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Position of the Polish Confederation Lewiatan on the Proposal for a directive on certain aspects concerning contracts for the supply of digital content.

I. Introduction.

In connection with the Proposal for a directive presented by the European Commission on certain aspects of contracts for the supply of digital content[1] (hereinafter: Proposal) the Polish Confederation Lewiatan is presenting below its comments on the solutions proposed in this act, as well as proposals of changes, which we believe should be introduced in the course of further legislative work. As we indicate below the impact of the Proposal on the digital world will be very large. Therefore, the needs for and consequences of encompassing certain contracts by these regulations and the assurance that the provisions of the Proposal do not restrict the development of new business models and rapidly emerging digital services need to be analysed.

Since the Proposal introduces a number of new concepts and, at the same time, regulates only selected aspects of the supply of digital content, before moving on to the Confederation's comments, it is worth explaining the main assumptions and terminology used by the Directive.

Objectives of the Directive.

The Proposal aims to establish the rights that the consumer has when the digital content supplied to him is not in conformity with the contract, thereby determining the entrepreneur's (the supplier's) duties. The Proposal also introduces the right to terminate every contract for the provision of digital content, the total duration of which exceeds 12 months. It provides that, in the event of termination of the contract because of the inconsistency of the digital content with the contract or the termination of a long-term contract, the operator is obliged to provide technical means to the consumer to retrieve "any content provided by the consumer and any other data produced or generated through the consumer's use of the digital content." The Proposal applies both to contracts covering digital content supplied not only for a price but also in exchange "for (personal and other) data" provided by consumers.

[1] Proposal for a directive on certain aspects concerning contracts for the supply of digital content 2015/0287 (COD) of 9 December 2015.

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

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Providers of digital content.

The Proposal very broadly defines digital content – this is not only the data produced and supplied in digital form (as to date, in accordance with Directive 2011/83/EU on Consumer Rights[2]), but also services which allow the creation, processing and storage of data supplied by the consumer, as well as sharing of and "any other interaction" with content.[3] Therefore, the Proposal encompasses the services of entities which produce and supply the digital content themselves (Article 2 (1) (a)) and services involving the provision of access to user content (Article 2 (1) (b) and (c).[4] In accordance with the Proposal, the supplier is any entrepreneur which provides access to digital content or makes it available itself.[5]

Contracts encompassed by the Proposal.

Under Article 3, the Proposal creates no doubts that the Directive applies to agreements for payment.[6] Furthermore, in accordance with that Article "[it] shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and (...) the consumer actively provides counter-performance other than money in the form of personal data or any other data." Recital 14 specifies that "this Directive should apply only to contracts where the supplier requests and the consumer actively provides data, such as name and e-mail address or photos, directly or indirectly to the supplier for example through individual registration or on the basis of a contract which allows access to consumers' photos." Therefore, the Proposal would apply to contracts for which money is not paid, in which the consumer registers in the service provider's service or actively sends him his data, e.g. by taking part in a competition in exchange for access to digital content.[7] At the same time, in accordance

[2] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

[3] Article 2 (1) of the Directive on contracts for the supply of digital content: "digital content" means a) data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software, b) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the consumer, and c) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service. This is a significant expansion of this definition in with respect to Article 3 (11) of the Directive on consumer rights, according to which "digital content" means data which are produced and supplied in digital form; it is not clear why the author of the author of the Proposal believed that, just 4 years after the adoption of Directive 2011/83/EC, the definition contained in it of digital content has become outdated.

[4] The very broad and vague wording of the provisions of Article 2 (1) (b) and (c), which is particularly vivid in the case of the latter ("any other interaction with data in digital form") is a separate issue.

[5] Article 2 (3) in connection with of Article 2 (10).

[6] Article 3 (1) This Directive shall apply to any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid.

[7] On the side-line, it could be added that the literal wording of recital 14 indicates that the list of data is closed, which was almost certainly not the lawmaker's intention.

