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Purpose: Notification 2024/288/HU

Amendment of Government Decree No 210/2009 of 29 September 2009 on the conditions of carrying out commercial activities

Delivery of a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535 of 9 September 2015

Excellency,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the Hungarian authorities notified to the Commission on 30 May 2024 the draft “*On the amendment of Government Decree No 210/2009 of 29 September 2009 on the conditions of carrying out commercial activities*” (hereinafter referred to as “the notified draft”).

According to the notification message, section 1 of the notified draft aims at protecting children and consumers online, taking into consideration the continuous growth of e-commerce. The notification message further indicates that, in the case of mail order trading, the trader shall publish specific information in connection with products which are intended for children and the essential element of which is the promotion or portrayal of gender identities that do not correspond to the gender assigned at birth, gender reassignment or homosexuality or potentially the direct, natural or self-intended representation of sexuality. In such cases, the product intended for children can only be marketed if the commercial communication of the concerned product contains the information ‘Sensitive content!’ in a clearly visible manner.

¹) Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services, OJ L 241 dated 17.9.2015, p. 1.

The Hungarian authorities moreover explain that “mail order trade” consists of commercial activity in the course of which the trader provides the buyer with commercial communication, including the features and price of the product, which makes it possible for the buyer to decide to enter into a transaction.

In the context of the notified draft, the Commission addressed to the Hungarian authorities a request for supplementary information on 14 June 2024 to obtain clarifications on the measures of the notified draft. The answers provided by the Hungarian authorities on 5 July 2024 are taken into account in the following assessment.

The examination of the relevant notified provisions led the Commission to issue the following detailed opinion.

1. Introduction

According to the notification message, and as confirmed by the Hungarian authorities in their reply to the request for supplementary information, the notified draft has the purported objective to protect children online in light of their fundamental rights to physical, mental and moral development, considering the continuous growth of e-commerce, as well as to facilitate informed consumer decisions.

The Commission underlines that the objective to protect minors online from harmful content is fully covered by the European legal framework for online services, in particular Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter “the DSA”)⁽²⁾ and Directive 2000/31/EC (Directive on Electronic Commerce)⁽³⁾. More specifically, the DSA aims at ensuring safe, predictable and trusted online environment in which fundamental rights enshrined in the Charter are protected, including the principle of consumer protection. The Commission would like to note that the provisions of the DSA aimed at the protection of minors have been strengthened during the legislative process, based on amendments to the Commission’s proposal tabled notably by the Council.

The DSA provides effective EU-wide horizontal rules which impose obligations on hosting service providers and online platforms to combat illegal and harmful content online, while strengthening the European single market and it requires such providers to put in place the necessary processes to safeguard the users’ fundamental rights. As a Union law Regulation, the DSA is directly applicable in all Member States, without the need for implementing measures.

The Commission would like to emphasize that the protection of minors is one of its enforcement priorities under the DSA. In autumn last 2023 the Commission sent detailed requests for information to the five Very Large Online Platforms (VLOPs) with the highest underaged user bases (namely TikTok, Snapchat, YouTube, Instagram and Facebook) to enquire about the measures they have taken to protect minors, who use their services. Based on the responses received as well as the information received in the risk assessment reports which those operators are obliged to carry under article 34 of the

²) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (DSA), OJ L 277, 27.10.2022, p. 1-102.

³) Directive 2000/31/EC 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 (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1-16.

DSA, the Commission has initiated proceedings against TikTok (on 19 February ⁽⁴⁾) and 22 April 2024 ⁽⁵⁾) as well as Instagram and Facebook (on 16 May 2024 ⁽⁶⁾), as the Commission suspects that these platforms are not compliant with their obligations under the DSA in relation to the protection of minors. This includes the potential non-compliance with obligations to put in place appropriate and proportionate measures to ensure a high level of privacy, safety and security for minors.

2. Detailed opinion

2.1 Evaluation in the light of the e-Commerce Directive

a) Applicability of the e-Commerce Directive

The notified draft law falls within the scope of the Directive on electronic commerce.

