



EUROPEAN COMMISSION

Bruxelles, 16.12.2024
C(2024) 9107 final

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Subject: Notification 2024/531/ES

**Draft Organic Law for the Protection of Minors in Digital
Environments**

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

**Delivery of comments pursuant to Article 5(2) of Directive (EU)
2015/1535 of 9 September 2015**

Sir,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the Spanish authorities notified to the Commission on 29 September 2024 the draft “*Anteproyecto de Ley Orgánica para la protección de las personas menores de edad en los entornos digitales*” (hereinafter referred to as “the notified draft”).

According to the notification message, the notified draft intends to establish measures with the aim of guaranteeing the protection of minors in digital environments. The notification message further explains that the ultimate aim of the notified draft is to mitigate the risks that the use of digital media potentially entails for the health, safety and privacy of minors.

In relation to the notified draft, the Commission addressed to the Spanish authorities on 7 and 21 October 2024 requests for supplementary information to obtain clarifications on the measures of the notified draft. The answers provided by the Spanish authorities on 18 and 25 October 2024 are taken into account in the following assessment.

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.

While the Commission shares the objective of the notified draft to protect minors online, the examination of the relevant provisions of that draft has led it to issue the following detailed opinion and comments.

1. Detailed opinion

1.1. Assessment in the light of Directive 2000/31/EC

a) Applicability of Directive 2000/31/EC

Certain provisions of the notified draft, and Article 5 thereof in particular, fall within the scope of application of Directive 2000/31/EC (Directive on Electronic Commerce) ⁽²⁾. Article 5 of the notified draft lays down a prohibition of access or activation by minors of certain random reward mechanisms offered by service providers. Article 5(2) clarifies that the offer of those random reward mechanisms can only be made where the provider has put systems of age verification of users in place that prevent access to or activation of these mechanisms by minors.

Firstly, concerning the personal scope of application of the notified draft: the obligation set out in Article 5 of that draft will apply to those service providers that make available the reward mechanisms to consumers in Spain. As explained by the Spanish authorities in their reply to the requests for supplementary information, providers subject to the obligation set out in Article 5 of the notified draft may also 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 Directive 2000/31/EC, insofar as they fulfil the conditions set out therein ⁽³⁾. The personal scope of application of Article 5 of the notified draft thus overlaps to a certain extent with that of Directive 2000/31/EC.

Secondly, concerning the material scope of application: Article 5 of the notified draft lays down requirements on providers of information society services to take certain measures aimed at preventing access by minors to content deemed harmful to them.

According to that provision, providers of information society services would only be permitted to offer random reward mechanisms to consumers if they have set up and operate an age verification system to prevent minors from accessing to or activating those mechanisms. That provision further specifies that the age verification system that providers put in place must guarantee the security, privacy, and protection of data, in particular in terms of data minimisation and purpose limitation, without that provision mandating a specific technological option for that system.

According to Article 2(h) and (i) of Directive 2000/31/EC, the coordinated field concerns requirements with which the service provider has to comply with in respect of *inter alia* the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider. The obligations laid down in Article 5 of the notified draft, insofar as they require information society service providers offering certain random rewards mechanisms to put in place an age verification system, therefore

²) 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.

³) In particular, “any service normally provided for remuneration, remotely by electronic means and at the individual request of a recipient of services”.

fall within the coordinated field of Directive 2000/31/EC and have therefore been analysed in the light of that Directive.

b) Article 3(1), (2) and (4) of Directive 2000/31/EC

The Commission notes that the provisions of the notified draft apply, among others, to providers of information society services offering their services to customers in Spain, irrespective of the Member State of establishment of those providers. This aspect has been confirmed by the Spanish authorities in their reply to the requests for supplementary information sent by the Commission services. According to the Spanish authorities, an a priori identification of the specific providers established in Member States other than Spain that will be subject to Article 5 of the notified draft is impossible, since that provision will apply to any such providers where they make available a random reward mechanism to customers in Spain.

In their replies to the requests for supplementary information sent by the Commission services, the Spanish authorities state their intention to enforce the notified draft against service providers established outside Spain where the offer of those providers requires the establishment of a system of age verification, in accordance with the terms laid down in Article 3(4)(b) of the Directive on electronic commerce. The Commission notes that this intention is not reflected in the text of the notified draft, as notified to the Commission. On the contrary, the notified draft will introduce measures of general and abstract application to service providers, irrespective of their place of establishment ⁽⁴⁾, rather than a targeted measure against a given service provider which Member States may notify following the procedures mandated by Article 3(4) of Directive 2000/31/EC.

