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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2. France

3A. Ministère de l'économie, des finances et de la souveraineté industrielle et numérique
Direction générale des entreprises
SCIDE/SQUALPI/PNRP
Bât. Sieyès -Teledoc 143
61, Bd Vincent Auriol
75703 PARIS Cedex 13
d9834.france@finances.gouv.fr

3B. Ministère de l'économie, des finances et de la souveraineté industrielle et numérique
Direction générale des entreprises
SEN - Pôle Régulation des Plateformes Numériques
Bât. Necker -Teledoc 767
120 Rue de Bercy
75012 PARIS

4. 2023/0461/FR - SERV60 - Internet services

5.

6. The French authorities have taken note of the observations and detailed opinion of the Commission made by letter dated 25 October on the draft law to secure and regulate the digital space. In accordance with Article 6 of Directive 2015/1535, they hereby submit the following brief reply, recalling that the parliamentary examination is continuing with the prospect of the forthcoming meeting of a Joint Committee of deputies and senators to examine the provisions still under discussion.

1. Brief reply to the detailed opinion

1.1. On aspects relating to the e-commerce directive

The Commission points out that the most important provisions of the draft law (Articles 1, 2, 4, 6, 7, 8 and 10) relate to “online public communication services” irrespective of where 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 to take measures in respect of a provider of an information society service established in another Member State. In the aforementioned opinion, the Commission expressly invites the French authorities to make the most of the flexibilities offered by these derogations, without, however, indicating the

precise terms and conditions which it considers should govern these derogations, or inform the French authorities of a change in the doctrine of the European executive with regard to the interpretation of Article 3.4.

The French authorities would like to emphasise that this has been their intention since the beginning of the legislative initiative.

Firstly, the essential provisions notified (Articles 1, 2, 4, 6, 7, 8 and 10) are based on the protection of overriding public interests as referred to in Article 3.4 of the Directive: protection of minors, protection of public order, protection of consumers.

Secondly, the French authorities intend, on the one hand, to limit, as a matter of principle, the application of the provisions falling within the scope of the e-commerce directive solely to services established in France or in a third country, and on the other hand, as regards services established in other Member States of the European Union, to allow them to be extended downstream to individually identified services, in compliance with the prior procedure provided for by this Directive, in accordance with the interpretation adopted by the Court of Justice of the European Union in its Google Ireland judgement C-376/22 of 9 November 2023.
Further parliamentary scrutiny of the text will enable to review the provisions falling within the scope of the Directive in the light of these requirements.

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

1.2.1. On the conformity of certain provisions of Article 22 of the draft law

In its opinion, the Commission observes that certain provisions of the bill “reproduce” more or less literally the terms of certain articles of the DSA and that this method of “retranscribing” into national law the wording of Articles of the Regulations would not comply with the principle of direct applicability of the Regulations.

The Commission refers in particular to Article 22, supplementing Article 5 of the Law of 21 June 2004 *for confidence in the digital economy, in its paragraphs (III), (V) and (VIII) second subparagraph.

◊ On Article 22, concerning Article 5(III) thereof:
Reminder of the provision:
III. "Persons whose activity consists in providing a hosting service may not be held civilly liable for activities or information stored at the request of a recipient of these services if they were not actually aware of their manifestly unlawful nature or of facts and circumstances showing this nature or if, as soon as they became aware, they acted expeditiously to remove this data or make access to it impossible.
" They may not be held criminally liable for the information stored at the request of a recipient of these services if they were not actually aware of the manifestly unlawful nature of the activity or information or if, as soon as they became aware of it, they acted promptly to remove this information or make access to it impossible.
The first and second subparagraphs of this (III) shall not apply when the recipient of the service acts under the authority or control of the person providing the hosting service.
The Commission observes that this provision seeks to reproduce the terms of Article 6 of the DSA Regulation.
Article 6 of the DSA
Hosting
1. Where an information society service is provided consisting in storing information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service provided that the provider:
(a) is not effectively aware of the illegal activity or illegal content and, with respect to a right to compensation, is not aware of facts or circumstances under which the illegal activity or illegal content is apparent; or
(b) from the moment he becomes aware of it, acts expeditiously to remove the illegal content or make it impossible to access it.

2. Paragraph 1 shall not apply where the recipient of the service acts under the authority or control of the supplier."

In the light of the Commission's observation, the French authorities wish to provide the following clarifications:
- The French Government wishes to take advantage of the legislative exercise implementing the DSA in France to recast and redesign a new architecture of the Law of 21 June 2004 on confidence in the digital economy (subject of Article 22) and to improve the overall readability of this text, which has been extensively revised over several years;
- The liability regime for hosting providers is a pillar of the legislative framework applicable to digital services and it is important, in the view of the French authorities, that the reference law (LCEN) explicitly includes the relevant provisions, avoiding elliptical references. It is essentially a question of legibility and accessibility of the law.
- It should be recalled that the objective of legibility of the law is a constitutional imperative in French law;
- As the Commission reports, the Council of State in its opinion of May 2023 considered that "these provisions do not face any obstacles" (including, therefore, those of a conventional nature);
- This effort to make French clearer should not alter the principle of direct applicability of the DSA Regulation.