Firstly, concerning the personal scope of application of the notified draft. The notified draft applies to providers of commercial activity in the course of which the trader provides the buyer with commercial communication, including the features and price of the product, which makes it possible for the buyer to decide to enter into a transaction. As confirmed by the Hungarian authorities in their reply to the request for supplementary information, by definition such activities fall within the scope of information society services. In particular, as pointed out by the Hungarian authorities, the scope of the underlying Trade Act extends to basic requirements and control of commercial activities, the pursuit of service activity for commercial purposes as well as the marketing of products.⁽⁷⁾ Therefore, the providers subject to the notified draft include providers of information society services within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 and thus also within the meaning of Articles 1 and 2 of the Directive on electronic commerce, insofar as they fulfil the conditions set out therein.

Secondly, concerning the material scope of the notified draft, as confirmed by the Hungarian authorities, the rules set out in the notified draft concern the pursuit of the activity of information society service providers, in particular the conditions of carrying commercial activities. In particular, the notified draft would impose on those providers of information society services in scope the obligations to mark certain products as “Sensitive content!” in a clearly visible way in cases where such products are intended for children and the essential element of which is the direct, natural or self-intended representation of sexuality or the promotion or portrayal of gender reassignment or homosexuality or gender identities that do not correspond to the gender assigned at birth, in order to be able to market such products.

The Hungarian authorities further allege that the notified draft is intended as a measure for the protection of minors within the meaning of Article 3(4) of the Directive on electronic commerce.

⁴ ([DSA: Commission opens formal proceedings against TikTok \(europa.eu\)](#)).

⁵ ([Commission opens proceedings against TikTok under the DSA \(europa.eu\)](#)). By decision of 5 August 2024, the Commission made the TikTok's commitments submitted to address the suspicions expressed by the Commission binding upon TikTok..

⁶ ([DSA: Commission opens formal proceedings against Meta \(europa.eu\)](#)).

⁷) In particular, “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

The obligations set up in the notified draft therefore fall within the coordinated field of the Directive on electronic commerce, as set out in Article 2(h) and (i) thereof and have therefore been analysed in the light of this Directive.

Thirdly, concerning the territorial scope of the notified draft, the Hungarian authorities confirmed in their replies to the request for supplementary information that the obligations set therein apply to providers of information society services offered in the Hungarian territory, including domestic providers and providers established in other Member States.

Article 3(1), (2) and (4) of the e-Commerce Directive

The Commission notes that the provisions of the notified draft apply to providers of information society services offering their services on Hungarian territory, irrespective of their place of establishment. This aspect has been confirmed by the Hungarian authorities. Therefore, the notified draft applies indistinctively to providers of information society services established in other Member States than Hungary.

In this regard, the Commission recalls that Article 3(1) and (2) of the Directive on electronic commerce establishes the “principle of control by the country of origin” according to which information society services must be regulated at the source of the activity. They are therefore, as a general rule, subject to the law of the Member State in which the providers of these services are established. Article 3(4) of the Directive on electronic commerce defines the circumstances and procedures under which a Member State of destination may derogate from this principle in order to impose measures necessary for either public policy (in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons), the protection of public health, public security, including the safeguarding of national security and defence, or the protection of consumers, including investors.

As mentioned above, according to the Hungarian authorities, the notified draft is a measure for the protection of minors within the meaning of Article 3(4) of the Directive on electronic commerce.

In this context, the Commission draws the attention of the Hungarian authorities to the recent case law of the CJEU ⁽⁸⁾ concerning the scope of Article 3(4) of the Directive as regards, in particular, measures of general and abstract application. ⁽⁹⁾ According to that case law, general and abstract measures, such as the notified draft are not able to benefit from the exemption of Article 3(4) of Directive on electronic e-commerce ⁽¹⁰⁾.

⁸() Case C-376/22, *Google Ireland and Others*, ECLI:EU:C:2023:835, and judgment of 30 May 2024 in joint cases *Airbnb Ireland UC and Amazon Services Europe Sàrl v Autorità per le Garanzie nelle Comunicazioni*, C-662/22 and C-667/22, EU:C:2024:432, paragraph 70.

