



EUROPEAN COMMISSION

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Purpose: Notification 2024/93/FR

Draft resolution on the appropriate visibility conditions for services of general interest and the arrangements for collecting the information referred to in Article 20-7 of Law No 86-1067 of 30 September 1986 on freedom of communication

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

Excellency,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the French authorities notified to the Commission on 21 February 2024 the draft “*Draft resolution on the appropriate visibility conditions for services of general interest and the arrangements for collecting the information referred to in Article 20-7 of Law No 86-1067 of 30 September 1986 on freedom of communication*” (hereinafter referred to as “the notified draft”).

According to the notification message, the notified draft intends to implement Article 20-7 of Law No 86-1067 on freedom of communication. Article 20-7 of Law 86-1067 imposes on those services which determine the arrangements for the presentation of audiovisual services on user interfaces the obligation to ensure, in the French territory, the appropriate visibility of all or part of the services of general interest, and the identification of the publisher of these services, in accordance with the conditions

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.

specified by ARCOM. Examples of services, subject to these obligations, are software application stores (“app stores”), TV sets (and their remote controls and their operating systems), virtual assistants, multimedia services (such as video-on-demand (“VOD”) or music on demand), multimedia “passerelles”, universal remote controls, gaming consoles. Pursuant to Article 20-7, ARCOM is empowered to supervise and enforce compliance of operators with those obligations of prominence, including by imposing fines in case of non-compliance.

ARCOM is further empowered to adopt a resolution setting out the concrete appropriate visibility conditions for user interfaces subject to the obligations contained in the aforesaid article. The notified draft specifies, in Articles 1 to 3, the conditions under which the appropriate visibility of services of general interest is ensured, in particular within the home pages of user interfaces, their search results and their recommendations. It also specifies the conditions pursuant to which user interface operators shall report to ARCOM the measures implemented.

In the context of the notified draft, the Commission addressed to the French authorities a request for supplementary information on 6 March 2024 to obtain clarifications on the measures of the notified draft. The answers provided by the French authorities on 15 March 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

The Commission takes note of the notification message, according to which the notified drafts pursue the objective of promoting media pluralism. ⁽²⁾ .

The Commission shares this objective, which is a fundamental value of the European Union, as enshrined in Art 11(2) of the Charter of Fundamental Rights of the European Union. Safeguarding media freedom and pluralism while promoting the digital single market is within the objectives of the Directive on electronic commerce and Regulation (EU) 2022/2065 (hereinafter “the DSA”) ⁽³⁾.

As such, the Commission recalls that Article 1(6) of the Directive on electronic commerce provides that Member States may adopt measures to ensure the defence of pluralism, in as much as those measures respect EU law, including the rules laid down in the e-Commerce Directive itself. ⁽⁴⁾

² ()The Commission also notes the notification message according to which the notified draft aims at implementing Article 20-7 of Law No 86-1067. The Commission notes that this provision was notified pursuant to Directive (EU) 2015/1535 under the reference 2022/194/FR. In its reaction to that notification, the Commission considered that the notified measure may amount to an undue restriction to the freedom to provide information society services within the internal market (Article 3 of 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.) and raised questions over its possible incompatibility with Article 15 of that Directive. The Commission reminds the French authorities of those considerations that remain pertinent, including for the purposes of the present notified draft which aims to implement Article 20-7 of Law No 86-1067.

³ ()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.

2. Detailed Opinion

2.1. Evaluation in the light of the Directive on electronic commerce

a) Applicability of the Directive on electronic commerce

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

Firstly, concerning the personal scope of application of the notified provisions, the notified draft shares the scope of the underlying basic provision Article 20-7 of Law No 86-1067 ⁽⁵⁾, which it intends to implement.

The operators of user interfaces subject to the obligations of Article 20-7, and the notified draft, are those that meet a certain threshold of connections from the French territories. The French authorities have also indicated the list of operators that were subject to the said obligations in 2023. ⁽⁶⁾ According to such list, these information society services under the scope of the notified draft include app stores, virtual assistants, video-on-demand and music-on-demand services and operating systems on connected TVs.

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.⁽⁷⁾ This assessment was also confirmed by the French authorities in their replies to the questions put by the Commission.

Secondly, concerning the material scope of the notified provisions: the rules set out in the notified draft concern in particular the requirements on providers of information society services to organize their search functionalities and their user interfaces and recommender system in a certain manner, as well as to report to ARCOM on the measures taken to comply with Article 20-7 of Law No 86-1067 and the notified draft.

⁴ ()As also described in its reaction to notification 2022/194/FR, the Commission recalls that Article 1(6) does not derogate from the application of the rules of the e-Commerce Directive (contrary to Article 1(5)) but rather serves to underline the importance that the EU attaches to the defence of pluralism, as an element that Member States may wish to take into account when regulating the provision of information society services (see recital 63).

⁵ ()The operators referred to in Article 20-7(II) are those ‘*which determine the arrangements for the presentation of the services on the user interfaces*’ which are defined by I. of the same Article as ‘*any scheme which offers the user a choice among several audiovisual communication services or from among programmes resulting from such services, which is:*

1. *Installed on a television set or on equipment intended to be connected to the television set;*
2. *Installed on a connected speaker;*
3. *Made available by a service distributor;*
4. *Made available in an app store’*

⁶ ()[Liste-interfaces-assujetties-aux-obligations-de-article-20-7-du-20-mars-2024.pdf \(arcom.fr\)](#): TV sets (and their remote controls), and their operative system (Samsung, LG, TCL, Sony, HiSense, Philips), connected speakers (Google assistant, Amazon’s Alexa, Apple’s Siri), multimedia “passerelles” (Chromecast, Amazon Fire TV, Xiaomi, Apple TV), universal remote controls; game sets (Nintendo Switch, Sony’s PS5, Microsoft’s Xbox); services “distributors” (Amazon Prime, Molotov, Canal+, Orange, Free, Bouygues Telecom, SFR, Deezer, Apple Music), and app stores (Google Play, Samsung Galaxy Apps, Apple store).