◊ On Article 22, in Article 5(V):
Reminder of the provision:
(V) "Persons whose activity consists in providing hosting services shall assist in combating the dissemination of content constituting the infringements referred to in Articles 211-2, 222-33, 222-33-1-1, 222-33-2, 222-33-2-1, 222-33-2-2, 222-33-2-3, 223-1-1, 223-13, 225 4-13, 225-5, 225-6, 225-10, 226-1 to 226-3, 226-4-1, 226-8, 227-4-2, 227-18 to 227-21, 227-22 to 227-24, 226-10, 226-21, 226-22, 312-10 to 312-12, 412-8, 413-13, 413-14, 421-2-5, 431-1, 433-3, 433-3-1 and 431-6 and the second subparagraph of Article 222-33-3 of the Criminal Code, as well as the fifth, seventh and eighth subparagraphs of Article 24 and Article 24a of the Law of 29 July 1881 on Freedom of the Press.
"To this end, they shall promptly inform the competent authorities of any unlawful activities referred to in the first subparagraph of this 1 which are reported to them and that the recipients of their services are engaged in.
" Failure to comply with this information obligation shall be punishable by one year's imprisonment and a fine of EUR 250,000.
" Legal persons may be held criminally liable for this offence under the conditions provided for under Article 121-2 of the Criminal Code. They shall be liable to a fine, in accordance with the procedures laid down in Article 131-38 of the same Code, as well as the penalties referred to in Article 131-39(2) and (9) of the said Code. The ban mentioned in the same Article 131-39(2) shall be imposed for a maximum of 5 years and shall relate to the professional activity during which or on the occasion of which the offence was committed."

The Commission observes that this provision seeks to reproduce the terms of Article 18 of the DSA.
Article 18 of the DSA:
Notification of suspected criminal offences
1. When a hosting service provider becomes aware of information leading to suspicion that a criminal offence posing a threat to the life or security of one or more persons has been committed, is being committed or is likely to be committed, it shall promptly inform the law enforcement or judicial authorities of the Member State(s) concerned of its suspicion and provide all relevant information available.

In the light of the Commission's observation, the French authorities wish to clarify the following points:
- Article 22, Article 5(V), which is intended to establish a criminal penalty in the event of failure to comply with the information obligation laid down in Article 18 of the DSA, and on this occasion, to clarify in French law the categories of criminal offences to be considered as "threatening the life or safety of persons" (public incitement to genocide, harassment, procurement, sexual abuse of minors, glorification of terrorism, incitement to armed assembly, glorification of crimes against humanity, incitement to hatred, etc.), cannot be interpreted as creating additional or lighter obligations than those of the DSA.
- Following the examination of the text by the French National Assembly last October, the provision was the subject of some rationalisation (deletion of the reference to 13 articles of the Criminal Code);
- The explicit transposition into this Article of the obligation to inform law enforcement authorities as laid down in Article 18 of the DSA is part of the constitutional requirement of legibility of the law, and does not alter the principle of direct

applicability of the Regulation.

◊ On Article 22, in the second subparagraph of Article 5(VIII):

Reminder of the provision in the July 2023 version:
(VIII) "When they receive a report from a minor under 15 years of age concerning illegal content, or contrary to their general terms and conditions of use, which mentions the same minor under 15 years of age registered on a platform under the conditions laid down in Article 6-7 of this Law, online platforms shall disable the aforementioned content without delay and until the completion of the procedure for processing the alert, regardless of its nature. The minor or his representatives shall, by any means, furnish proof that the person mentioned is under 15 years of age.".

The Commission observes that this provision seeks to reproduce the enacting terms of Article 16 of the DSA.
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, careful, non-arbitrary and objective manner.”

The French authorities shall inform the Commission that the provision in the second subparagraph of Article 22, Article 5(VIII), in the version of the text dated July 2023, has been deleted in the version dated October 2023 as voted by the French National Assembly.

1.2.2. On the protection of minors

◊ On the relationship between the DSA and the AVMSD

In the above-mentioned opinion, the Commission points out that the protection of minors is an integral part of the policy objectives pursued by the DSA. The French authorities recognise and welcome the Commission’s ambition to improve the protection of minors online. They also point out that the latter is linked to the AVMSD.

Article 2 of the DSA Regulation explicitly states that "this Regulation shall be without prejudice to the rules laid down by other Union legal acts governing other aspects of the provision of intermediary services in the internal market or specifying and supplementing this Regulation, in particular the following acts: Directive 2010/13/EU". Furthermore, recital 10 states that it applies: "without prejudice to other acts of Union law governing the provision of information society services in general, governing other aspects of the provision of intermediary services in the internal market or specifying and supplementing the harmonised rules laid down in this Regulation, such as Directive 2010/13/EU of the European Parliament and of the Council (7), including the provisions of that Directive on video-sharing platforms".

The European co-legislators have therefore explicitly provided that the DSA Regulation does not affect the rules laid down by the Audiovisual Media Services Directive (“AVMSD”) as revised in 2018.

