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Her Excellency
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Minister of Europe and Foreign Affairs
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Purpose: Notification 2023/461/FR

Legislative provisions to secure and regulate the digital space

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

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

Madam Minister,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the French authorities notified the Commission on 24 July 2023 of Articles 1 to 10a, 22, 28, 29 and 36 of the draft “*Legislative provisions to secure and regulate the digital space*” (hereinafter referred to as “the notified draft”). This notification follows on from notification 2023/352/FR “*Bill to Secure and Regulate the Digital Space*” (hereinafter “notification 2023/352/FR”) concerning the previous draft legislative provisions, prior to the French Senate's amendments. Compared to notification 2023/352/FR, in this notification the French authorities have formally notified the Commission of Articles 1, 2, 3, 4, 5, 6, 7, 9, 10 and 36 of the draft law following the amendments of the French Senate, and added the following provisions which were not included in the previous notification: Articles 2a, 4a, 4b, 5a, 10a A, 10a, 22, 28 and 29. ⁽²⁾ ⁽³⁾

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.

²() The following assessment takes into account the clarifications provided by the French authorities, including those concerning notification 2023/352/FR, insofar as these clarifications concern the provisions which are also part of this notification and are still relevant.

³() This detailed opinion and comments are limited to the provisions of the bill that have been notified.

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

1. Introduction

The Commission shares the objectives of the notified provisions to protect minors online, in particular against content that may be prejudicial to the state of health, physical, mental and moral development of minors, such as pornographic content. Although such content may be legal in the Member States, minors should not have access to it when using online services. To ensure that minors can use online services safely, platforms that may be used by minors must play their part and assume their responsibilities quickly.

The Commission also notes that the objectives of the notified provisions are clearly aligned with those of the European legal framework for online services, in particular Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter “the DSA”)⁴⁾ and Directive 2000/31/EC (Directive on Electronic Commerce)⁵⁾.

In this context, the Commission would like to emphasize that the DSA provides an effective EU-wide regulatory solution to the problems that the notified provisions aim to resolve. The DSA provides for a common set of EU rules that impose a wide range of obligations on hosting service providers and online platforms to combat illegal and harmful content online, while strengthening the European single market. As an EU Regulation, the DSA is directly applicable in all Member States, without the need for implementing measures.

While the DSA is directly applicable, as explained below, the European legal framework provides tools that could enable the French authorities to achieve their objectives, in particular: (i) Article 3 of the Directive on electronic commerce as regards restrictions which France wishes to impose on information society services which are not established in France; and (ii) Article 9 of the DSA as regards the possibility of issuing orders to providers of intermediary services on a cross-border basis.

The Commission invites the French authorities to make use of these tools when preparing the final version of the law, in the light of the following detailed opinion and comments.

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 bill falls within the scope of the Directive on electronic commerce.

Firstly, concerning the personal scope of application of the notified provisions: according to the notified draft and as confirmed by the French authorities in their responses, the category of “*online public communication services*” used in the notified bill is defined in

⁴⁾ 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 (Digital Services Act) OJ L 277, 27.10.2022, p. 1-102.

⁵⁾ 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.

Article 1 of Law 2004-575 of 21 June 2004 on confidence in the digital economy, which transposes the Directive on electronic commerce into French law. ⁽⁶⁾ Therefore, the notified draft applies to information society services as defined in Article 1(1)(b) of Directive (EU) 2015/1535 and therefore 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⁾

Secondly, concerning the material scope of the notified provisions: the rules set out in the notified draft concern in particular content moderation and the access by minors to information society services. 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 apply to information society services offering their services on French territory, irrespective of their Member State of establishment.

In this respect, the Commission recalls that Article 3(1) and (2) of the Directive on electronic commerce establish the “principle of control by the country of origin” according to which information society services must be regulated at the source of their 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.

However, this principle is not absolute. 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.⁽⁸⁾

The Commission calls on the French authorities to make full use of the flexibilities offered by Article 3(4) of the Directive on electronic commerce.

2.2. Evaluation in light of the DSA

a) Applicability of the DSA

The notified bill falls within the scope of the DSA.