⁹() Case C-376/22, *Google Ireland and Others*, ECLI:EU:C:2023:835. In particular, paragraphs 59 and 60: “59 On the contrary, the consequence of such an interpretation is that Member States are not, as a matter of principle, authorised to adopt such measures, so that verification that those measures are necessary to satisfy overriding reasons in the general interest is not even required.

60 Having regard to all the foregoing considerations, the answer to the first question must be that Article 3(4) of Directive 2000/31 must be interpreted as meaning that general and abstract measures aimed at a given category of information society services described in general terms and applying indiscriminately to any provider of that category of services do not fall within the concept of ‘measures taken against a given information society service’ within the meaning of that provision.”

¹⁰() Judgment of 9 November 2023 in Case C-376/22, ECLI:EU:C:2023:835, paragraphs 59 and 60:

In the form notified to the Commission, the draft law constitutes such a general and abstract measure that would apply indistinctively to domestic and foreign providers of information society services. In any event, based on the information available to it at this stage, the Commission is not in the position to verify whether and how the Hungarian authorities intend to ensure that all other substantive and procedural requirements set out in Article 3(4) of the Directive on electronic commerce are fulfilled.

In any event, even if it could be considered (*quod non*) that the notified draft would constitute a measure for the purposes of Article 3(4) of the Directive on electronic commerce and a Member State intended to derogate from Article 3(2) of that Directive in respect of the procedures set out therein, the Commission would like to remind the Hungarian authorities that the justification of such derogation provided for in Article 3(4) of the Directive on electronic commerce must be interpreted in the light of the Charter, in line with the arguments developed below in section 2.3, and the measure would still have to be necessary and appropriate in order to comply with Article 3(4) of the E-Commerce Directive. The Hungarian authorities have not provided any information, in the context of the present notification, to justify how the notified draft would fulfil those conditions.

Therefore, in the Commission's views, as it stands, the notified draft constitutes an unjustified restriction to the freedom to provide information society services from another Member State contrary to Article 3 of the Directive on electronic commerce and the recent case law of the CJEU.

2.2. Assessment in light of the Digital Services Act

a) Applicability of the Digital Services Act

The notified draft falls within the scope of the DSA.

Firstly, concerning the personal scope of the notified provisions, the notified draft sets out requirements on mail-order trade and is applicable to providers of commercial activity in the course of which the trader provides the buyer with commercial communication, including the features and price of the product, which makes it possible for the buyer to decide to enter into a transaction. As confirmed by the Hungarian authorities, by definition falls within the scope of information society services, thus under Article 3 of the DSA.

Secondly, as regards the material scope of the notified provisions, the Hungarian authorities have confirmed in the context of replies to the Commission services' request for supplementary information, that the purported objective of the notified draft is to protect children online as well as to facilitate informed consumer decisions in the context of commercial communication. These objectives are one of the main policy objectives

⁵⁹ On the contrary, the consequence of such an interpretation is that Member States are not, as a matter of principle, authorised to adopt such measures, so that verification that those measures are necessary to satisfy overriding reasons in the general interest is not even required.

⁶⁰ Having regard to all the foregoing considerations, the answer to the first question must be that Article 3(4) of Directive 2000/31 must be interpreted as meaning that general and abstract measures aimed at a given category of information society services described in general terms and applying indiscriminately to any provider of that category of services do not fall within the concept of 'measures taken against a given information society service' within the meaning of that provision."

See also Judgment of 30 May 2024 in joint cases *Airbnb Ireland UC and Amazon Services Europe Sàrl v Autorità per le Garanzie nelle Comunicazioni*, C-662/22 and C-667/22, EU:C:2024:432, paragraph 70.

pursued by the DSA, including as regards the exposure of minors to harmful content or unsafe products. ⁽¹¹⁾

b) Assessment in view of the scope of the DSA

The Commission would like to stress that the DSA aims to contribute to the proper functioning of the internal market for intermediary services by establishing fully harmonised rules for a safe, predictable and reliable online environment. In particular, it establishes a fully harmonized regulatory framework concerning the accountability and responsibilities of intermediary service providers, including online marketplaces, with regard to their obligations to combat illegal and harmful content on their services. This is emphasised in recital 9 of the DSA.

