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His Excellency
Péter Szijjártó
Minister of Foreign Affairs and Trade of
Hungary
1027 Budapest, Bem rakpart 47.

Purpose: Notification 2024/344/HU

Draft act restricting access to pornographic content on the internet for the protection of children, and amending certain acts relating to electronic commerce services and advertising.

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

Excellency,

Within the framework of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the Hungarian authorities notified to the Commission on 27 June 2024 the draft “*Act [...] of 2024 restricting access to pornographic content on the internet for the protection of children and amending certain acts relating to electronic commerce services and advertising*” (hereinafter referred to as “the notified draft”).

According to the notified draft law, providers of information society services (specifically, caching and hosting service providers, and providers of online search engines) are obliged to operate an easily accessible, transparent and user-friendly electronic system on their website, in order to facilitate the reporting and removal of any content that violates minors’ personality rights. Furthermore, internet service providers are obliged to provide an internet screening service to filter out pornographic sites, at the request of parents, inform the subscriber in advance of the possibility of a safe service, free of charge, and provide an unfiltered service in the case of fixed (home) services. The screening is done based on a constantly updated black list, drawn up by the National Media and Info-communications Authority, of the most visited websites specifically dedicated to pornographic content.

The notified draft moreover amends previous legislation on requirements and restrictions for commercial advertising. In the case of advertising via application providers or video

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.

sharing platform service providers, the draft law mandates such providers to provide a clear reference to the “advertising character” of commercial communications, including the fact that the advertisement might be specifically addressed to children or minors. The Hungarian authorities explain that the amendment of the rules on advertisement aims at extending the existing restrictions on advertising providers, so as to also cover the activities of influencers who reach a wide range of young people.

In the context of the notified draft, the Commission addressed to the Hungarian authorities a request for supplementary information on 15 July 2024 to obtain clarifications on the measures of the notified draft. The answers provided by the Hungarian authorities on 1 August 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 and the reply of the Hungarian authorities to the request for supplementary information, according to which the notified draft pursues the objective of ensuring that children use the internet safely, which is broadly part of Hungary’s commitment to protecting children from adverse impacts offline and online.

The Commission shares the objective of the notified draft law insofar as its aim is to protect minors online, in particular against pornographic content, that may be prejudicial to their development. Although such content may be legal in the Member States, minors should not have access to it when using online services.

The Commission also notes that the objectives of the notified draft law are aligned with those of the European legal framework for online services, in particular Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter “the DSA”) ⁽²⁾ and Directive 2000/31/EC (Directive on Electronic Commerce) ⁽³⁾. More specifically, the DSA aims at ensuring safe, predictable and trusted online environment in which fundamental rights enshrined in the Charter are protected. The Commission would like to note that the provisions of the DSA aimed at the protection of minors have been strengthened during the legislative process, based on amendments to the Commission’s proposal tabled notably by the Council.

Furthermore, it should be noted that, on 31 July 2024, the Commission launched a call for evidence for guidelines on protection of minors online under the DSA with the aim to gather feedback for its upcoming guidelines on protection of minors online. Once adopted, these guidelines will advise on how providers of online platforms are to implement high levels of privacy, safety and security for minors online, as required by the DSA. ⁽⁴⁾

²) 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.

³) 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.

The Commission would like to emphasize that the DSA provides an effective Union-wide regulatory solution to some of the objectives pursued by the notified draft. The DSA provides for a common set of Union rules that impose a wide range of obligations on hosting service and online platforms providers to combat illegal and harmful content online, while strengthening the European single market. As a Union law 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 Directive on electronic commerce

a) Applicability of the Directive on electronic commerce

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

Firstly, concerning the personal scope of application of the notified draft, the notified draft regulates certain aspects of electronic commerce services and information society services, amending Act CVIII of 2001. In particular, as pointed out by the Hungarian authorities, the notified draft sets out rules applicable to information society services (including internet service providers, caching and hosting service providers, as well as on online search engine providers). The notified draft therefore applies to providers of information society services as defined in 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.

Secondly, concerning the material scope of the notified draft, the rules set out in the notified draft concern in particular the requirement on providers of information society services to take certain measures aimed at preventing access from minors to pornographic content and advertisement for adults. In particular, the notified draft obliges service providers to implement the following measures for the pursuit of their activities:

- As regards internet service providers:
 - o provide the filtered internet access within a given tariff package only upon the subscriber's specific request and provide unfiltered internet service in the absence of a request from the subscriber (Section 6);
 - o provide the possibility of simultaneous filtered and unfiltered internet service from the same subscriber access point, free of charge (Section 6);
- As regards caching and hosting service providers, and online search engines providers:
 - o operate on their website an easily accessible, transparent and user-friendly electronic system which facilitates the submission of the notification that information made available by the service provider infringes the minor's personality rights (Section 1);
- As regards app stores and video-sharing platform services:
 - o indicate a reference to the nature of the advertising and indicate whether it is addressed to minors (Section 10).

