CONFEDERATION OF INDUSTRY
OF THE CZECH REPUBLIC

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The Position and Comments of the Confederation of Industry of the Czech Republic (hereinafter SP CR) on the Draft Digital Services Act Regulation (hereinafter DSA)

Scope:

The SP CR welcomes the proposal of the European Commission. Together with the draft Digital Markets Act, these are important pieces of legislation that can fundamentally address several shortcomings that have arisen in the European Digital Single Market in recent years.

The SP CR appreciates that the DSA is conceived as a legislation complementing some existing and often well-established regulations, such as Directive 2000/31 / EC (eCommerce) 2010/13 / EU (AMSD), (EU) 2019/790 (Copyright), (EU) 2019/1150 (P2B) and many others. Due to this approach, many functional principles (e.g. the so-called "country of origin") will be developed further in the digital area.

These regulations have enabled the development of the European digital economy and expanded access to information, and have also made a significant contribution to the implementation of the European Single Market. Their maintenance and improvement due to the introduction of protection of voluntary content moderation efforts will promote innovation and the preservation of human rights. The SP CR supports the need for standardized and substantiated requests for content removal as well as the effort to ensure the users have greater control and transparency in relations to the recommendations.

The SP CR emphasizes that transparency reporting obligations must be reasonable, proportionate, and based on clear statistical data. The transparency requirements should be flexible enough to distinguish differences between services. It will also be important to take into account the risk that information may be misused for fraudulent activities, that commercially sensitive information may be revealed, or that users' privacy may be impacted.

According to Article 74, the DSA Regulation will apply three months after its entry into force, which may be too short a time for many online and intermediary service providers to be able to prepare for all the obligations in the proposal. We, therefore, propose that this period be significantly extended.

Comments on specific points

Article 2

The definition, which is in the first version of the DSA proposal, defines illegal content as content that is incompatible with the EU or Member State law, thus allowing for an overly broad interpretation of these laws. This can lead to legal uncertainty, and removal of legal content and to other negative effects on freedom of expression on the Internet. The proposed definition may also have implications for the extent of liability of the service providers in question, given the fact that it is likely to include "references" to other sources.

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This would mean that the service provider should examine a broad context of the stored information to determine illegality of the content hosted on its devices. This is not only ill conceived from a legal point of view, but potentially very burdensome for service providers. The SP CR believes that the definition of "illegal content" should be adjusted to avoid unintended consequences or be completely deleted.

Article 5

As part of the DSA proposal, not only hosting companies are referred to as hosting providers but also entities that use user content or offer mediation in the Internet environment. At the same time, a more detailed provision is planned to be added (paragraph 3 of Article 5 of the DSA proposal), which will stipulate that the limitation of the provider's liability does not affect situations in which the platform operator may be a direct seller or service provider. In this context, for the sake of completeness, it is important to point out the existence of a special provision in Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9 / EC, and 2001/29 / EC, which is currently being incorporated into the Czech law, which will affect providers of online content sharing services and which lays down stricter rules on liability for user content. The issue of responsibility for third-party content is perceived by the SP CR as important, especially from the point of view of "marketplaces". Currently, an increasing number of online stores offer also indirect sale of goods or services of other merchants in combination with their own direct sales. It is important not to overburden both the operators of such platforms and the small and medium-sized enterprises, for whom this sales model is one of the positive options for their development. The SP CR also proposes clarification of this section: "online platforms that allow consumers to conclude a distance contract with traders". It refers to intermediaries allowing a consumer and trader to conclude contracts on the intermediary's platform without being redirected to the third-party trader's website. This clarification is in accordance with the aim to provide consumers with transparency as to the contracting party with whom they conclude contracts.

The legislative proposal should specify that cloud services are classified as basic hosting services, not as online platforms. The main purpose of these services is not to disseminate information to the public but to store content and share it in closed groups. In the case of B2B cloud services, the client has control over the content, not the cloud service provider. Content moderation on such services is not technically possible and, given the nature of these services, not even desirable (due to data sensitivity, trade secrets, etc.).