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

with recital 14 “the Directive should not apply to situations where the supplier collects data necessary for the digital content to function in conformity with the contract, (...) or for the sole purpose of meeting legal requirements.[8] It should also not apply to situations where the consumer is exposed to advertisements exclusively in order to gain access to digital content.”

Therefore, it seems as if the Directive will apply to contracts for which money is not paid, with regard to the provision of services such as:

- blogs operated on the Internet, if they require the registration of consumers in the site,
- discussion forums, if access to them is subject to registration,
- social networks (registration is required in most of them),
- the use of sales platforms to offer goods or services or in order for these goods/services to be purchased by consumers (contract between the platform operator and the users),
- the use of free of charge VOD services, if they require registration,
- cloud storage services, if they require registration or give the service provider access to the data held,
- client account services in the Internet, where invoices and consumer contracts are kept and through which the information obligations are performed with respect to the consumer (e.g. accounts provided by electricity and gas suppliers, even though their “core” services are not of a digital nature),
- services of free delivery of digital press, if registration is required in the site,
- computer games, if registration is required in the site,
- access to databases (e.g. legislation databases), if registration is required in the site,
- all mobile applications such as online stores,
- contact forms of the “report doubts/ask” type (it is usually necessary to provide contact information),
- services provided by public authorities, requiring registration (majority), e.g. portals enabling official matters to be handled through the Internet,
- services providing access to music files, films etc. if they require logging on,
- web browsers.

[8] Recital 14 “This Directive should not apply to situations where the supplier collects data necessary for the digital content to function in conformity with the contract, for example geographical location where necessary for a mobile application to function properly, or for the sole purpose of meeting legal requirements, for instance where the registration of the consumer is required for security and identification purposes by applicable laws. This Directive should also not apply to situations where the supplier collects information, including personal data, such as the IP address, or other automatically generated information such as information collected and transmitted by a cookie, without the consumer actively supplying it, even if the consumer accepts the cookie.”

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

The Internet of things.

In accordance with recital 17 of the Proposal "it is opportune to address specific issues of liability related to the Internet of Things, including the liability for data and machine-to-machine contracts, in a separate way." It should be noted that "connected objects" are usually accompanied by an application (often provided free of charge), which enables the consumer to make full use of the given "smart device" and to which logging on is normally required. An example may be the use of a smart watch – when data (e.g. sports results) is stored in it, which is saved to the application's memory or the application can be used to enhance a watch with an additional function. It will be difficult in practice to separate these two regulations.

II. Detailed comments.

1. Definition of digital content.

The reason for accepting such a broad definition of digital content and thus specifying its subjective scope of is not satisfactorily explained in the justification of the Proposal. It should be emphasised that contracts for the provision of the services referred to in Article 2 (1) (b) and (c) apply to "products" and legal relations which differ significantly from the sale of digital content. Therefore, they should not be regulated in the same way. The purchase of digital content is a one-off event and the consumer acquires a defined product in this way. Such contracts are "digital" equivalents to the traditional contract for the sale of goods. In the case of the provision of services, digital content can be supplied for a long time and be subject to significant changes in this time, forced by technological progress or changes on the market. In many cases, the fulfilment of responsibilities which are typical of one-off sales contracts by service providers will be inadequate and, in many cases, will cause many difficulties. This is because a contract for the provision of services is a "due diligence contract" and not a "results contract".

2. Data as a counter-performance.

Many doubts are raised by the inclusion of contracts performed free of charge in exchange for personal data or other data within the scope of the Proposal. Firstly, it will be very difficult to separate the data which is provided by the consumer as a counter-performance from that which must be provided in order to conclude and perform the contract or to ensure the functioning of the service involving the

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

supply of content**.** Doubts are also raised by the matter of the use of the data, which, however, is obtained from customers, but is then pseudonomised of anonymised to improve the quality of the services or raise the level of security. It should be emphasised that, in many cases, the registration of the service provider on the site arises from the need to ensure security of use of the service, even though it is not "absolutely necessary for the performance of the contract" and often does not arise from the provisions of the law. The scope of this limitation is so narrow that it is difficult to apply it in practice.