Firstly, concerning the personal scope of the notified provisions: according to the information provided in the notification, Articles 1 to 6 of the notified draft amend French Law No 2004-575 of 21 June 2004 on confidence in the digital economy. In their responses to the Commission's request for additional information, the French authorities state that the concept of “*online public communication services*” of the notified draft includes providers of intermediary services, hosting services and online platforms as defined in Article 3 of the DSA ⁽⁹⁾. The French authorities also explain that Article 22 of

⁶⁾ Under this Article, the “*online public communication services*” are defined, echoing the definition of information society services set out in Directive (EU) 2015/1535.

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

⁸⁾ Cfr. Opinion of the Advocate General in Case C-376/22, ECLI:EU:C:2023:467, paragraphs 63 to 74, published on 8 June 2023.

⁹⁾ Article 3 of the DSA defines intermediary services by reference to the definition set out in point (b) of Article 1(1) of Directive (EU) 2015/1535, and thus as information society services within the meaning of

the notified draft defines the relevant service categories within its scope by aligning them with the definitions in the DSA and that “*Internet service providers*” constitute mere transport services within the meaning of Article 3(g)(i) of the DSA. The French authorities also point out that the provisions of the notified draft apply to all “*online public communication services*” including those not established in France ⁽¹⁰⁾ and including very large online platforms or very large online search engines ⁽¹¹⁾.

Secondly, concerning the material scope of the notified provisions: the French authorities confirm that the objective of the notified draft is to enhance the security and reliability of the online space, in particular as regards the protection of minors against illegal or harmful content. This concern is one of the main policy objectives pursued by the DSA, as explained in recitals 40, 71 and 81 of the Regulation. The notified draft therefore aims to achieve the same objectives as those pursued by the DSA, which includes, of course, protection of minors against harmful content, such as pornographic content, throughout the EU..

b) Harmonisation effect of the DSA

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 concerning the accountability and responsibilities of intermediary service providers with regard to their obligations to combat illegal and harmful content on their services. This is emphasised 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 notified provisions reproduce or correspond to the same obligations covered by the DSA, they are not in conformity with the DSA. The Commission draws the attention of the French authorities, for example, to the second subparagraph of Article 22(5)(III), (V) and (VIII) of the notified draft, which fall within the scope of Articles 6, 16 and 18 of the DSA. ⁽¹²⁾ The Commission calls on the French authorities to ensure that the final law is in line with the principle of direct applicability of the DSA in all Member States. ⁽¹³⁾

The Commission also 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). In addition, the DSA also includes important additional obligations applicable to very large online platforms and very large online search engines with regard to the protection of

Article 2(a) of the Directive on electronic commerce.

¹⁰⁾ In this regard, see section 2.1(b) of this letter.

¹¹⁾ In this regard, see section 2.2(c) of this letter.

¹²⁾ The Commission notes that Article 22(5)(III) of the notified bill appears to reproduce *verbatim* Article 6 of the DSA.

¹³⁾ 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 report of the French Council of State on the draft that was to become the notified bill reached the same conclusion: “ *The Council of State considers that these provisions do not face any obstacles but propose not to retain those which go beyond what strictly require the implementation of the “DSA” Regulation.* “ (points 52 and 55). [avis_ce_ecoi2309270l_cm_10.05.2023.pdf](#) (legifrance.gouv.fr).

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 these transposition measures in national law, should also be formally repealed.

minors. These must (i) identify and (ii) mitigate any systemic risk to the protection of minors and the rights of children (Articles 34 and 35).

In particular, the DSA refers to age verification systems as an example of effective and targeted enforcement measures to protect children's rights (Article 35). The Commission services have announced a cooperation exercise with Member States in the specific area of age verification systems for the implementation of DSA rules. The Commission is committed to working with the national authorities of the Member States with relevant expertise to identify best practices and standards in the field of age verification. This cooperation would build on existing measures at national level, including those resulting from the transposition of Directive (EU) 2018/1808 ⁽¹⁴⁾, and take into account the relevant ongoing initiatives, as well as the state of the art and current market practices. The resulting best practices and standards could then form part of a Europe-wide solution that could be transmitted to online platforms for the implementation of their DSA obligations. Given the particular expertise of the French Media Regulatory Authority (ARCOM) and the Centre of expertise for digital platform regulation (PEReN) in this field, France is set to play a guiding role in this exercise, for the benefit of the whole new generation of Europeans.

