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His Excellency
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Minister for Europe and Foreign Affairs
37, Quai d'Orsay
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France

Subject: Notification 2023/632/FR

Draft law to secure and regulate the digital space adopted at first reading by the National Assembly

Issue of the detailed opinion provided for in Article 6(2) of Directive (EU) 2015/1535 of 9 September 2015

Communication of comments in accordance with Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Dear Minister,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the French authorities notified the Commission on 8 November 2023 of Articles 2b, 3a A, 5a B, 5d, 15, 15a, 16 and 36 of the “Draft law to secure and regulate the digital space adopted on first reading by the National Assembly” (hereinafter “the notified draft”). This notification follows on from two previous notifications concerning other draft legislative provisions of the same draft law: notification 2023/352/FR “*Law to secure and regulate the digital space*” (hereinafter “notification 2023/352/EN”) and notification 2023/461/FR “*Legislative provisions to secure and regulate the digital space*” (hereinafter “notification 2023/461/FR”²). In relation to notifications 2023/352/FR and 2023/461/FR, the French authorities have formally notified the Commission of the new

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 of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

²) In response to notification 2023/461/FR, on 25 October 2023 the Commission issued a detailed opinion on some of the provisions of the draft law covered by this notification. The French authorities had indicated in the notification message that they undertook to re-examine the issues raised by the Commission in this detailed opinion.

Articles 2b, 3a A, 5a B, 5d, 15, 15a, 16 and 36 of the draft law following the amendments introduced at first reading by the National Assembly. ⁽³⁾ ⁽⁴⁾

The review of the notified draft led the Commission to issue the detailed opinion and the following comments.

1. Introduction

The notified draft contains provisions of the *adopted draft law to secure and regulate the digital space adopted* that were added or amended at first reading by the National Assembly, and after notification 2023/461/FR. These new or amended provisions pursue the same objectives as the draft law notified under notification 2023/461/FR concerning the protection of minors and other users when using online services.

As mentioned in the detailed opinion on notification 2023/461/FR, the Commission shares these objectives, which are clearly aligned with those of the European legal framework for online services, in particular Regulation (EU) 2022/2065 (Regulation on a single market for digital services, hereinafter the “DSA”)⁵⁾ and Directive 2000/31/EC (Directive on electronic commerce)⁶⁾.

In this regard, the Commission recalls that the DSA provides an effective EU-wide regulatory solution to the problems that the notified provisions aim to solve. The DSA provides for a common set of European rules which, while strengthening the European single market, impose a wide range of obligations on hosting service providers and online platform providers in order to combat illegal and harmful content online, guarantee users' fundamental rights and a high level of protection for the privacy, safety and security of minors. The DSA also lays down obligations for large service providers with regard to access to their data by the competent supervisory authorities, so that their compliance with the DSA can be monitored and checked. As a EU regulation, the DSA is directly applicable in all Member States, without the need for implementing measures.

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 subjective scope of the notified provisions: they cover the following categories of suppliers:

³⁾ The following assessment takes into account the clarifications provided by the French authorities in the context of this notification, including those concerning notifications 2023/352/FR and 2023/461/FR, insofar as these clarifications are still relevant for the purposes of this notification.

⁴⁾ This detailed opinion and comments are limited to the provisions of the draft law that have been notified.

⁵⁾ 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.

⁶⁾ 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.

- Providers of online communication services ⁽⁷⁾ and social media service providers ⁽⁸⁾, in accordance with Articles 6 and 1 of Law 2004-575 on confidence in the digital economy, which transposes the Directive on electronic commerce into French law. ⁽⁹⁾
- Very large online platforms and very large online search engines. ⁽¹⁰⁾ According to Article 3 of the DSA, they constitute intermediary services and information society services.

Therefore, several of the provisions of the notified draft apply to 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.⁽¹¹⁾ This assessment was also confirmed by the French authorities in their replies to the questions put by the Commission services.

Secondly, concerning the scope of the notified provisions: the rules set out in the notified draft concern the exercise of the activity of information society service providers, in particular the moderation of content and the obligations concerning access to data and systems. These obligations 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.

b) Article 3(1), (2) and (4) of the Directive on electronic commerce

The Commission notes that the provisions of the notified draft (in particular Articles 2b, 3a(A)(1)(b), 5a(B), 5d and 16) apply to providers of information society services offering their services on French territory, irrespective of the Member State of the establishment ⁽¹²⁾. Therefore, the considerations set out in the detailed opinion issued by the Commission on notification 2023/461/EN as regards the lack of conformity between the notified provisions and the Directive on electronic commerce also apply to certain provisions of this notification.

In particular, 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 certain measures. The Commission draws the attention of the French

⁷) Article 3a A of the notified draft.

⁸) Article 5a B of the notified draft.

⁹) Pursuant to this article, “*online public communication services*” are defined by echoing the definition of information society services set out in Directive (EU) 2015/1535.