Furthermore, it should be emphasised that matters of personal data processing in the Internet will be regulated in detail in the EU regulation on personal data protection, which, according to the declarations of the lawmakers, will be adopted in March this year (work has been ongoing on it since 2012). The Regulation defines personal data very broadly. Just as the currently applicable Directive 95/46/EC on personal data protection, it gives the data subjects (and hence subscribers in the meaning of the Proposal), among others, the right to withdraw consent for processing data and the right to object to the processing of personal data on the basis of the so-called the legitimate interest of the data controller. It also introduces the right of portability of personal data (Article 18), which is processed within the framework of the performance of the contract or on the basis of consent and the so-called right to be forgotten. These provisions ensure a high level of protection of the interests of citizens related to the processing of their personal data. **The regulation of the matter of contracts provided free of charge, with the simultaneous provision of the consumer's data or other data will lead to the duplication of the obligations provided for in the regulation on personal data protection and will introduce discrepancies between requirements of both acts.**

3. Compliance with Directive 2011/83/EU.

Article 5 (2), which introduces the obligation to "supply the digital content immediately" is inconsistent with the Consumer Rights Directive 2011/83/EU which requires the consumer's express consent for the provision of service and, as a result, the waiver of the right of withdrawal from the contract (Article 16 (m) of this Directive). Article 3 (7) of the Proposal does not provide for sufficient clarification because the scope of the Consumer Rights Act is broader than the scope of the Proposed Directive. In accordance with this article "If any provision of this Directive conflicts with a provision of another Union act governing a specific sector or subject matter, the provision of that other Union act shall take precedence over this Directive." It appears desirable to make those provisions uniform to eliminate any confusion for entrepreneurs and consumers.

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

Proposition

Article 5 (2) "The supplier shall supply the digital content immediately after the conclusion of the contract, unless the parties have agreed otherwise **or the timing of delivery of the content has not been defined in the provisions of other EU acts**. The supply shall be deemed to take place when the digital content is supplied to the consumer or, where point (b) of paragraph 1 applies, to the third party chosen by the consumer, whichever is the earlier."

4. Conformity of the goods with the contract.

Article 6 (1) (c) provides that digital content is in conformity with the contract, if supplied "along with any instructions and customer assistance as stipulated by the contract." If the contract does not specify these issues, then paragraph 2, which specifies the criteria of conformity of digital content with the contract in the absence of appropriate contractual provisions, will apply.
It should be noted that many of the contracts encompassed by the scope of the Proposal (especially free of charge contracts, as described above) do not contain provisions on instructions and technical support. It is difficult to require that each supplier of a blog or Internet forum prepares a service level agreement (namely an agreement on maintenance and the systematic improvement of the quality level of the services, as agreed by and between the customer and the service provider, through a constant cycle of: arrangements, monitoring of the service, reporting and review of the results achieved[9]). On the other hand, in the absence of provisions regarding instructions and technical support, the point of reference for the assessment of conformity of the digital content with the contract will be the "standard of international technical standards" or in the absence of such technical standards, "applicable industry codes of conduct and good practices." In many cases, the standard may prove to be disproportionate to the "complexity of the service." In areas where there are no such standards or codes of good practice, it will be difficult for service providers to specify what reasonable technical support can be expected.

Proposition

Point (c) of paragraph 1 should be deleted.

[9] https://pl.wikipedia.org/wiki/Service_Level_Agreement

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

5. Third party rights.

In accordance with Article 8 (1), "at the time the digital content is supplied to the consumer, the digital content shall be free of any right of a third party, including based on intellectual property, so that the digital content can be used in accordance with the contract." Paragraph 2, which refers to the contracts for continuous supplies, provides similarly. We understand that the intention of the lawmaker is to combat illegal distribution of content in the Internet. However, it should be noted that the provision is not properly formulated. Not all digital content can be free of third party rights. For instance, in the case of content protected by intellectual property rights, third parties retain moral or economic rights to the work. This is because, by allowing others to use the work under licence (most frequently non-exclusive) they do not waive their rights to that work.