Article 6

The SP CR welcomes the fact that the liability regime from the eCommerce Directive is transposed almost literally into the DSA proposal. In Article 6, we welcome the introduction of the so-called "good Samaritan principle", which stipulates that intermediary services may be eligible for a content liability exemption even if they carry out so-called "voluntary investigations from own-initiative". It is advisable to clarify this provision in the next legislative process in the context of the recital (22) so that the interpretation of this exception is clear in the cases where the service provider acquires knowledge from own-initiative investigations or other activities to enforce rules and requirements in relation to content on their service.

Article 7

The SP CR welcomes that Article 7 of the DSA confirms absence of a general obligation for intermediary services to actively monitor content that is stored on or transmitted by their services. This essential principle

of the eCommerce Directive must be maintained in the next legislative process in the DSA, including the principles contained in other articles, such as obligations relating to Article 22 or the risk mitigation for large online platforms.

Article 8 and 9

Concerning obligations under Articles 8 and 9, it will be necessary to further examine the scope of real rights and obligations when, under an illegal content order, the intermediary service provider has to respond appropriately to suggestions from any EU Member State. Such an approach will significantly increase costs for the vast majority of European digital businesses, which are not ready for this type of compliance today but above all, it will entitle any Member State to intervene against any European platform although the platform may not in effect operate in the Member State. In article 8 the SP CR proposes focusing also on the requirement for the authorities to define the territorial scope of their orders. This could lead to excessive content removal and censorship by some Member States, which call for Europe-wide removal of content violating only local laws. It would therefore be useful to incorporate in the text provisions to address this risk and to clarify that intermediaries are only obliged to address orders that are a result of due process and in accordance with Article 47 of the Charter of Fundamental Rights. The requirement to inform the courts of their orders' impact is limited to situations in which intermediaries receive orders directly from the court and not, for example, from complainants.

Also, safeguards should be added to Article 9 to ensure adequacy of data access obligations. This article should be amended to comply with the e-Evidence legislation.

It would be appropriate for national "Digital Services Coordinators" to play a greater role in the whole process, which can ensure faster and more efficient transmission of Article 8 and Article 9 requests to national platforms. They can also provide greater legal certainty for services without having to evaluate the legitimacy of such requests sent by various subjects and various national judicial, administrative or other similar authorities.

Article 11

It is correct for every intermediary service operator operating within the EU and based outside the EU to have a designated legally responsible representative. It is imperative in this respect that the level of capacity between European and non-EU based subjects to respond adequately to the supervisory and other authorities of EU Member States is harmonised and that, to the extent appropriate, they are made accountable. It would be good to carry out a detailed assessment of the impact of the costs to European services in the interest of meeting a similar requirement in the top 10 EU export markets and the impact of increasing costs of access to the European market on developing countries. It is necessary to specify how European citizens can still shop abroad and use services abroad to access information outside the DSA and without having to physically travel outside the EU. If the intention is to create a "big EU firewall", European customers should make this choice consciously. If this is not intended, a clear path must be set for third-country services to remain outside the DSA and to cooperate with Europeans customers at the same time.

Article 12

It is essential to clarify the scope of the obligations under Article 12 of the DSA proposal, particularly in relation to the existing Regulation (EU) 2019/1150. It is very important to find a balanced approach between the protection of the interests of service users and the right of intermediary services to protect their trade

secrets and their ability to defend against unlawful misuse of their services. Intermediary service providers are no longer obliged to publish detailed information on the operation of their mechanisms and algorithms. The DSA proposal is without prejudice to Regulation (EU) 2019/1150, the principle of Regulation (EU) 2019/1150 should be maintained (9).

Article 13

Transparency reporting obligations under Article 13 of the DSA do not represent added value and will only be an "obligation for an obligation's sake". As with Regulation (EU) 2019/1150, a balanced approach needs to be set, both in terms of the details to be published and in terms of the recurring burden on traders with an existing risk of significant fines.