⁴⁰ [Commission launches call for evidence for guidelines on protection of minors online under the Digital Services Act | Shaping Europe's digital future \(europa.eu\)](#).

The obligations set up in the notified draft therefore fall within the coordinated field of the Directive on electronic commerce, as set out in Article 2(h) and (i) thereof and have thus been analysed in the light of this Directive.

Thirdly, concerning the territorial scope of the notified draft, the Hungarian authorities confirmed in their replies to the request for supplementary information that the obligations set therein apply also to providers of information society services that are established in the territory of a Member State other than Hungary.

b) Article 3(1), (2) and (4) of the e-Commerce Directive

Based on the information provided by the Hungarian authorities in the context of this notification, the Commission notes that the notified draft applies to providers of information society services offering their services on Hungarian territory, irrespective of their place of establishment. Therefore, the notified draft applies indistinctively to providers of information society services established in other Member States than Hungary.

In this respect, the Commission recalls that Article 3(1) and (2) of the Directive on electronic commerce establishes the “country of origin principle” according to which information society services may only be regulated at the source of their activity. Such providers are therefore, as a general rule, subject to the law of the Member State in which they 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 the principle of control by the country of origin in order to impose certain measures. Member States may take measures to derogate from this principle, where necessary, for the reasons exhaustively listed in Article 3(4)(a) of the Directive and in compliance with the substantive and procedural requirements set out in its Article 3(4)(a) and (b).

As mentioned above, according to the Hungarian authorities, the notified draft is a measure for the protection of minors within the meaning of Article 3(4) of the Directive on electronic commerce.

In this regard, the Commission draws the attention of the Hungarian authorities to the recent case law of the CJEU ⁽⁵⁾, 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 ⁽⁶⁾. Thus, any application to cross-border providers established in other Member States needs to precisely identify the service providers, as well as the Member State of establishment.

⁵() Judgment of 9 November 2023 in Case C-376/22, *Google Ireland and Others*, ECLI:EU:C:2023:835, and judgment of 30 May 2024 in joint cases *Airbnb Ireland UC and Amazon Services Europe Sàrl v Autorità per le Garanzie nelle Comunicazioni*, C-662/22 and C-667/22, EU:C:2024:432, paragraph 70.

⁶() Case C-376/22, *Google Ireland and Others*, ECLI:EU:C:2023:835. 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.”

In the form notified to the Commission, the draft law appears to constitute such a general and abstract measure that would apply indistinctively to domestic and foreign providers of information society services, and therefore would not fall within the scope of Article 3(4) of the Directive on electronic commerce as interpreted by the CJEU. In any event, based on the information available to it at this stage, the Commission is not in the position to verify whether and how the Hungarian authorities would ensure that all the substantive and procedural requirements set out in Article 3(4) of the Directive on electronic commerce would be fulfilled.

The Commission also recalls that, being a subcategory of information society services, video-sharing platform services also fall under the scope of the Directive on electronic commerce, including its Article 3 (as also clarified in Article 28a of Directive 2010/13/EU ⁽⁷⁾ – ‘the AVMSD’). As stated in paragraph 5 of Article 28a, for the purposes of the AVMSD, Article 3 and Articles 12 to 15 of Directive 2000/31/EC shall apply to video-sharing platform providers deemed to be established in a Member State in accordance with paragraph 2 of the same Article.

Therefore, in the Commission’s views, as it stands, the notified draft constitutes an unjustified restriction to the freedom to provide information society services from another Member State contrary to Article 3 of the Directive on electronic commerce as interpreted in the recent case law of the CJEU.

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.

Firstly, concerning the personal scope of the notified provisions, the notified draft sets out requirements on information society services, including online intermediary services. As confirmed by the Hungarian authorities, those requirements would apply to providers of online intermediary services (as defined in Article 3 of the DSA), including app stores, video-sharing platforms and online search engines.

Secondly, concerning the material scope of the notified provisions, in the notification message as well as in their replies to the request for supplementary information, the Hungarian authorities have confirmed that the objective of the notified draft is to ensure that children use the internet safely, which is broadly part of Hungary’s commitment to protecting children from adverse impacts offline and online. The objective of reinforcing the protection of minors online is a key aspect of the DSA, including as regards the exposure of minors to harmful content or unsafe products.

More specifically, Section 1 of the notified draft requires caching and hosting service providers as well as online search engine providers to operate on their website an easily accessible, transparent and user-friendly electronic system which facilitates the submission of the notification when information made available by the service provider infringes the minor’s personality rights. According to Section 1 of the notified draft, the service provider may reject the request to block access to the contested information

⁷ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version) (OJ L 95, 15.4.2010, p. 1, ELI: <http://data.europa.eu/eli/dir/2010/13/oj>).

where it considers the notification to be unfounded, provided the applicant is given clear and detailed information on the reasons for this refusal.