Proposition

It seems appropriate to state that "the legal condition of digital content supplied to the consumer should be such as to enable him to use the content in accordance with the contract in a manner that does not breach third party rights."

6. Termination of the contract in the event of an inconsistency of the digital content with the contract.

In accordance with Article 14 (4), "the consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract." It should be clarified that the release from payment for digital content applies to the period in which there was an inconsistency between the digital content and the contract. In the case of digital content supplied continuously, the disclosure of non-compliance arising from the termination of the contract after several months of use of the service, which is based, for instance, on a monthly subscription, should not release the subscriber from the obligation to pay the fee for the use of digital content for the period when there was no inconsistency.

Proposition

Article 13 (4) "The consumer shall not be liable to pay for any use made of the digital content in the period prior to the termination of the contract consumer **in the part which corresponds to the period in which the inconsistency of the digital content with the contract took place."**

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

7. Refraining from using data or personal data.

In accordance with Article 13 (2) (b) "the supplier shall take all measures which can be expected to refrain from the use of a counter-performance other than money which the consumer has provided in exchange for the digital content, or any other data collected by the supplier with respect to the supply of the digital content including any content provided by the consumer, with the exception of the content which has been generated by the consumer together with others who continue to make use of the content."

This provision is inconsistent with the provisions governing the principles of personal data processing and protection. It is impossible in practice to completely separate data provided as a "counter-performance" from data collected and processed for the purpose of performing the contract or collected for other legitimate purposes. The data collected for these purposes is frequently identical; furthermore, the grounds for processing the data may differ. As a result, even after the termination of the contract, in accordance with the law, some of the data will have to be processed, for example, for making settlements, archiving or in the event of asserting claims.

Proposition

a). Preferred: exclusion of free of charge contracts from the scope of the Proposal of the directive,
b). Deletion of the phrase "and any other data collected by the supplier in relation to the supply of the digital content." Only data provided as a counter-performance, which extends beyond that, which is necessary to enter into or perform the contract or the processing of which is required by the provisions of the law should not be used.

8. Retrieval of generated or produced data.

In accordance with Article 13 (2) (c) "the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content to the extent that data has been retained by the supplier. The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format."

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

It can be expected that the fulfilment of this obligation will be related to major technical problems and legal doubts (related, among other things, to separating data that the user generated from "system" data, e.g. in digital games). There is also no certainty that, even if the supplier keeps the data, it will be able to assign this content to a given consumer (some services almost certainly do not require detailed identification data) and, therefore, it will not be possible to issue it to the authorised party. It should be emphasised that the provision should not obligate the service provider to retain data produced and generated by the user. This article should be clarified by limiting its scope to that data which the supplier has retained in accordance with the contract and applicable law.

Proposition

In accordance with Article 13 (2) (c) "the supplier shall provide the consumer with technical means to retrieve all content provided by the consumer and any other data produced or generated through the consumer's use of the digital content **if the supplier has retained this data to the extent which complies with the contract and the applicable law.** The consumer shall be entitled to retrieve the content free of charge, without significant inconvenience, in reasonable time and in a commonly used data format."

9. The right to terminate long-term contracts.

In accordance with Article 16, the consumer should be able to terminate the contract in any case when:
- the contract has been concluded for an indeterminate period, or
- if the initial contract duration exceeds 12 months, or
- if the total time for which the contract has been extended exceeds 12 months.

