital platforms within the EU will guarantee a uniform approach in the application of legislation and effective enforcement. In our view, this will significantly reduce the imposition of additional administrative burdens on Member States.
- **The list of sanctions imposed upon large online platforms acting as gatekeepers, when they fail to abide by the obligations mentioned above, should be flexible and possible to adapt to the circumstances of a given case.** It is also necessary to create a system of **interim measures**, which would prevent further harm to be caused until the completion of the proceedings. Sanctions should have **preventive and remedial functions but also impose a significant financial and behavioural burden upon the infringing entities**. In infringements restricting market access, structural remedies should also be considered.
- With regard to the introduction of a **new competition tool**, the new instrument should help to regulate the situation on dysfunctional markets, where there is a high degree of concentration, high entry barriers, consumer lock-in, lack of access to data or the ability to collect data; too much transparency through the use of algorithms, e.g. for price setting.

### 3) Disinformation

- Limiting the spread of disinformation should be addressed **within the framework of and in parallel with the works under the Digital Services Act.**
- As announced by the Commission, we would welcome an in-depth discussion on this issue also in the context of the **revision of the Code of Conduct on Combating Disinformation** and the **development of the European Action Plan for Democracy (EDAP).**
- Despite the voluntary “Code of Conduct on Combating Disinformation”<sup>3</sup> in place since 2018, Internet platforms have not been willing to take sufficient measures to increase transparency in political advertising, remove illegal or harmful content or reducing disinformation.
- In line with the “*ERGA Report on Disinformation: Assessment of the Implementation of the Code of Practice*”<sup>4</sup> of May 2020, in our view the model of **self-regulation did not fully work** and that **co-regulation** would ultimately be the better solution to support platforms to combat disinformation. We propose such a system **involves obligation for platforms to cooperate with national authorities and introduction of a mechanism allowing for periodical accountability.** If case of no progress, traditional regulation should be considered.
- There is also a need to distinguish between the notion of **illegal content** (e.g. terrorist or paedophile) **and legal but harmful content, which includes disinformation.** When examining harmful content account should be taken of the scale, extent and harmfulness of a particular phenomenon, especially when it comes to public security issues or protection of key national interests.
- EU and Member States should aim at further strengthening **cooperation between Internet platforms and public authorities.** we support the idea to have information verified by so-called “**fact-checkers**”, provided, however, that their independence and high standards are ensured. **Poland is watching closely and would like to participate in the creation of an independent European network of entities verifying facts** within the European Electronic Media Observatory - EDMO.
- We are in favour of increasing transparency regarding origin, creation, financing, dissemination and targeting of information online. **It is also worth considering the use of modern technologies, especially artificial intelligence** when fighting disinformation.
- More importantly, there is a need to **protect electoral processes against disinformation.** Education, critical thinking, and media literacy have here been identified as the most effective methods of combating the spread of disinformation.

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<sup>3</sup> [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=54454](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454)

<sup>4</sup> <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>

- At the same time we want to **support high-quality journalism** and create support programmes for civil journalism on the Internet.

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In conclusion, we would like to see the DSA package become **a forward-looking solution**, technologically neutral and flexible enough to respond to the rapid pace of changes observed in the digital sector. We hope and will do our best to have the work on this file completed during this term of office of the European Commission and the European Parliament.