



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

Message 201

Communication from the Commission - TRIS/(2024) 2893

Directive (EU) 2015/1535

Notification: 2024/0531/ES

Forwarding of the response of the Member State notifying a draft (Spain) to request for supplementary information (INFOSUP) of European Commission.

MSG: 20242893.EN

1. MSG 201 IND 2024 0531 ES EN 23-12-2024 25-10-2024 ES ANSWER 23-12-2024

2. Spain

3A. SDG de Asuntos Industriales Energéticos, de Transportes y Comunicaciones, y de Medio Ambiente
DG de Coordinación del MI y otras Políticas Comunitarias
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Ministerio de Asuntos Exteriores, UE y Cooperación

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4. 2024/0531/ES - SERV60 - Internet services

5.

6. In the framework of the notification procedure provided for in Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, on 20 September 2024, Spain notified the Commission of the 'Preliminary Draft Organic Law for the Protection of Minors in Digital Environments' (hereinafter the 'APLO') (Notification 2024/0531/ES).

A request for additional information was received from the European Commission on 7 October 2024, which was replied to on 18 October 2024.

A second request for additional information was received from the European Commission on 21 October 2024, with a request for a reply by 25 October 2024.

The questions asked by the Commission are set out below, followed by their respective replies:

QUESTION 1: '1. The Commission services take note of the information provided in the replies to questions 3 and 7 according to which the obligation to set up and operate an age verification system would not apply to providers of online intermediary services as per the meaning of Article 3 of Regulation (EU) 2022/2065:

'In this case, compliance with this obligation shall apply to those natural or legal persons who, using intermediary services, for example, online platforms as defined in Article 3(i) of Regulation (EU) 2022/2065, market to the public the products or functionalities defined in the aforementioned Article 5. That is, the parties bound by this paragraph 2 are those that market the defined products or functionalities, not the providers of online intermediary services.' (reply to question 3)

'Article 5 contains a definition of a random reward mechanism and, as noted above, paragraph 2 of said Article states that the offer of such functionalities can only be made when there are systems of age verification in place. Therefore, to the extent that a functionality as defined in Article 5(1) is made available to consumers by information society services



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within the meaning of Directive 2000/31/EC, the requirement for an age verification system would apply to them (with the exception mentioned above – see reply to question 3 – of those that have the nature of intermediary services).’ (reply to question 7)

The Commission services would welcome practical examples of the providers that would be subject to the above obligation concerning age verification, as well as the practical way in which they are expected to comply with the said obligation when those providers offer their functionalities using online intermediary services. Finally, the Commission services would request the Spanish authorities to confirm that, in view of the above, functionalities provided by providers of online platforms similar to the case of TikTok Lite (for Commission opening decision of 22 April 2024 and decision making commitments of 5 August 2024 binding please consult this link) would not be covered by the scope of Article 5 of the notified draft.’

REPLY TO QUESTION 1

The two aspects for which the Commission requests further explanation on Article 5 are addressed below:

A) Practical examples of the providers that would be subject to this obligation and measures to be adopted:

To the extent that the functionalities described in Article 5 are present in a video game, the entity marketing that product (distributor, developer, etc.) would be obliged to establish an age verification system. Thus, for example, a developer who wanted to distribute a video game featuring the random reward mechanism included in the definition and who marketed their product through an intermediary platform (for example, Steam) would be obliged to ensure that the design of their product includes the aforementioned verification system.

As regards the practical way in which this obligation is expected to be complied with when this functionality is offered using online intermediary services, the provision provides that the prohibition is on the ‘access to’ or ‘activation of’ random reward mechanisms. Therefore, it must be the product in which the regulated functionality is included that incorporates the identity verification system. In the case of a video game, this could be implemented in such a way that age verification takes place either at the time of accessing the video game itself, or when the option to activate the functionality is offered, at the discretion of the marketing entity. In any case, the technical aspects of this verification system are not predetermined, although they must ensure security, privacy and data protection.

B) Confirmation that the functionalities provided by providers of online platforms similar to the case of TikTok Lite would not be covered by the scope of Article 5 of the notified draft:

As noted in the previous report (reproduced in the new Commission consultation), online intermediary services would not be affected by the obligation set out in Article 5. In addition, and without prejudice to this, a functionality such as that described in the case of TikTok Lite would not fall within the scope of the definition established in Article 5 in the event that it were offered by one of the obliged parties.