¹⁰) Article 16 of the notified draft

¹¹) In particular, “*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*”.

¹²) According to the explanations provided by the French authorities in their replies to the Commission's request for further information, the obligations set out in the notified draft would apply only to information society service providers established in Member States other than France by way of derogation from Article 3(1) and (2) of the Directive on electronic commerce and after compliance with the procedure laid down in paragraph 4 thereof. The Commission takes note of these explanations, which are not, however, included in the notified draft, which would apply indiscriminately to information society service providers available in France.

authorities to the recent case law of the CJEU, which recalls the limits of the scope of Article 3(4) of the Directive as regards, in particular, measures of general and abstract application such as the notified draft. ⁽¹³⁾

The Commission invites the French authorities to take into account the above considerations in order to ensure the compatibility of the notified draft with Article 3 of the Directive on electronic commerce.

2.2. Assessment in light of the DSA

a) Applicability of the DSA

The notified provisions of the notified draft fall within the scope of the DSA.

In particular, several of the notified provisions impose obligations on providers of online intermediary services:

- Article 2b, relating to a ban on influencers promoting pornographic content on platforms that do not set up age verification mechanisms and do not effectively implement them: although this article does not impose direct obligations on online platforms, monitoring and enforcement of this article by the French authorities should result in requirements being imposed on **online platform providers** regarding the implementation of age verification systems and the way in which they implement their terms and conditions. As set out in the detailed opinion on notification 2023/461/EN, the DSA includes obligations on online platform providers specifically to put in place measures for the protection of minors on their services, including age verification systems, as part of the implementation of Article 28 of the Digital Services Legislation and, for providers of very large online platforms, in the implementation of Articles 28, 34 and 35 of the Digital Services Legislation, the latter referring to such systems as an appropriate mitigating measure. In Article 14, the DSA also imposes requirements on intermediary service providers relating to the application of their terms and conditions, which must be carried out in compliance with the fundamental rights of the recipients of the service (including the fundamental rights relating to the rights of the child enshrined in Article 24 of the Charter of Fundamental Rights of the European Union).
- Article 3a A, first paragraph, point (b), imposing obligations on **publishers of online platforms** to set up and implement a notification mechanism for content deemed unlawful, while broadening the grounds for determining whether content is unlawful: this article overlaps with Article 16 of the DSA.
- Article 5a B, imposing an obligation on **publishers of online platforms** providing social networking services to set up a mediation mechanism to enable users to resolve disputes between themselves concerning content disseminated on these platforms: Articles 20 and 21 of the DSA fully harmonise the obligations of

¹³ () Case C-376/22, ECLI:EU:C:2023:835, of 9 November 2023. 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.”

online platform providers concerning the mechanisms for resolving disputes relating to this content and its moderation.

- Article 5d, imposing obligations on **providers of online social networks** regarding the information to be provided to users as part of their content moderation decisions, including that resulting from notifications submitted by trusted alerts: this article comes under the harmonised provisions of Articles 17 and 22 of the DSA.

Furthermore, in their responses to the Commission's request for further information, the French authorities indicate that these provisions of the notified draft would apply to providers of online platforms and hosting services, as defined in Article 3 of the DSA.

b) Harmonisation effect of the DSA

In this regard, the Commission would like to remind the French authorities of the conclusions of the detailed opinion issued in response to notification 2023/461/FR.

As mentioned in this detailed opinion, the DSA aims to contribute to the proper functioning of the internal market for intermediary services by establishing harmonised rules for a safe, predictable and reliable online environment. In particular, it establishes a regulatory framework for the liability and due diligence of providers of intermediary services with regard to their obligations to combat illegal and harmful content on their services. This is underlined in recital 9 of the DSA.

In this context, the Commission recalls that, being a regulation, as a general rule, the DSA does not require national implementing measures ⁽¹⁴⁾. Consequently, insofar as the notified provisions reproduce or correspond to the same obligations covered by the DSA, such as those referred to in section 2.2.a) of this detailed opinion, they do not comply with the DSA. The Commission takes note of the commitment given by the French authorities, as indicated in their reply to the request for additional information, to re-examine the issues raised by the Commission and invites the French authorities to ensure full alignment of the final law with the principle of direct applicability of the DSA in all Member States ⁽¹⁵⁾.

c) Monitoring and enforcement system

As mentioned in the detailed opinion of 25 October, in order to ensure the full effectiveness of the DSA in the pursuit of our shared objectives, the Commission recalls that it is essential to preserve the monitoring and enforcement system of the DSA.