Article 14 and 15

According to the DSA proposal, all entities that work with user content (including online platforms) have a new obligation to create and operate a mechanism for receiving and processing requests for content removal, including detailed information to users that their content may have been removed. (Articles 14 and 15 of the DSA proposal). The SP CR supports the need for standardized and substantiated requests for content removal through legal removal channels. It would be useful to further specify what standards should be met for a notification to be considered valid. To avoid excessive administrative burdens, penalties should be taken into account to discourage participants from making fraudulent or false notifications.

It is also necessary to assess compatibility of Article 14 of the DSA with the already existing Directive (EU) 2019/790, in particular with its Chapter 2. The DSA proposal in Article 14 imposes obligations on hosting service providers who are typically also sharing service providers. Online content and similar obligations are imposed on these operators by Directive (EU) 2019/790. For example, the described "notice and takedown" mechanism in Article 14 of the DSA may conflict with the mechanism of Article 17 (4) of Directive (EU) 2019/790. At the same time, it must be ensured that the information that platforms have to provide in the context of content removal (Article 15) is justified. Too detailed information could complicate investigations, compromise users' data and effectively provide guidance on how the system can be misused.

Article 17

In particular, the medium and large companies will be impacted by the requirement to set up an internal system for receiving and handling user complaints from online platform operators and out-of-court dispute resolutions. The DSA establishes a principle that the operator of an online platform is obliged to restore content if it accepts that the service user's complaint about its previous removal was justified. The user is also entitled to make such a complaint for up to 6 months from the moment the content was removed by the platform. Such a long period will create a need for significant investments and costs on the part of the platforms to be able to fulfil such an obligation even after 6 months from the removal of the content. Also, the proposal does not respect the right of the online platform operator to change the service within 6 months in such a way that it will not even be possible to restore the content on the modified service. Such right of the service user should be significantly reduced in time, approximately to a few days. Functioning of the internal complaints system, alternative dispute resolution, and judicial redress should be reviewed to see if it is effective. If online services have already introduced similar dispute resolution systems under Regulation 2019/1150, these systems, processes, and control mechanisms could be acceptable from the DSA's point of view. Services have invested heavily in implementing these processes and should rely on them at least until it is declared that they are not sufficient from the DSA perspective.

Article 18

Decisions on disputable matters of breaches or non-breaches of the platform's service conditions should be ruled by courts, not primarily by out-of-court dispute resolutions. Since everyone has the right to have their case heard fairly, publicly, and within a reasonable time by an independent and impartial tribunal established by law, these disputes between users and platforms should be settled primarily in courts and Member States should set optimal conditions for such types of disputes so that both platform operators and service users are not discriminated against in such disputes. There is a risk that these systems will be misused for unfair competition practices, that there will be conflicting decisions between individual regulators and out-of-court arbitrators, and that platforms will be de facto prevented from moderating content reasonably. It would be unfortunate if the work of independent courts in this area were to be transferred to commercial entities, whose responsibilities and knowledge are set out in Article 18 only very vaguely.

Article 19

It should be noted that in smaller Member States and in uncommon language areas within the EU, selection of suitable "trusted flaggers" can be a major challenge. These bodies in such Member States often have insufficient experience or their funding model results in their excessive political or another social distinction, which then corresponds to the level of their reporting. Therefore, the SP CR does not agree that the so-called “trusted flaggers” automatically acquire a higher position in the entire reporting process as set out in Article 19.

Article 20

The current proposal does not clarify whether, if the platform decides not to suspend access to a service user, it becomes responsible for the content that such a user uploads to the service. It is also not clear why the platform should be obliged to issue a prior warning to such a user of the service if such a user seriously violates terms of the service. A possible interpretation of Article 20 (3) may also mean that according to the DSA the online platform should not have the right to suspend a user's access to the service if the conditions set for it to suspend access to the service are stricter than the criteria set out in Article 20 (3) of the DSA proposal.

Article 21

It is already the case that anyone in EU Member States who has credible information about a serious crime or its preparation is obliged to report such conduct to law enforcement authorities or to prevent it. There is a need to better clarify the specific situations in which the online platform, as a legal entity, has this reporting obligation under Article 21 of the DSA proposal.