The Commission recalls that the protection of minors, a particularly vulnerable category of recipients of online intermediary services, against, among others, harmful content is one of the main policy objectives pursued by the DSA, as explained in recitals 40, 71 and 81 of the Regulation. More specifically, Article 28 of the DSA is entirely devoted to the protection of minors and requires online platforms to put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors, on their service.

Ensuring a safe, trustworthy and transparent online environment for consumers is also among the main objectives of the DSA, as clarified in its recital 24, 40 and 72-74. Chapter III, section 4 of the DSA provides for specific requirement on online marketplaces (referred to under the DSA as online platforms allowing consumers to conclude distance contracts with traders), including as regards the information to be displayed by online marketplaces in order to allow consumers to make informed decisions.

Furthermore, Articles 34 and 35 of the DSA require providers of very large online platforms to assess the risks that their services may create for minors and consumers and to take targeted and effective measures to mitigate them.

Furthermore, even if the draft notified would constitute a measure protecting minors (quod non), it would impose on providers of online platforms, including some designated as very large online platforms, requirements aimed at protecting minors from certain content which the national authorities consider as harmful for their development, hence supplementing the fully harmonized provisions of the DSA.

The Commission calls on the Hungarian authorities to ensure that the final law is in line with the principle of direct applicability of the DSA in all Member States.

For the reasons set out above, section 1 of the notified draft is deemed incompatible with the full harmonisation effect of the DSA.

c) Monitoring and enforcement system

The supervision and enforcement of compliance with the obligations set out in the notified draft is regulated in Government Decree No 210/2009 of 29 September 2009 on

¹¹ (See Articles 1, 28, 30, 31, 34 and 35, as well as recitals 40, 71, 74 81, 83 and 89 of the DSA.

the conditions of carrying out commercial activities, which the notified draft aims to amend. Those competences are entrusted to the relevant Hungarian national authorities.

To ensure that the DSA is fully effective in the pursuit of objectives such as the protection of minors and consumers, which is also pursued by the notified draft, it is essential to preserve the harmonising effect of the DSA and also its supervision and enforcement system.

In accordance with Chapter IV of the DSA, the supervision and enforcement of the DSA are based on close cooperation, on the one hand, between the appointed national digital services coordinators (and other competent authorities) under the country of origin principle and, on the other hand, between these national authorities and the Commission (Articles 55 and 56 of the DSA).

The Commission therefore calls on the Hungarian authorities to ensure that the notified draft does not endanger the supervision and enforcement architecture of the DSA.

d) Absence of general monitoring obligations

On the basis of the information made available to the Commission, it is unclear how providers under the scope of the notified draft are to comply with the marking requirements. In particular, section 1 of the notified draft requires providers of information society services in scope, including intermediary services as defined in the DSA, to mark certain products as “Sensitive content!” in a clearly visible way in cases where: (i) such products are intended for children; and (ii) the essential element of which is the direct, natural or self-intended representation of sexuality or the promotion or portrayal of gender reassignment or homosexuality or gender identities that do not correspond to the gender assigned at birth, in order to be able to market such products.

In this regard, the Commission services addressed questions in the context of the request for supplementary information, to which however the Hungarian authorities failed to reply. It therefore remains unclear how those providers of intermediary services are expected to determine whether the products are intended for children and, more particularly, if the essential element of which is the direct, natural or self-intended representation of sexuality or the promotion or portrayal of sex reassignment or homosexuality or gender identities that do not correspond to the sex assigned at birth. In particular, it remains unclear whether providers of intermediary services are only to rely on the information provided by the traders or are required to perform additional general fact-finding exercises and to monitor the content available on their services.

On the basis of the information made available, the Commission cannot exclude that the obligations of the notified draft would not result in a requirement for providers of intermediary services to perform general fact-finding exercises and monitoring the content available on their services, which would be contrary to Article 8 of the DSA.