However, in the absence of a EU-wide solution to verify the age of users, the Commission understands France's wish to introduce transitional measures within its jurisdiction in compliance with EU law. In this context, national law could provide for a transitional solution but it should also envisage a mechanism to withdraw or repeal any national measures that become redundant once the European technical solution is implemented.

c) Monitoring and enforcement system

To ensure that the DSA is fully effective in the pursuit of our shared objectives, in particular the protection of minors, 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).

In this respect, the Commission notes that the notified draft entrusts the supervision and enforcement of the notified provisions to the French authorities alone, including with regard to service providers outside the jurisdiction of France ⁽¹⁵⁾ and very large online platforms or very large online search engines.

The Commission calls on the French authorities to ensure that the final law is aligned with DSA's supervision and enforcement architecture. ⁽¹⁶⁾

¹⁴) OJ No. L 303, 28.11.2018, p. 69.

¹⁵) In this regard, see section 2.1(b) of this letter.

¹⁶) In its aforementioned report, the Council of State also noted that the Commission is the only body competent for the monitoring and enforcement of the DSA's obligations under Section 5 of Chapter III with regard to designate very large online platforms and very large search engines (point 64).

d) Absence of general monitoring obligations

The DSA does not define what constitutes illegal content. It is solely up to Member States, such as France, to determine what is considered a (criminal) offence in their territory, which may result in the issuance of removal orders against intermediary service providers, in particular to take down or render impossible access to certain content considered illegal under national law.

In this context, it is also up to the Member States to identify the competent national authorities empowered to issue orders to intermediary service providers following the establishment of an offence, including those established outside France.

However, it is essential to ensure that the interpretation of the relevant provisions is in line with Article 8 of the DSA (which prohibits obligations of general monitoring and active fact-finding of illegality by platforms) and the relevant fundamental rights.

In particular, this concerns:

- Obligations of online platform providers whose activity is not editors of content: in particular, the obligation to display a prior warning message to users before accessing certain types of pornographic content should only apply provided they are made aware of the existence of such content on their services (Article 4A of the notified draft).
- Obligations to implement measures to block any other account held by a convicted person, and to prevent the creation of new accounts by a convicted person, throughout the execution of the sentence: in particular, it would be desirable to make it clear that it is exclusively for the administrative authority to identify “other accounts”.

For the reasons set out above, the Commission hereby issues a detailed opinion pursuant to in 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 the Member State which is the author of the draft technical regulation concerned postponing its adoption for 4 months from the date of its notification. This deadline therefore ends on 27 November 2023.

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.

In particular with regard to age verification, the Commission invites the French authorities to exchange information at technical level, to ensure that national technical standards encourage the development of technical solutions at EU level, without hindering this progress. 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

The Commission notes that several provisions of the notified draft empower the competent French authorities to issue orders to intermediary service providers, including to block access or remove certain content deemed illegal under national law, or to block access to services that wholly or substantially reproduce the same content.

In this respect, the Commission would like to remind the French authorities, on the one hand, of the importance of ensuring compliance with Article 8 of the DSA (¹⁷) and, on the other hand, of the procedures and conditions set out in Article 9 of the DSA to ensure that these orders can produce all the intended effects in the architecture of the DSA. Article 9 of the DSA states that such orders may be issued on a cross-border basis and it lays down certain specific minimum conditions which administrative or judicial orders issued by a Member State must fulfil in order for their transmission to give rise to the obligation for intermediary service providers to inform the competent authorities of the effect given to these orders.

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

Yours faithfully,

For the Commission,

Thierry Breton
Member of the Commission

CERTIFIED COPY
For the Secretary-General

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¹⁷ () Case C-18/18, *Glawischnig-Piesczek vs Facebook*, ECLI: EU:C:2019:821.