Message 201

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Forwarding of the response of the Member State notifying a draft (France) to request for supplementary information (INFOSUP) of European Commission.

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1. The Commission services would welcome any explanations on the obligations for service providers under the scope of the Regulation (EU) 2022/2065 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act, hereinafter ‘DSA’) that would arise from the notified draft.

Once the administrative authority designated by the notified draft (OFAC) has established that a site is clearly designed to carry out activities constituting one of the offences set out in Article 12 of the Law of 21 June 2004 on confidence in the digital economy, the obligations incumbent on providers are as follows:

 Step 1:
- For the publisher: cease these activities.
- For web browser providers: display, without delay and for a period of seven days, a warning message to users informing them of the risk of harm they may face if they access this site, and providing a link to an information page on an official website of the Ministry of the Interior (interim measures).

If the publisher cannot be contacted and/or the report of the offence remains valid five days after the publisher has been

served with a formal notice to cease these activities, the following obligations apply:

 Step 2:
- For internet service providers and/or domain name system resolution providers: an order to immediately block access to this service for a period of three months and to redirect users to an official information page.
- For web browser providers: an order to immediately display the warning message to users for a period of three months.
- For search engines and directories: remove the relevant websites from their listings.

In summary, the notified draft introduces the following obligations for online public communication services identified as facilitating the commission of an offence referred to in Article 24 of the SREN Act:
- to display a message warning the user of the risk of harm they may face if they access that address;
- to display an identical message making access to public communication services identified as fraudulent subject to explicit confirmation by the user;
- to redirect users to a government information page.

2. The French authorities are kindly invited to clarify whether the provisions of the notified draft, in particular Articles 2 and 3, are addressed to providers of intermediary services as defined in Article 3(g) of the DSA.

Section 24 of the SREN Act refers to the following:
- The person whose task is to provide an online public communication service, as defined in Article 1 of Law No 2004-575 of 21 June 2004 on confidence in the digital economy, which transposes the e-Commerce Directive into French law. As stated in the French authorities' response to the Commission's request for further information regarding notification 2023/461/FR, this includes providers of intermediary services, hosting services and online platforms as defined in Article 3 DSA.
- Web browser providers, according to the definition of a 'web browser' in Article 2(11) of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
- Internet service providers.
- Domain name resolution system providers, meaning any person providing a service enabling the a domain name to be translated into a unique number identifying a device connected to the internet.
- Search engines and directories.

The notified draft is therefore aimed at intermediary services within the meaning of Article 3(g) DSA insofar as it targets providers of internet services and domain name resolution system services that constitute 'mere conduit' services within the meaning of Article 3(g)(i) DSA.

3. In the affirmative, the Commission services would welcome further information on how the notified draft interacts with Article 9 of the DSA. In particular, the French authorities are invited to clarify whether they deem Articles 2 and 3 of the notified draft, read together with the underlying basic text: (i) acts as legal bases under national law to issue orders to act against illegal content pursuant to Article 9 DSA; and (ii) whether the notices issued based on this article are orders to remove illegal content pursuant to Article 9 DSA. If the affirmative, the Commission services would welcome clarifications on whether the notices to be issued pursuant to Articles 2 and 3 of the notified draft, read together with the underlying basic text, meet the minimum conditions listed under Article 9(2) DSA, as well as how the notified draft ensures that the rest of the requirements of Article 9 are met.

Article 1 of the notified draft, read in conjunction with Article 24 of the SREN Act, establishes the powers of OFAC officials to issue injunctions.
Notifications do constitute order to act against illegal content, within the meaning of Article 9 DSA.
The legal basis for issuing an order is therefore found in the notified draft, which designates OFAC as the administrative authority; in the SREN Act, which specifies the offences that may be subject to an order within the meaning of the DSA; and in Article 9 DSA, which sets out the minimum conditions that order must meet.
The requirements of Article 9(2) DSA will be duly met by means of the details regarding the content of messages, without

there being any need to replicate in national law the minimum conditions set out in that provision, which is directly applicable.

That is why Articles 2 and 3 of the notified draft merely require that access to the website be conditional upon the display of a warning message, and that such access be subject to the user's explicit confirmation. The message will warn the user of the risk of harm incurred in accessing this address, and will direct them to an official website run by the Ministry of the Interior that is designed to guide citizens through the relevant procedures. This website will explain the reasons behind the measure, how the scheme works, and the avenues of appeal.

The information page to which users will be redirected if a website is blocked by internet service providers will also set out the reasons for this measure, along with the available avenues of appeal and a reference to the Ministry's official website.

4. The French authorities are kindly invited to clarify the interplay of Articles 2 and 3 of the notified draft, read together with the underlying basic text, which would impose an obligation on the service provider to display a warning message and redirect the recipient of the service, with the maximum harmonization effect of the DSA.

Articles 2 and 3 of the notified draft merely specify the obligation to display a warning message on the fraudulent website regarding the risk involved, encouraging users to be redirected to a government website, and to specify the content of that message, as well as the obligation to display a message requiring the user's explicit consent should they wish to access the fraudulent site. These obligations stem from Article 4(3) DSA, which leave the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to cease or prevent an offence.
This obligation to issue a warning and redirect users to an official page applies only to web browser providers, which, unless we are mistaken, are not subject to the DSA.
Articles 2 and 3 of the notified draft therefore do not affect the supervisory and enforcement structure of the DSA. The European Commission is the only body competent to monitor and enforce compliance with the obligations under Section 5 of Chapter III of the DSA in respect of designated very large online platforms and very large search engines; the notified draft does not affect this competence.

5. The French authorities are kindly invited to provide more information as regards the interplay between Articles 2 and 3 of the notified draft and Article 8 of the DSA, in particular as regards preventive measures.

The cybersecurity filter, the details of which are set out in the notified draft, is a preventive measure based on the principle of a graduated approach to the measures implemented. This preventive measure aims at combating online public communication services where they are clearly designed to:
- carry out acts that constitute an offence as provided for by law; or
- to upload or direct the user to an interface whose characteristics are liable to create confusion with the online interface of an existing service, and to induce the internet user to provide personal data or to pay a sum of money.

Thus, the obligations imposed on providers are subject to a prior finding by the administrative authority designated by the notified draft (OFAC) of the manifest and infringing nature of the facts.
Consequently, providers are not subject to a general duty of supervision, nor are they required to actively seek out facts or circumstances indicating illegal activities, since the facts giving rise to the implementation of the filter are reported to them by the administrative authority.

6. The Commission would welcome clarifications on how the notified draft takes into account Article 4(3) DSA in combination with Article 9(1) DSA.

The notified draft designates the competent administrative authority (OFAC) to establish offences under national law that

may lead to an order requiring the service provider to cease the established offence. The notified draft does not contain any provisions relating to the prevention of offences under national law.

The notified draft does not include an obligation for intermediary service providers to inform it, without undue delay, of any action taken in relation to the order (Article 9(1) DSA).

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