2.3. Possible violation of the Services Directive 123/2006/EC

The notified draft measure would also violate the Services Directive in case the draft legislation applied to activities not covered by the above-mentioned provisions, i.e.

activities of sale of goods carried out without using information society services. Such activities would be covered by the Services Directive since retail is a service activity to which the Directive applies. Also, Article 16 of the Services Directive allows for restrictions only if they are justified by one of four public interest objectives enumerated in Article 16, namely public policy, public security, public health and the protection of the environment. The Hungarian authorities do not identify and substantiate to what extent the draft legislation pursues the public interest reasons admitted by Article 16 of the Services Directive, nor do they provide adequate evidence or analysis on the necessity and proportionality of the envisaged restrictions.

2.4. Assessment under Article 56 TFEU

It should also be noted that even in case of matters for which EU secondary legislation exists and national laws are assessed against those specific rules, the fundamental freedoms guaranteed by the Treaty, including Article 56 TFEU, may apply. In particular, Article 56 TFEU may apply to cross-border services subject to the contested provisions to the extent such services are not exhaustively harmonised by secondary legislation. It is settled case-law of the CJEU that all measures which are liable to prohibit, impede or render less attractive the exercise the freedom to provide services must be regarded as constituting restrictions in the meaning of Article 56 TFEU (see, *inter alia*, Case C-465/05 *Commission v Italy*, paragraph 17). Moreover, it should be underlined that Article 56 TFEU requires the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member States, when they are liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services. The freedom to provide services is for the benefit of both providers and recipients of services (see, *inter alia*, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International*, paragraph 51). The CJEU has held that national measures which restrict the exercise of the fundamental freedoms guaranteed by the Treaty can be justified only if they satisfy four conditions: they must apply in a non-discriminatory manner; they must be justified by overriding reasons relating to the general interest; they must be suitable for securing the attainment of the objective which they pursue (including with regard to their coherence); and they must not go beyond what is necessary in order to attain that objective and cannot be replaced by less restrictive means (C-424/97 *Haim*, paragraph 57; C-65/05 *Commission v Greece*, paragraph 49; C-134/05 *Commission v Italy*, paragraph 24).

2.5. Assessment under the EU Charter of Fundamental Rights

The Commission would first like to recall that pursuant to Article 2(1) TEU, the Union is founded on the values of, *inter alia*, equality, the rule of law and respect of human rights. According to Article 6(1) TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union (hereinafter the Charter) ⁽¹²⁾, which shall have the same legal value as the Treaties. Further, pursuant to Art. 6(3) TEU, fundamental rights, as guaranteed by the European Convention on Human Rights, constitute general principles of EU law.

The notified draft law falls within the scope of EU law as described above, and must therefore comply with the Charter. To the extent that it imposes an obligation to label a product with “Sensitive content!” in a clearly visible manner when it is representing or

¹²() Charter of Fundamental Rights of the European Union, Official Journal of the EU C 326, 26.10.2012, p. 391–407.

promoting a gender identity not corresponding to the sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality, it constitutes a restriction of the right to freedom of expression and to receive information and of the right to non-discrimination of the groups that the product portrayed, as enshrined in Articles 11 and 21 respectively of the Charter.

i. *On the restriction of the right to freedom of expression – Article 11 of the Charter of Fundamental Rights*

The right to freedom of expression interpreted, in line with Article 52(3) of the Charter, in accordance with the corresponding provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 10 ECHR), and the case-law of the European Court of Human Rights (ECtHR), enjoys a very wide scope and is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. That right constitutes one of the essential foundations of a democratic society, and ensures pluralism, tolerance and broadmindedness ⁽¹³⁾.

The obligation to label with “Sensitive content!” a product which is representing or promoting a gender identity not corresponding to the sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality, is unclear, very vague and could cover a broad range of contents. Moreover, it has a stigmatising effect as this label is commonly associated to alert about dangerous content, while in this case it would need to be applied to products merely because those are considered as representing or promoting a difference from self-identity corresponding to sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality. Also, identification of what is to be considered as ‘the dominant element’ of a product, as well as the concept of ‘promotion’ are very vague and unspecific concepts.