In this regard, the Commission recalls that Article 3(1) and (2) of Directive 2000/31/EC establishes the “home State control principle”, according to which information society services may only be regulated at the source of their activity. Providers of such services are therefore, as a general rule, subject to the law of the Member State in which they are established.

Article 3(4) of Directive 2000/31/EC lays down the circumstances and procedures under which a Member State of destination, i.e. the Member State in which information society services are provided by a provider established in another Member State, may derogate from the home State control principle, where necessary, for the reasons exhaustively listed in Article 3(4)(a) of the Directive and in compliance with the substantive and procedural requirements set out in its Article 3(4)(a) and (b). The Commission draws the attention of the Spanish authorities to the recent case law of the Court of Justice in this respect, which recalls the limits of relying on Article 3(4) of Directive 2000/31/EC for this purpose. According to that case law, measures of general and abstract application, that are not limited to a given information society service, such as those imposed by Article 5 of the notified draft, cannot benefit from the exemption provided by Article 3(4) of Directive 2000/31/EC.⁽⁵⁾

⁴ () Cf. Case C-376/22, ECLI:EU:C:2023:835, of 9 November 2023. In particular, paragraphs 59 and 60.

⁵() Judgment of 9 November 2023 in Case C-376/22, ECLI:EU:C:2023:835, 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.”*

The notified draft, in the form notified to the Commission, constitutes such a measure of general and abstract application that will apply indistinctively to domestic and foreign providers of information society services in Spain. In any event, based on the information available to the Commission, it is not possible to verify whether and how the Spanish authorities intend to ensure that both the substantive and procedural requirements set out in Article 3(4) of Directive 2000/31/EC are or could be fulfilled. In this regard, the Commission recalls that that provision not only requires a restrictive measure to be limited to a given information society service, pursue one of the objectives laid down in that provision and do so in a proportionate manner (the substantive requirements), but that it also requires the Member State of destination to request the Member State of establishment of the provider in relation to whom the measure will be adopted to take the necessary measures and, where that Member State does not take any measure or the measure it takes is inadequate, inform that Member State, as well as the Commission, of the measure it intends to adopt (the procedural requirements).

The Commission also recalls that, being a subcategory of information society services, video-sharing platform services also fall within the scope of Directive 2010/13/EU (the AVMSD). As stated in paragraph 5 of Article 28a, for the purposes of the AVMSD, Article 3 and Articles 12 to 15 of Directive 2000/31/EC shall apply to video-sharing platform providers deemed to be established in a Member State in accordance with paragraph 2 of the same Article.

For the reasons set out above, the Commission hereby issues a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535.

The Commission reminds the Spanish 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 23 January 2025.

Furthermore, the Commission draws the attention of the Spanish 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.

If the Spanish 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 Union law, the Commission is ready to initiate proceedings against Spain in accordance with Article 258 of the TFEU.

3. Comments

3.1 Digital Services Act

Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter “the DSA”) ⁽⁶⁾ aims to contribute to the proper functioning of the internal market for intermediary services by

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.

⁽⁶⁾ 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.

establishing fully harmonised rules for a safe, predictable and reliable online environment. In particular, it establishes a fully harmonised regulatory framework concerning the accountability and responsibilities of intermediary service providers with regard to their obligations to combat illegal and harmful content on their services.

The Commission recalls that the protection of minors, a particularly vulnerable category of recipients of online intermediary services, is an essential aspect of the DSA. The DSA contains a provision devoted to the protection of minors online (Article 28) applicable to all providers of online platforms and significant additional obligations applicable specifically to providers of very large online platforms and very large online search engines with regard to the protection of minors (Articles 34 and 35). Such providers must (i) identify, analyse and assess and (ii) mitigate any systemic risk to the protection of minors and the rights of children. In particular, the DSA refers to age verification systems as an example of an effective and targeted enforcement measure to protect children's rights (Article 35(1)(j)). Article 14 DSA also imposes requirements on providers of intermediary services concerning the application of their terms of service, which need to be carried out with due regard to the fundamental rights of the recipients of the service (hence including the rights of the child as enshrined in Article 24 of the EU Charter of Fundamental Rights).

The Commission further recalls that the DSA is a horizontal legislative instrument that fully harmonises the rules for the provision of intermediary services in the Union ⁽⁷⁾ Being a regulation, the DSA does not allow for national implementing measures. ⁽⁸⁾ This is because, pursuant to Article 288 TFEU, regulations are directly applicable throughout the Union and thus in all of the Member States. Unlike in the case of directives, national implementing measures are not permitted in relation to regulations, unless the regulation itself leaves it to the Member States to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation ⁽⁹⁾.

