Message 201

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Forwarding of the response of the Member State notifying a draft (France) to of European Commission.

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5.

6. The French authorities have taken note of the Commission’s comments and detailed opinion by letter dated 17 January on the draft law to secure and regulate the digital space, in reply to the communication of 8 November 2023 (2023/632/FR). In accordance with Article 6 of Directive 2015/1535, they hereby address the following brief reply.

The draft law to secure and regulate the digital space (‘PJL SREN’) was the subject of a final reading in the Senate and the National Assembly on 2 and 10 April. The text adopted by the Parliament makes it possible to provide a response to the opinion and to the comments most recently communicated by the Commission (see points 1 and 2 below). Moreover, it does not contain any substantial changes – compared to the versions notified to the European Commission on 7 June 2023 (2023/0352/FR), 24 July 2023 (2023/461/FR) and 8 November 2023 (2023/632/FR) respectively – which change the scope, shorten the timetable for application, or add requirements or make them more binding, which would justify a new notification under Directive 2015/1535.

As an indication, the French authorities also notified under Directive 2015/1535 the draft framework determining the reference framework for age verification systems (2024/0208/FR) on 15 April.

1. Brief reply to the detailed opinion

1.1. On aspects relating to the e-commerce Directive

The Commission points out that several notified provisions apply to providers of information society services offering their services on French territory, irrespective of the Member State in which the service provider is established. It recalls the possibilities offered by Article 3.4 of the e-commerce Directive, which allow a Member State, under certain conditions, to derogate from the country of origin principle ('PPO') and draws attention to the recent CJEU case-law recalling the limits of the scope of this Article (Case C-376/22 'Google Ireland' of 9 November 2023). In the aforementioned opinion, the Commission also calls on the French authorities to take account of this case-law and the conditions it lays down in order to ensure the compatibility of certain provisions of the draft law with Article 3 of the e-commerce Directive.

As already indicated in their letter of 22 December 2023, the French authorities have been careful to adjust certain articles of the draft law in order to respond appropriately to the requirements formulated by the CJEU.
The Commission will therefore take note that, since it is a piece of legislation falling within the scope of Directive 2000/31/EC, Articles 1 and 2 on the protection of minors are, in their latest version, amended as follows:
- The territorial scope of Articles 1 and 2 is limited only to services established in France or outside the European Union;
- The text now lays down precise conditions for extending the application of these rules to services established in other EU Member States. These conditions are strictly related to those laid down in Article 3 of the e-commerce Directive, as interpreted by the CJEU. The system applicable to service providers established in other Member States is based in particular on a mechanism for the individual designation of the actors concerned and compliance with the substantive and procedural conditions laid down in Article 3 above.

In response to the Commission's specific comments on Articles 2b, 3a(A), 5a(B), 5d and 16, the French authorities refer to the brief reply set out below.

1.2. On aspects relating to the Digital Services Act (DSA)

1.2.1. Compliance of certain provisions with the DSA

In its opinion, the Commission points out that certain notified provisions of the draft law fall within the scope of the DSA by imposing obligations on providers of online intermediary services. The Commission refers in particular to Article 2b, Article 3a(A), point (b) of the first subparagraph, Article 5a(B) and Article 5d.

 On Article 2b

Article 2b prohibits influencers from promoting pornographic content on online platforms which do not offer the technical possibility of excluding users under the age of 18 from viewing such content.
The European Commission notes that, although targeting influencers and not platforms, the implementation of Article 2b would result in requirements for online platforms. It concludes that this Article falls within the scope of the DSA (in particular Articles 14, 28, 34 and 35) and that Article 2b would thus conflict with the principle of maximum harmonisation effect of the DSA.
In view of the comments made by the Commission and the risks of friction with the DSA, the French authorities would inform the Commission that Article 2b has been deleted from the version of the text resulting from the readings of the parliamentary assemblies in April 2024.

 On point (b) of the first subparagraph of Article 3a(A)

Reminder of the provision in the November 2023 version:
b) After the second occurrence of the word: 'code', the following words are inserted: ', against the dissemination of images or depictions of torture or acts of barbarism, against the dissemination of images or depictions of rape as defined in Article 222-23 of the same code, against the dissemination of images or representations of incest as defined in Article 222-22-3 of the said code or against the dissemination of an image or representation of a pornographic nature including adults, falling within the scope of Article 226-2-1 of the same code and disseminated without their consent';

The Commission submits that this provision overlaps with the notification and action mechanism provided for in Article 16 of the DSA and provides for a wider scope of content classified as unlawful criminal offences:
Article 16 of the DSA
Reporting and action mechanisms
1. Hosting service providers shall put in place mechanisms enabling any individual or entity to report to them the presence within their service of specific items of information that the individual or entity considers to be illegal content. These mechanisms are easy to access and use and allow notifications to be submitted exclusively by electronic means. […]
Hosting service providers shall process the notifications they receive under the mechanisms provided for in paragraph 1 and take their decisions regarding the information to which the notifications relate in a timely, diligent, non-arbitrary and objective manner.'