The contested obligation in the Decree constitutes a restriction of the freedom of expression of producers and distributors of the goods representing or promoting that content is so far as it may discourage their production and marketing should the producer or distributor fear that it will be qualified as representing or promoting a difference from self-identity corresponding to sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality.

The contested rule creates a strong disincentive for anybody to discuss, promote or depict relations and issues of persons who are not heterosexual and cisgender, while dissuading the persons concerned from publicly expressing their sexual orientation, sex change or self-identity divergent from birth, conveying their views and opinions about it and from cooperating with content providers depicting such situations. Such ‘chilling effect’ clearly interferes with the freedom of expression ⁽¹⁴⁾.

This measure could result in discouraging certain producers and distributors, who would tend to only produce/distribute products that would not represent a part of the society, this having a serious impact on public debate on important social issues, which is central to any democratic society ⁽¹⁵⁾.

¹³ () ECtHR judgment of 7 December 1976, *Handyside v. the United Kingdom*, app. no. 5493/72, ECLI:CE:ECHR:1976:1207JUD000549372, § 49.

¹⁴ () ECtHR, judgment of 20 June 2017, *Bayev a.o. v. Russia*, 67667/09 and others, ECLI:CE:ECHR:2017:0620JUD006766709, § 62.

ii. *On the restriction of the right to non-discrimination – Article 21 of the Charter of Fundamental Rights*

Article 21 of the Charter prohibits any discrimination based on any ground, including on the grounds of sex or sexual orientation. Under the CJEU's case-law, discrimination of persons due to gender re-assignment, falls under discrimination on the basis of sex, which is also prohibited under Article 23 of the Charter.

The notified draft is premised on the wholly unjustified and unsubstantiated claim that the reference to homosexuality or to non-cisgender life represents a threat to the physical, mental or moral development of minors. However, the Commission considers the reverse to be true. The restriction of content depicting the lives of non-heterosexuals or non-cisgender persons seeks to reduce the availability of information on persons and lives that form an integral part of society. Such restriction is liable to foster a sense of “non-belonging”, of stigmatisation and alienation of persons, including in particular, young persons and adolescents whose gender identity or sexual orientation may not conform to ‘traditional social standards’. In the Commission's view, the restrictive measures are thus susceptible to cause rather than avoid harm. The notified draft in reality contains measures which are discriminatory against persons of different sexual orientations and gender identities, including minors, thereby violating the Charter. Although Hungary formally invokes the protection of minors (which is of course as such a legitimate public interest), the justification put forward by Hungary cannot therefore be regarded as valid in the light of the Charter.

By imposing an obligation to insert a label pointing to the sensitiveness of a content when a product representing or promoting a gender identity not corresponding to the sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality, the Decree introduces a distinction based on whether the producers and distributors place on the market a good that contains certain views or behaviours considered as “traditional” and thus presumably generally accepted, by contrast with marketing goods that contains other views or behaviours – amongst which those portraying LGBT people – that are not presumed generally accepted and are, to the contrary, considered dangerous for children.

The contested rule restricts the ability of non-heterosexual and non-cisgender persons of being promoted (also in the sense of depicting the risks ensuing from the stigmatization of divergence from sex at birth, sex change or homosexuality, or the balanced discussion thereof, or the promotion of acceptance of diversity in those regards) or merely being represented where, by virtue of the contested rules, they cannot freely appear, as any demonstration of their sexual orientation or situation of sex change or identity deviating from the one at birth will need to be avoided or taken out, when they appear in products for children.

Where a Member State, when acting within the scope of EU law, treats the producers and distributors that produce and place on the market goods portraying LGBTIQ+ persons in a positive way less favourably than others (i.e. producers and distributors that produce and place on the market goods for which there would be no need to insert any disclaimer) on the basis of the fact that the good that it is placed on the market represent or promote a gender identity not corresponding to the sex at birth, gender reassignment or

¹⁵() European Commission for Democracy through Law (Venice Commission) Opinion on the issue of the prohibition of so-called “Propaganda of Homosexuality” in the light of recent legislation in some member states of the Council of Europe, 14-15 June 2013.

homosexuality, or the direct, natural or self-intended representation of sexuality, it is discriminatory on the grounds of sex and sexual orientation, independently of the sex ⁽¹⁶⁾ or sexual orientation of the producers or the distributors, and such distinction cannot be objectively justified, that imposition is contrary to Article 21 of the Charter.

iii. Justification

In line with Article 52(1) of the Charter, the above-described interferences will be acceptable only insofar as they are prescribed by law, respect the essence of the concerned rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest and the need to protect the rights and freedoms of the others.