It is thus essential for the Member States to avoid enacting national legislation that may potentially overlap with the provisions of the DSA. Any such overlap would lead to fragmentation of the internal market, which is precisely what the harmonised rules of the DSA are meant to avoid, and lead to substantial legal uncertainty for both providers of intermediary services and the recipients of such services.

The Commission observes that, in as much as the notified draft pursues the same objective as the DSA concerning the protection of minors from exposure to online content harmful to their development, it falls within the field already harmonised by the DSA. The Commission further observes that its services have recently launched a cooperation exercise with the Member States and their Digital Services Coordinators in the concrete area of age assurance systems for the implementation of the rules contained in the DSA as regards the protection of minors online. This exercise builds upon existing measures at national level and ongoing initiatives, such as the EU Digital Identity Wallet included in the recently adopted regulation amending Regulation (EU) No 910/2014 as

⁷) DSA, recital 9.

⁸) Case 40/69, Bollmann, EU:C:1970:12, para 4; Case 74/69, Krohn, EU:C:1970:58, paras 4 and 6; and joined Cases C-539/10 P & C-550/10 P, Stichting Al-Aqsa, EU:C:2012:711, para 87 (on the risk of divergent definitions under EU and national law).

⁹) Case C-606/10, ANAFE, EU:C:2012:348, para 72.

regards establishing a framework for a European Digital Identity ⁽¹⁰⁾, to ensure proper age verification and age assurance, taking into account the state of the art and the current market practices. The best practices and solutions identified as part of this exercise are expected to form the basis of an EU-wide solution to ensure age verification and age assurance, which providers of online platforms can rely upon to ensure that they comply with their obligations under the DSA to protect minors accessing their services.

In this regard, the Spanish authorities, in their reply to the request for supplementary information sent by the Commission services, acknowledge the full harmonisation effect of the DSA with regard to the due diligence obligations of intermediary service providers and that the Member States cannot adopt national measures that overlap or contradict the fully harmonised framework laid down by the DSA. The Spanish authorities further state that, although the objectives of the notified draft partially overlap with those of the DSA in relation to the protection of minors online, that draft respects the full harmonisation effect of the DSA. The Commission also takes note of the commitment of the Spanish authorities to, where appropriate, make adjustments to the notified draft to clarify its interplay with the DSA.

In this regard, the Spanish authorities provided further clarifications in their replies to the requests for supplementary information sent by the Commission services as regards the scope of application of Article 5 of the notified draft. According to them, the requirement to set up and operate an age verification system set out in Article 5(2) of the notified draft will apply only to the developer or marketer of the defined random rewards mechanism, but not to providers of intermediary services within the meaning of Article 3 of the DSA. ⁽¹¹⁾

While the Commission takes note of these explanations, it encourages the Spanish authorities to clarify the scope of application of Article 5 in the final text of the notified draft and its relationship to the DSA.

3.2 Treaty on the Functioning of the European Union

Article 4 of the notified draft requires that digital terminal equipment with the capacity to be connected to the internet incorporates a parental control operating system, which must be activated by default. It should be noted that such digital terminal equipment is a good within the meaning of the Treaty on the Functioning of the European Union (TFEU). The Spanish authorities have not provided any information on alternative solutions considered or whether solutions for child protection are available outside operating systems, for instance via on-device controls.

The Commission takes the opportunity to remind the Spanish authorities that non-discriminatory obstacles to the fundamental principle of the free movement of goods must be justified under one of the exemptions referred to in Article 36 TFEU or on the basis of mandatory requirements developed in the case law of the Court of Justice. For a national measure to be justified under Article 36 TFEU or on the basis of one of the mandatory requirements established in the case law of the Court of Justice, it must comply with the principle of proportionality (Judgment in Case C-390/99 *Canal Satélite Digital*). The measure in question must be necessary to achieve the desired aim and the aim must not be achievable by less extensive bans or restrictions or measures with a

¹⁰() Commission proposal adopted by the European Parliament on 29 February 2024 and by the Council on 26 March 2024

¹¹() This distinction was confirmed by the Spanish authorities in both their replies submitted on 18 and 15 October 2024.

lesser impact on intra-Union trade. In other words, the means chosen by Member States must be confined to what is actually necessary to achieve the aim, and they must be proportional to the aim thus pursued (Judgment in Case C-319/05 Commission v Germany).

The Spanish authorities are invited to take these comments into account.

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

Yours faithfully,

For the Commission,

Stéphane Séjourné
Executive Vice-President