¹⁴) Cfr. *Case 40/69, Bollmann*, EU:C:1970:12, para 4; *Case 74/69, Krohn* EU:C:1970:58, paras 4 and 6; and combined cases C-539/10 P & C-550/10 P, *Stichting Al-Aqsa*, EU:C:2012:711, para 87. The Commission notes that the measures transposing Articles 12 to 15 of the Directive on electronic commerce into French law (which have been repealed and replaced by Articles 4 to 8 of the DSA), as well as any reference to those transposition measures into national law, should also be formally repealed.

¹⁵) The Commission welcomes the fact that, as confirmed in the notification message, France is fully committed to ensuring the effective implementation and success of the DSA. However, given the imminent full implementation of the Digital Services Legislation from 17 February 2024 - the Digital Services Legislation having already been applicable since the end of August 2023 to the very large online platforms and very large online search engines designated in April 2023 - the argument relating to the full implementation of the DSA on French territory through the adoption of the notified draft is irrelevant. Rather, the Commission believes that all efforts at the national level should be aimed at ensuring the conditions for effective implementation and enforcement without delay, including through the timely implementation of Article 49.

In this respect, the Commission notes that, if the notified draft were adopted, it would entrust the monitoring and enforcement of the notified provisions to the French authorities only, including with regard to service providers established or located outside the jurisdiction of France ⁽¹⁶⁾ and providers of very large online platforms or very large search engines, thereby circumventing the enforcement rules set out in Chapter IV of the DSA.

In accordance with Chapter IV of the DSA, the monitoring and enforcement of the DSA is based on close cooperation, on the one hand, between the National Digital Services Coordinators (and other competent authorities) on the basis of 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 DSA gives the Commission exclusive powers to monitor and enforce the enhanced due diligence obligations imposed on providers of very large online platforms or very large online search engines. ⁽¹⁷⁾

The Commission calls on the French authorities to ensure that the final text is aligned with the supervision and enforcement architecture of the DSA.

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 French authorities that, in accordance with this Article, the issuing of a detailed opinion requires the Member State which is the author of the draft technical regulation concerned to postpone its adoption for 4 months from the date of its notification. This deadline therefore ends on 11 March 2024.

Furthermore, the Commission draws the attention of the French 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 with regard to such an opinion. In addition, the Commission invites the French authorities to communicate to it, as soon as it is adopted, the final text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

If the French 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 reserves the right to initiate proceedings against France in accordance with Article 258 of the TFEU.

3. Comments

3.1 Assessment in light of the DSA

¹⁶() In this regard, see section 2.1(b) of this letter.

¹⁷() The Commission notes that, in its report on the draft law, the Council of State noted that the Commission was the only body competent to monitor and enforce the DSA's obligations under Section 5 of Chapter III with regard to the designation of very large online platforms and very large search engines (point 64).

Firstly, the Commission notes that Article 3a A of the notified draft empowers the competent French authorities to issue orders to intermediary service providers, including to prevent access to or remove certain content deemed illegal under national law. This provision gives more details on the conditions and procedures to be followed by the competent national authorities when issuing withdrawal orders to hosting service providers concerning adult pornographic content distributed without consent and deemed illegal under national law. The provision empowers the competent authority to impose fines if the hosting service provider fails to comply with the withdrawal order within 24 hours.

In this respect, the Commission would like to remind the French authorities of the procedures and conditions set out in Article 9 of the DSA to ensure that these orders can produce all the effects expected in the architecture of the DSA. Article 9 of the DSA states that such orders may be issued on a cross-border basis and lays down certain specific minimum conditions that administrative or judicial orders issued by a Member State must meet in order for their transmission to give rise to an obligation on intermediary service providers to inform the competent authorities of the action taken in response to such orders.

Secondly, in the event that Article 2a of the notified draft implies, for its implementation, obligations for publishers of online platforms as regards the possible identification of pornographic content, the Commission would also remind the French authorities of the importance of ensuring compliance with Article 8 of the DSA, which prohibits the imposition of general monitoring obligations on intermediary service providers ⁽¹⁸⁾.

Finally, the Commission takes note of the task entrusted to certain national public authorities in Article 16(2)(a) of the notified draft as regards research contributing to the detection, identification and understanding of the systemic risks referred to in Article 34 of the DSA. In this context, the Commission would like to point out that these skills must comply with the skills system defined in Chapter IV of the DSA. In addition, the Commission calls on the French authorities to ensure that the final version of Article 16(2)(b) and Article 2a are properly aligned with Article 40 of the DSA, which fully harmonises the obligations incumbent on providers of very large online platforms and very large online search engines to provide access to data, the conditions of such access, the restrictions on the use of such data and the procedures for granting the status of approved researcher.

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

Please accept, Minister, the assurance of my highest consideration.

¹⁸ () Case C-18/18, *Glawischnig-Piesczek vs Facebook*, ECLI: EU:C:2019:821.

For the Commission,

Thierry Breton
Member of the Commission

CERTIFIED COMPLIANT AMPLIFICATION
For the Secretary-General

Martine DEPREZ
Director