In the written exchanges with the Commission, the Hungarian authorities relied on several justifications that in their view justify the contested decision. In accordance with the information provided by the Hungarian authorities, the measure is *‘aimed at strengthening parental competences when buying products for children online, in line with Hungary’s commitment to child protection’* and, ultimately, *‘to protect minors and promote informed consumer choices.’*

The Commission considers that the contested measure cannot be seen as pursuing a legitimate aim for the purpose of Article 52(1) of the Charter and it notes that the justifications of the decision with a view to the protection of consumers and children, does not seem to be supported by any assessment explaining why a product representing and promoting the said content would be detrimental to such categories of persons.

As regards consumer protection, Article 38 of the Charter requires the Union policies to ensure a high level of consumer protection. With this objective in mind, the Union has adopted legal provisions to protect the economic interests of consumers, including information obligations for traders. As described above, the DSA sets out obligations for providers of online marketplaces regarding the information to be displayed in order to allow consumers to make informed decisions. Article 6 of the Consumer Rights Directive 2011/83/EU lays down pre-contractual information requirements and Article 7 of the Unfair Commercial Practices Directive 2005/29/EC requires traders to provide consumers with material information that the average consumer needs, according to the context, to take an informed transactional decision. The Consumer Rights Directive 2011/83/EU is a full harmonisation Directive ⁽¹⁷⁾ and its Article 6 does not contain an information requirement concerning the “representation or promotion of a gender identity not corresponding to the sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality”. Article 6(8) of that Directive provides that those information requirements are in addition to information requirements contained in Directives 2006/123/EC and 2000/31/EC (Directive on Electronic Commerce) and do not prevent Member States from imposing additional information requirements in accordance with those Directives.

In the case at hand, neither the risks nor the degree of severity of the harms at stake for consumers have been sufficiently explained by the Hungarian authorities. In any event, the protection of consumers under Article 38 of the Charter must be balanced with other

¹⁶() Under the Court’s case-law, discrimination of persons due to gender re-assignment, falls under discrimination on the basis of sex, see case C-423/04, *Richards*, ECLI:EU:C:2006:256)

¹⁷ ()Article 4 of Directive 2011/83 states: “Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive”.

fundamental rights. National measure (allegedly) pursuing the general objective of ensuring a high level of consumer protection must not override more specific fundamental rights, in particular the right to non-discrimination in Article 21, which provides for a clear prohibition of any discrimination on the grounds of sexual orientation.

The other stated objective is the need to take account of the best interests of the child and to safeguard the right of parents to choose the education be given to their child ⁽¹⁸⁾.

The protection of those rights, as put forward by the Hungarian authorities cannot be considered as justifying that contested measure. The Hungarian authorities have not provided any justification as to why exposure of children to such content would be detrimental to their well-being or not in line with the best interests of the child.

It is to be noted that the ECtHR consistent case-law affirms that “*there is no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or ‘vulnerable adults’*” ⁽¹⁹⁾. To the contrary, and as recognised by the Venice Commission Opinion mentioned above “*it is only through fair and public debate that society may address such complex issues [as the one raised in the present case]. Such debate backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily*” ⁽²⁰⁾. Moreover, in that occasion, the Venice Commission noted that the UN Human Rights Committee, in the case of *Fedotova v Russia*, “*duly distinguished ‘actions aimed at involving minors in any particular sexual activity’ from ‘giving expression to [one’s] sexual identity’ and ‘seeking understanding for it’*”.

The Commission notes that Hungary has not demonstrated that the promotion (intended *inter alia* as the depiction of the risks ensuing from the stigmatization of divergence from sex at birth, sex change or homosexuality, or the balanced discussion thereof, or the promotion of acceptance of diversity in those regards) or the mere portrayal of deviation from the identity corresponding to one’s sex at birth sex, sex change or homosexuality would adversely affect children.