Moreover, under Section 6 of the notified draft, internet service providers are required to provide an internet screening service at the request of parents to filter out pornographic sites, and to provide the filtered internet access within a given tariff package only upon the subscriber's specific request.

Furthermore, Section 10 of the notified draft requires application providers and video sharing platform service providers to display a reference to the advertising character of the content in question. Where such advertising is specifically addressed to children, this information should also be added to the reference about the advertising nature of the content at stake.

b) Full harmonisation effect of the DSA

The Commission would like to stress that the DSA aims to contribute to the proper functioning of the internal market for intermediary services by establishing fully harmonised rules for a safe, predictable and reliable online environment. In particular, it establishes a regulatory framework concerning the accountability and responsibilities of providers of the various categories of intermediary services with regard to their obligations to combat harmful content on their services. This is emphasised in recital 9 of the DSA.

The Commission recalls that the protection of minors, a particularly vulnerable category of recipients of online intermediary services, against illegal and harmful content, is one of the main policy objectives pursued by the DSA, as explained in recitals 40, 71 and 81 of the Regulation. More specifically, Article 28 of the DSA is entirely devoted to the protection of minors: it is specifically addressed to providers of online platforms and requires them to put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors, on their service (these obligations therefore do not apply to all internet service providers). In addition, the DSA also includes important additional obligations applicable to the providers of very large online platforms and very large online search engines with regard to the protection of minors. Those providers must (i) identify, analyse and assess and (ii) mitigate any systemic risks related to the protection of minors and the respect of the rights of children (Articles 34 and 35).

Article 16 of the DSA requires the providers of hosting services to put in place easy to access and user-friendly mechanisms that allow any individual or entity to notify them, exclusively by electronic means, of the presence on their service of specific items of information that the individual or entity considers to be illegal content. In accordance with this article, the providers of hosting services are obliged to notify the individual or entity of its decision in respect of the information to which the notice relates, providing information on the possibilities for redress in respect of that decision. This notice and action mechanism is limited to hosting service providers, and therefore does not apply to online search engines providers, also due to freedom of expression considerations which were carefully assessed during the DSA legislative process.

Concerning providers of caching services, Article 5 of the DSA has fully harmonized the conditions for the exemption of liability from illegal content transmitted on their services.

Pursuant to this provision, the provider of the caching service would obtain actual knowledge of the fact that the content has been removed or rendered inaccessible due to its illegality at the initial source of the transmission, or from national orders, contrary to notices pursuant to the mechanism under Article 16 of the DSA that applies as regards hosting services.

Moreover, Article 26 of the DSA obliges providers of online platforms to make advertising more transparent, ensuring that users are able to identify, in a clear, concise and unambiguous manner and in real time that the information is an advertisement, who is placing it and who paid for it and why the users are seeing it.

In this context, the Commission recalls that, the DSA being a regulation, as a general rule, Member States are prevented from adopting national measures that would overlap or contradict its fully harmonising framework ⁽⁸⁾.

For the reasons set out above, the notified draft, in particular its Sections 1 and 10, is deemed incompatible with the maximum harmonisation effect of the DSA.

b) Monitoring and enforcement system

The notified draft does not include a specific system for its supervision and enforcement of compliance, which is to be carried out in accordance with the provisions of the Act CVIII of 2001 on certain aspects of electronic commerce services and information society services, which the notified draft aims to amend. Those competences are entrusted to the relevant Hungarian national authorities.

To ensure that the DSA is fully effective in the pursuit of objectives such as the protection of minors and consumers, which is also pursued by the notified draft, it is essential to preserve the harmonising effect of the DSA and the supervision and enforcement system which is instrumental to achieving these goals.

In accordance with Chapter IV of the DSA, the supervision and enforcement of the DSA are based on close cooperation, between, on the one hand, 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 therefore calls on the Hungarian authorities to ensure that the notified draft does not endanger 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 Hungarian 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 28 October 2024.

⁸⁾ Case 40/69, *Bollmann*, EU:C:1970:12, para 4; Case 74/69, *Krohn*, EU:C:1970:58, paras 4 and 6; and Joined Cases C-539/10 P & C-550/10 P, *Stichting Al-Aqsa*, EU:C:2012:711, para 87 (on the risk of divergent definitions under EU and national law).

Furthermore, the Commission draws the attention of the Hungarian 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 Hungarian 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 Hungarian 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 Hungary in accordance with Article 258 of the TFEU.

I remain, your Excellency, yours faithfully,

For the Commission,

Margrethe Vestager
Executive Vice-President