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”.

In particular, the notified draft imposes on those providers of information society services obligations regarding the:

- Organization and presentation of content in their user interfaces (Articles 1 and 2 of the notified draft);
- Design of their search functionalities and the results from those searches and their recommender systems (Article 3 of the notified draft);
- Reporting on the implemented measures to the French competent authority (Article 4 of the notified draft).

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, and the underlying Article 20-7, apply to information society services offering their services on French territory and meeting a set threshold of connections from the said territory, irrespective of their Member State of establishment. This aspect has been confirmed by the French authorities in their reply to the request for further information. ⁽⁸⁾

Therefore, the considerations set out in the reaction issued by the Commission on notification 2022/194/FR as regards the lack of conformity between the notified provisions and the Directive on electronic commerce also apply to this notification.

In this sense, 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 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. ⁽⁹⁾ The Commission invites the French authorities

⁸ ()The French authorities have also indicated the list of operators subject to the said provisions in 2023, which includes operators established in other Member States, and have indicated that the list of operators of 2024 is expected to include about 15 operators, some of which are likely to be established in other Member States.

⁹ ()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.”*

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 Digital Services Act

a) Applicability of the Digital Services Act

The notified draft falls within the scope of the DSA. In particular, it imposes obligations on operators which qualify as providers of online intermediary services pursuant to Article 3 of the DSA. This aspect has been confirmed by the French authorities in their replies to the questions sent by the Commission.

In particular, the notified draft would apply to providers of app store services meeting a certain number of connections from the French territory. According to the information received by the French authorities, the Commission notes that two of the three providers of app stores targeted by the obligations in 2023 have also been formally designated by the Commission as very large online platforms under the DSA.

The notified draft, and the underlying Article 20-7 of Law No 86-1067, imposes on those operators obligations regarding the presentation of third party content on the user interface and search results of their services, as well as requirements regarding the parameters to be used in their recommender systems. According to the notification message, these obligations are aimed at promoting media freedom and pluralism online.

The DSA sets up the fully harmonized regulatory framework applicable to providers of intermediary services, including online platforms, in the Union as regards their obligations concerning content intermediated in their services. The Commission notes that safeguarding fundamental rights, including media freedom and pluralism, is at the core of the design of the DSA, which includes specific safeguards to protect media pluralism online. As such, the DSA addresses some of the issues also covered by the notified draft.

In particular, Article 27 of the DSA harmonizes the requirements of providers of online platform services, within the meaning of the DSA, regarding the parameters used in their recommender systems, including an obligation to provide a functionality to allow users to select and modify at any time their preferred option for the order of information presented to them. It is unclear how the notified draft would be applied in a way that would be consistent with Article 27 of the DSA.

Further, Articles 34 and 35 of the DSA require providers of very large online platforms to assess the risks that their services may create for media freedom and pluralism and to take targeted and effective measures to mitigate them. Those measures may include, in particular, adapting their online interfaces and their algorithmic and recommender systems.

b) Harmonisation effect of the DSA

In this regard, the Commission would like to remind the French authorities that the DSA aims to contribute to the proper functioning of the internal market for intermediary services, while safeguarding fundamental rights. 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.

Consequently, insofar as the obligations in the notified draft pursue the same aim as those covered by the DSA and would apply to the same service providers, they are not in conformity with the DSA. The Commission draws the attention of the French authorities to the obligations set out in Article 3 of the notified draft, which fall within the scope of the DSA.

c) Monitoring 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 recalls that, pursuant to Article 56 of the DSA, the Commission holds the exclusive competence for the supervision and enforcement of Section 5 of Chapter IV of the DSA as regards formally designated very large online platforms and very large online search engines.

In this respect, the Commission notes that the notified draft, based on the underlying Article 20-7, entrusts the supervision and enforcement of provisions that fall within the harmonized fields of the DSA to the French authorities alone, including with regard to service providers outside the jurisdiction of France and very large online platforms. The Commission invites the French authorities to ensure that the final text of the notified draft is in line with the monitoring and enforcing system set out in the DSA.

d) Absence of general monitoring obligations

On the basis of the information made available to the Commission, it is unclear how operators under the scope of the notified draft, and underlying Article 20-7, are to determine if the services, or parts thereof, deemed of general interest are present in their offer, as well as the identity of the publisher. In particular, it is unclear whether operators are simply expected to rely on the information provided to them by the publisher of the services of general interest. It rather seems that in order to comply with the obligation of result (to implement certain measures to give prominence to specific services and content offered by those services), operators under the scope of the notified draft will be required, in practice, to carry out fact finding activities, for regularly checking the list of services made public by ARCOM, and monitoring their content with a view to identify content provided by those services of general interest.

Therefore, when it comes to operators under the scope of the notified draft that qualify as online intermediary services pursuant to the DSA the notified draft seems to result in a requirement for those services to perform general fact finding exercises and monitoring the content available on their services contrary to Article 8 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 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 21 June 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 on such an opinion.

The Commission furthermore invites the French 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 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 is ready to initiate proceedings against France in accordance with Article 258 of the TFEU.

I remain, your Excellency, yours faithfully,

For the Commission,

Thierry Breton
Member of the Commission