This means that the provision will also be applicable to contracts concluded for a specified term, e.g. a week or a month, if the total time in which the consumer uses the service exceeds 12 months. In accordance with the Proposal, in such a case, the termination of the Contract shall become effective 14 days after the receipt of the notice.
Although it is possible to understand the attempt to guarantee the consumer the ability to change the service provider in the case of contracts concluded for a long time, guaranteeing such a right with respect to contracts entered into for a specified term is unreasonable. In this case, at the end of each billing period, the consumer makes a decision on whether he wants to remain in a contractual relationship with the service provider. If he withdraws from it, he can inform the entrepreneur of his willingness to terminate the contract. The contract is then terminated after the expiry of the notice

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

period provided for in the contract, as appropriate to the type of contract and its duration. It should be noted that, depending on the type of service, the reference period (term of subscription) may be from 3 days to several months. The use of a uniform 14-day period is therefore groundless. It could hinder settlements between the consumer and the entrepreneur because the contract would be terminated in the middle of the billing period. Furthermore, with such a structure, it will be necessary to determine the moment from which its timing starts, which can be difficult, since the consumer may notify the service provider of the desire to terminate the contract in any form. It is worth adding that the 14-day subscription term is relatively rarely used in contracts for the provision of digital content. If a specific date needs to be indicated, a 30-day term is more appropriate.

Proposition

Article 16 (2) "The consumer shall exercise the right to terminate the [long-term] contract by notice to the supplier given by any means. Termination shall become effective **at the end of the notice period specified in the contract and, in its absence, no later than** 30 days from the date of receipt of the notice."

10. Editorial comments:

Counter-performance

Article 3 (1) *in fine* – if the Directive encompasses free of charge contracts, the notion of "counter-performance other than money in the form of personal data or any other data" should be used consistently throughout the whole of the Proposal, because otherwise the list of such "counter-performances" will be open-ended and as a result, the Proposal will also apply to an even broader list of contracts.
At present, Article 6 (2) (a), Article 13(2) (b), Article 15 (2) (b) and Article 16 (4) (a) use the term "counter-performance other than money,"[10] without specifying that this applies to a performance which is the provision of personal data or other data.

[10] Proposition: Article 6 "Conformity of the digital content with the contract" Paragraph 2. To the extent that the contract does not stipulate, where relevant, in a clear and comprehensive manner, the requirements for the digital content under paragraph 1, the digital content shall be fit for the purposes for which digital content of the same description would normally be used including its functionality, interoperability and other performance features such as accessibility, continuity and security, taking into account whether the digital content is supplied in exchange for a price or counter-performance other than money **by providing personal data or any other data;** Article 13 "Termination" paragraph 2. Where the consumer terminates the contract: (...) (b) the supplier shall take all measures which could be expected in order to refrain from the **use of the personal data or other data provided as a counter-**

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS

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Article 3 (2)

- in the Polish version, the term "customer" [*klienta*] should be replaced with "consumer" [*konsumenta*].
- the term "digital product" which is not defined in the Proposal should be replaced with the term "digital content".

Article 13 (1).

It should be clarified that the right to terminate the contract provided for in the Article shall apply on the conditions described in Article 12. The current wording suggests that this is the consumer's independent right.

Proposition:

Article 13 (1) "The consumer exercising his right to terminate the contract on the conditions specified in Article 12 must provide the notice of this to the supplier using any means."

The Polish Confederation Lewiatan, 2 March 2016
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performance other than money which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer with the exception of the content which has been generated jointly by the consumer and others who continue to make use of the content; Article 15 "Modification of the digital content" (...) Paragraph 2. Where the consumer terminates the contract in accordance with paragraph 1, where relevant, (...) (b) the supplier shall refrain from the use of **the personal data or other data provided** as a counter-performance other than money, which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer. Article 16 "Right to terminate long term contracts" Paragraph 4. Where the consumer terminates the contract in accordance with this Article: (a) the supplier shall take all measures which could be expected in order to refrain from the use of **the personal information or other data provided as** a counter-performance other than money, which the consumer has provided in exchange for the digital content and any other data collected by the supplier in relation to the supply of the digital content including any content provided by the consumer;

Konfederacja Lewiatan
ul. Zbyszka Cybulskiego 3
00-727 Warszawa

tel.(+48) 22 55 99 900
fax (+48) 22 55 99 910
lewiatan@konfederacjalewiatan.pl
www.konfederacjalewiatan.pl

NIP 5262353400
KRS 0000053779
Sąd Rejonowy dla
m.st. Warszawy w Warszawie
XIII Wydział Gospodarczy KRS