Thus, according to the Commission Opening Decision of 22 April 2024 (DSA.100121 – TikTok – INVESTIGATION INTO COMPLIANCE WITH ARTICLES 34, 35 AND 42(4)), the TikTok Lite software application would feature the possibility of accumulating virtual points from the performance of certain tasks through the application, such as discovering new content, linking content, following creators, as well as daily checks or recommending the application to friends. These points could be redeemed in exchange for two types of rewards: 1- gift cards from associated third parties (such as Amazon and PayPal) and 2- virtual currencies can be used to send gifts to creators on TikTok (paragraph 10 of the Opening Decision).

In the draft notified to the Commission, the relevant random reward mechanisms are those that require for their access and activation real money or other elements, the acquisition of which has required the use of real money, and in which the reward, in addition to being a virtual object, is the result of a random process. In the case of TikTok Lite described, a priori, the elements of acquisition cost and randomness in obtaining the reward would be missing, as the latter is the result of the performance of a series of tasks by the user in their interaction with the intermediary platform.

QUESTION 2: ‘Concerning Article 4, paragraph 3 second sub-paragraph, the Commission services would welcome a clarification on the obligations for providers of information society services as per the meaning of Directive 2000/31/EC, such as operating systems, that would result from this provision. The Commission services would also ask the Spanish authorities to clarify whether those obligations, if any, would also apply to providers of information society services established in other Member States in view of CJEU C-376/22.’



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REPLY TO QUESTION 2

Article 4(3) of the draft legislation contains a sole obligation, which is addressed exclusively to manufacturers of digital terminal equipment with an operating system and the ability to connect to the internet.

That obligation is specified in the first sub-paragraph of Article 4(3), under which those manufacturers are required to ensure that the terminal equipment in question includes in its operating system a parental control functionality that allows its users to restrict or control the access of those persons to services, applications and content harmful to minors, the activation of which should occur by default at the time of the initial configuration of the terminal equipment. Both the inclusion of this functionality and its configuration and updating must be free of charge for the user.

On the basis of this premise, the second and third sub-paragraphs of Article 4(3) lay down requirements for manufacturers of terminal equipment to be able to comply properly with this obligation.

Second sub-paragraph: manufacturers, in fulfilling this obligation, must ensure that the operating systems installed on their terminal equipment incorporate parental control functionality. In many cases – fundamentally, when the manufacturer of the equipment is not the creator of the operating system, but merely a licensee or user of it – for reasons of industrial property and acquisition of the appropriate licences, the manufacturer of the terminal equipment cannot independently verify whether the operating system has that functionality without the necessary and essential assistance of the creator of the computer code that constitutes the operating system. For this reason, and in order to enable the manufacturer of the equipment to comply properly with the sole obligation laid down in Article 4(3), the second sub-paragraph provides that the manufacturer may request the operating system provider to simply provide information, by means of certification, as to whether the operating system has parental control functionality.

Therefore, the second sub-paragraph of Article 4(3) does not contain any obligation for the providers of operating systems beyond providing certain information to the manufacturers of certain devices so that they can comply with the sole obligation imposed in Article 4(3), which is that terminal equipment with the ability to connect to the internet that they want to market in Spain must have a parental control system for the benefit of users.

Moreover, it is considered that, even if it were not provided for in the draft legislation, proof of the circumstance pointed out by the providers of operating systems to the manufacturers of equipment would be a condition that the latter would naturally need to incorporate in the licence (or similar) agreement in order to avoid their own liability for compliance with the requirement imposed on the equipment they manufacture by the first sub-paragraph of Article 4(3). In that context, the provision contained in the second sub-paragraph simply reinforces the legal coverage of the contractual clause which would naturally have to be agreed in the same way.

Third sub-paragraph: the third sub-paragraph simply provides for a measure to ensure the confidentiality and privacy of personal data, whereby the personal data of minors collected or generated during the activation of the parental control functionality may not be used in any case, even when the user acquires the age of majority, for commercial purposes, such as direct marketing, profiling and behavioural advertising.

European Commission

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