Moreover, since the contested provision entail measures stigmatising *inter alia* LGBTIQ+ people and persons with different sexual orientations, including minors, the contested rules cannot be justified under the public policy general interest of protection of minors and considering the children’s best interests, in the sense of Article 24 of the Charter.

The third stated objective, closely linked with that of the protection of children, relates to the right to education. However, as the measure is not related to products sold for education purposes, but applicable to any product intended for children, it does not appear to be focused on the protection of the right of education. Furthermore, as established in settled case-law “the provisions of the Convention and Protocol must be read as a whole”. (...) “The two sentences of Article 2 of Protocol No. 1 to the European Convention on Human Rights (right to education) must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 of the Convention which

¹⁸() See reply to Question 6 ‘*It follows from the above that Hungary has a legal obligation to actively assist and support parents in fulfilling their parental responsibilities, while at the same time they have an unrealistic right to do so according to their moral and philosophical values, in accordance with the maturity and age of the child.*’

¹⁹() ECtHR, judgement of 21 October 2021, *Alekseyev v. Russia*, app. no 4916/07 and others, ECLI:CE:ECHR:2010:1021JUD000491607, § 86.

²⁰ () ECtHR, judgement *Alekseyev v. Russia*, cited above, § 86.

proclaim the right of everyone, including parents and children, (...) to "freedom of thought, conscience and religion", and to "freedom ... to receive and impart information and ideas" ⁽²¹⁾.

Finally, the contested rules go beyond what is necessary. They are over-comprehensive as they prohibit any display of sexual orientations, regardless of the specific context where (any) sexual orientation is expressed or the explicit character of sexual content.

As already said, in the absence of any specific assessment, the Commission takes the view that it does not appear justifiable to assume, in a general way, that a product representing or promoting a gender identity not corresponding to the sex at birth, gender reassignment or homosexuality, or the direct, natural or self-intended representation of sexuality, would be detrimental to consumers and to children in a manner that requires the obligation to insert a disclaimer about its content. On the contrary, this measure unduly restricts the freedom of expression of the producers, distributors and discriminates against LGBT people.

Pursuant to Article 6(2) of Directive (EU) 2015/1535, the Commission or a Member State may issue a detailed opinion to the effect that the measure envisaged may create obstacles to the free movement of services or to the freedom of establishment of service operators within the internal market. In this connection, the Commission takes the view that the notified draft constitutes an unjustified restriction to the freedom to provide information society services. In particular, the notified draft restricts the freedom to provide information society services from another Member State contrary to Article 3 of the Directive on electronic commerce and the recent case law of the CJEU.

Consequently, the Commission hereby issues a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535.

The Commission reminds the Hungarian authorities that, in accordance with this Article, the issuing of a detailed opinion entails that the Member State which is the author of the draft technical regulation concerned is required to postpone its adoption for 4 months from the date of its notification. This deadline therefore ends on 2 October 2024.

Furthermore, the Commission draws the attention of the Hungarian authorities to the fact that, under this provision, the Member State to which a detailed opinion is addressed is required to inform the Commission of the action it intends to take on such an opinion.

The Commission furthermore invites the Hungarian authorities to communicate the definitive text to the Commission once it has been adopted, in accordance with Article 5(3) of Directive (EU) 2015/1535.

If the Hungarian authorities fail to comply with the obligations laid down in Directive (EU) 2015/1535 or if the text of the draft technical regulation under consideration is adopted without taking account of the objections raised or is otherwise contrary to EU law, the Commission is ready to initiate proceedings against Hungary in accordance with Article 258 of the TFEU.

The Commission services are open to close cooperation and discussions with the Hungarian authorities on possible solutions to the problems identified, in full compliance with EU law.

²¹) ECtHR judgment of 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, app. No 5095/71 and others, ECLI:CE:ECHR:1976:1207JUD000509571, § 52.

Yours faithfully,

For the Commission,

Thierry Breton
Member of the Commission