Article 22

Medium and large enterprises will be impacted by the requirement to properly identify traders offering services or goods within the platform and to allow traders to fulfil their legal obligations through the platform (Article 22 (6) of the DSA proposal). Due to the fact that the introduction of this obligation should bring benefits for retail traders selling through online platforms and could also contribute to better consumer orientation, the SP CR supports the introduction of this obligation in principle.

Some of the proposed responsibilities may be too far-reaching or may not be correct. The "economic operator" in point (d) is taken from the corpus of product safety legislation and has no necessary logical connection with the trader applying for a market trading account. This entity may differ for each product offered by the reseller and is therefore not the correct information for the DSA obligation.
The inclusion of "economic operators" in Article 22 (1) (a) D) is correct in the DSA. Article 22 aims to identify the trader when applying for an account. No connection is required between the trader and the economic operator.
Where the proposal imposes an obligation to verify identity of traders on an online platform against official national online databases, the Regulation should also oblige Member States to set up such online systems for online platforms and ensure that these systems allow automated access and are available for online platforms free of charge.

Article 24 and 30
Medium and large companies will be impacted by the requirement to make information on the origin of advertising messages available to users. The cost-benefit ratio of this proposal does not make sense in the context of general commercial advertising. It is completely disproportionate to impose such a regime across all advertising to address political advertising on social media. This also applies to the other obligations in Article 30. Fulfilling this obligation could be relatively complex from a technical point of view, especially if the platform operator uses advertising from the so-called programmatic advertising systems. In a situation where the operator of the online platform is the publisher and the operator of the advertising system is a third party, the consequences of the implementation of Article 24 of the DSA in practice will represent such a publisher's responsibility for advertising messages, the content of which is not under their control. For this reason, the requirement of Article 24 (b) and Article 24 (c) for such a publisher is impossible to meet as it has no information about the published information of the publisher, unlike the operator of the advertising system.

Article 25 - 33
Any definition of what constitutes a VLOP and other obligations related to this status should be defined directly by the Regulation and should not be left to the Commission to decide using delegated acts. Indeed, there does not appear to be adequacy or other reasonable limitations on the type of operational recommendations that may result from the audit (Article 28), including the introduction of general monitoring through proactive measures. Access to and control of data under Article 31 is too broad and inappropriately defined, and response times are insufficient to allow for proper scrutiny of requests or consideration of an alternative that could achieve the same result.
The grounds for rejecting an application should be extended not only to the unavailability of the requested data or the protection of business secrets but also to concerns relating in particular to the requesting institution or especially to the academic and the purposes for which the data may be used. The exact circumstances in which VLOPs have to share data with these groups should not be decided in delegated acts as this is an exceptional competence and should instead be specified in the Regulation itself.

Article 26 and 35
It is necessary to ensure that risk reduction measures (Articles 26 and 35) do not have an adverse impact on freedom of expression and freedom of establishment. It is especially important to prevent legal content from being censored through Codes of Conduct. In this context, we propose clarifying in Article 59 that Codes of

Conduct covering legal content should be voluntary and not subject to sanctions. It would be appropriate to narrow down the definition of risks related to illegal content (Article 26 (1)) while allowing regulators to oversee systems and processes related to community guidelines. It would be appropriate to take away the regulator's ability to propose interim measures as well as binding measures (A55-56) concerning categories of legal content.

Article 38 - 68

The powers of digital services coordinators and the Commission contained in these articles represent an extremely wide range of investigative powers outside the context of a court order or competition investigation. It is not clear whether they are subject to full judicial review and, if so, how.

As the DSA explicitly regulates processes at the EU level, the penalties in Article 59 should also be linked to the profits generated by online service users - customers or consumers - located in the EU / EEA. The fines are also not in line with the Omnibus Directive, which lays down a flexible set of criteria for fixing the level of appropriate fines (negligence, intensity of infringement, etc.). As with other sanction regimes under the DSA, there is a concern that they need to be defined in a way that takes into account potential distortions of competition even with offline competitors that are not subject to such a regime; excessive removal of content or complete cessation of service should be avoided simply for fear of disproportionate sanctions. On the contrary, this would distort competition, which is certainly not the intention of the Regulation.