In the light of the Commission's observation, the French authorities wish to clarify the following points:
- Article 3a(A) concerns the mechanisms for removal injunctions issued by an administrative authority, unlike Article 16 of the DSA, which deals with notices of illegal content made by users. The fields of the two Articles are therefore quite distinct. In particular, Article 3a(A) does not require online platforms to put in place any particular mechanism for the collection of injunctions.
- The exclusive subject matter of Article 3a(A) relates to the mechanisms of administrative injunctions issued by a competent national authority. Recital 31 of the DSA states that the system of judicial or administrative injunctions falls within the legal system of each Member State and that the competent national authorities may, without prejudice to the DSA, take injunctive measures against providers of intermediary services.
- Moreover, it is not within the scope of the DSA Regulation to interfere with the Member States' definition of the scope of criminal content.
However, in view of the questions raised by the Commission on this Article, the French authorities are in a position to inform it of the following changes to the version of April 2024:
- The scope of the Article is reduced to a purely experimental arrangement for a limited period of two years.
- The scope of content covered by the injunction mechanism is limited to images or representations of torture or barbarism only. Content containing images or representations of rape or incest or pornographic images of adults and disseminated without their consent shall be removed from the scope of the Article.
- Sanctions for non-withdrawal are repealed.

 On Article 5a(B)

In the aforementioned opinion, the European Commission argues that the measures provided for in Article 5a(B) do not comply with the DSA. Incorporating into French law an obligation for social networks to put in place a mediation system for the benefit of users would be considered to exceed the maximum requirements laid down by the DSA, which, in Articles 20 and 21 thereof, fully harmonises the obligations of online platform providers with regard to dispute resolution mechanisms for content disseminated on these platforms.
The French authorities have been aware of the Commission's observations regarding the compulsory subscription of agreements with associations to carry out this mediation work by those above a certain audience threshold. In order to respond to the Commission's reservations, the April 2024 version of the draft law makes this mediation system for disputes purely optional for social networks. Social networks will therefore be free to assess whether such mediation protocols should be concluded with the associations concerned.

 On Article 5d

Reminder of the provisions of the November 2023 version
Article 5d
After the third sentence of the second paragraph of Article 4 of Law No 2023-566 of 7 July 2023 aimed at establishing a digital majority and combating online hate is inserted a sentence worded as follows: ' When facts likely to fall under Articles 222-3-2 to 222-33-2-3 of the Criminal Code and involving the minor are notified by a trusted flagger to social network providers, the latter shall send the holders of parental authority a warning message reminding them of the terms

of the criminal proceedings incurred in the event of infringement of the same Articles 222-33-2 to 222-33-2-3, on the one hand, and the conditions under which they may incur civil liability on the basis of the fourth subparagraph of Article 1242 of the Civil Code, on the other. ’

The European Commission notes that Article 5d imposes additional information obligations on social networks as part of their moderation decisions. It considers that this Article runs counter to the harmonised provisions of Articles 17 and 22 of the DSA.
Article 17
Explanatory memorandum
1. Hosting service providers shall provide all affected recipients of the service with a clear and specific explanatory memorandum for any of the following restrictions imposed on the grounds that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions (…)
3. The explanatory memorandum referred to in paragraph 1 shall at least contain the following information: (…)

Article 22
Trusted flaggers
1. Online platform providers shall take the necessary technical and organisational measures to ensure that notices submitted by trusted flaggers, acting within their designated area of expertise, through the mechanisms referred to in Article 16, are given priority and are processed and decided upon without undue delay. (…)

The French authorities inform the Commission that Article 5d has been deleted in the version of the draft law dated April 2024.

1.2.2. On the monitoring and enforcement system

In the above-mentioned opinion, the Commission reiterates its concerns about compliance with the DSA's supervisory framework and the rules on the division of powers between Member States’ authorities and the European executive, especially with regard to service providers established in another Member State and very large online platforms.

On this point, the French authorities refer to the brief reply set out in points 1.1 and 1.2 above.

2. Brief reply to comments

In the above-mentioned letter, the Commission notes that Article 3a(A) of the notified draft empowers certain French authorities to issue injunctions to prevent access or to remove certain content deemed illegal under national law. In this respect, the Commission recalls the procedures and conditions set out in Article 9 of the DSA Regulation. The French authorities are fully aware of the provisions laid down in Article 9 of the DSA and will ensure that the orders concerned comply fully with the requirements of this Article. However, the French authorities point out that, while compliance with these minimum conditions requires the existence of an obligation, on the part of the services targeted by an injunction, to report on the action they have taken, it does not affect the validity of the injunctions themselves, and therefore the obligation on the targeted operators to comply with them.

The Commission also recalls the prohibition laid down in Article 8 of the DSA, which prohibits any obligation of general monitoring of content and points to the rule laid down in Article 2a of the draft law which, according to the Commission, could undermine this principle by requiring the actors referred to in that Article to identify pornographic content.

In the light of this observation, the French authorities would like to provide the following clarifications.
It should be noted that Article 2a explicitly provides that the identification of the online service allowing access by minors to pornographic content shall be carried out by the administrative authority. The provision provides that, in the event of non-compliance with a formal notice issued by the Regulatory Authority for Audiovisual and Digital Communication, targeting a specifically identified software application, the Authority ‘may require software application stores to prevent the download of the software application in question’. Since the request sent to these app stores concerns applications

specifically identified by the competent authority, it does not appear to the French authorities that this provision is likely to infringe Article 8 of the DSA, which prohibits the imposition of general monitoring obligations on intermediary service providers.

Finally, the Commission calls on the French authorities to ensure that the final version of Article 16(2)(b) and Article 16(2a) is well aligned with Article 40 of the DSA, which fully harmonises the obligations of providers of very large online platforms and very large online search engines as regards the access of researchers to their data.

To avoid any ambiguity, the draft law version of April 2024 contains the following amendments:
- Article 16(2)(b) is deleted.
- The wording of Article 16(2a) has been revised to better link the conditions under which the PEReN's experimental and research tasks are carried out, prior to and independent of the entry into force of the DSA, with the latter.

This wording does not conflict with Article 40 of the DSA as regards the obligations incumbent on providers of very large platforms or search engines as regards access to data by researchers.

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