Article 28b (1.a) of the AVMSD calls on Member States to ensure that “providers of video-sharing platforms under their jurisdiction take appropriate measures to protect minors from programmes, videos created by the user that may adversely affect their physical, mental or moral development”. Article 28b (3.f) states: " For the purposes of the protection of minors provided for in paragraph 1(a), the most harmful content shall be subject to the strictest access control measures. These measures shall consist of […] setting up and using systems to verify the age of users of video-

sharing platforms with regard to content likely to harm the physical, mental or moral development of minors."

The French authorities therefore consider that the DSA Regulation does not affect the rules laid down in the AVMSD and that, under the terms of this Directive, a Member State is entitled to adopt measures aimed at video-sharing platforms and requiring, in particular, the setting up of systems for verifying the age of users.

Article 60 of Law No 86-1067 of 30 September 1986 on the Freedom of Communication already empowers the French Media Regulatory Authority (ARCOM) to ensure that video-sharing platforms comply with the obligations laid down in Article 28b of the AVMSD.

In this respect, Article 1 of the draft law, which provides for the application by video-sharing platforms of an age verification system under the control of ARCOM, appears to be a complementary measure to the system of national rules transposing the AVMSD.
The obligation will apply both to video-sharing platforms and to sites with editorial responsibility for their content (which are outside the scope of the DSA).

◊ On the creation of the European digital identity portfolio

That said, the French authorities understand the Commission’s concern and its commitment to the convergence of a European approach to age verification mechanisms applicable to information society services. While there is no harmonised European standard in this area at this stage, the French authorities agree with the Commission’s desire to rapidly engage in close cooperation with the Member States with a view to building such a solution at European level.

The French authorities therefore welcome the recent political agreement reached on the draft European Regulation on the European framework for a digital identity. They are actively involved in European technical work to develop harmonised prototypes for a European digital identity portfolio. Four pilot projects are currently under way, covering a range of uses (public services, banks, diplomas, travel documents, etc.). These prototypes of the European digital identity portfolio will provide the building blocks and technological frameworks related to age verification solutions.

The scheme provided for in the draft law is scrupulously in line with this pan-European approach.

The French authorities concerned (in particular ARCOM, CNIL, PEREN) intend, throughout this development period, to use their expertise and their work at European level to contribute effectively to European action, as the Commission invites them to do in the above-mentioned opinion.

However, the French authorities note that the timetable for the development of these prototypes is still a long way off: the current development programming means the first results cannot be expected before the end of 2025. They are pleased that the Commission, in these circumstances, has expressed its openness to the French age verification system, in the absence of a solution at European level, in the short-term.

With regard to the future, the French authorities undertake to revise, all or part of their internal legal framework when a sufficiently precise legal basis at EU level will make it possible to impose an effective age verification mechanism on all or some of the platforms concerned by access to pornographic content.

The possibility of adopting a draft sunset clause is under consideration, but such a clause is difficult to draft in domestic law until a certain date of application of such a measure is known, nor the scope of the services concerned specifically determined.

In the same spirit, and in accordance with the Commission’s wishes, it is planned that the online age verification framework, as currently under construction at ARCOM, will be notified to its services.

1.2.3 On the monitoring and enforcement system

In the aforementioned opinion, the Commission notes that the notified draft entrusts supervision and control of certain provisions solely to the French authorities, including those concerning service providers established in another Member State and very large online platforms.

Firstly, the French authorities refer on this point to the initial brief reply mentioned in point 1.1 above.

Secondly, the French authorities inform the European Commission that they have taken note of the decision of the Court of Justice of the European Union of 9 November 2023 clarifying the interpretation of Article 3.4 of the e-commerce directive.

The French authorities are carefully examining the lessons to be drawn from this case-law with regard to the main provisions laid down in the draft law aimed at securing and regulating the digital space.

The French authorities therefore intend to make the necessary adjustments to those provisions of the draft law that fall within the scope of the Directive on electronic commerce.

Thus, for a limited number of provisions of the draft law (in particular Articles 1 and 7, and other Articles still to be specified), it is envisaged to introduce differentiated rules of application between the services concerned established in France (and outside the EU) and those established in the other Member States of the European Union:
- The obligations laid down in these Articles would apply only to players established in France or outside the European Union;

- With regard to service providers established in other EU Member States, the obligations laid down in these provisions and the corresponding control and sanction mechanisms may, where the conditions referred to in Article 3(4)(a) of Directive 2000/31/EC are met, be extended to individually targeted service providers, after having complied with the procedure laid down in 4(b) or, where applicable, in Article 3(5).

1.2.4 On the absence of a general monitoring obligation

In the aforementioned opinion, the Commission reiterated the prohibition laid down in Article 8 of the DSA, which prohibits any obligation of generalised monitoring of content. It notes that the rules laid down in Articles 4 A and Article 5 respectively (July 2023 version) could undermine this principle.

The French authorities provide the following brief reply:

- Article 4 A (July 2023 version) was amended by the National Assembly in October 2023 and no longer applies to publishers of online public communication services. The new version targets producers of pornographic content within the meaning of Article L.132-23 of the Intellectual Property Code, which are not information society services.

- With regard to the obligation laid down in Article 5: the provision provides that the platform services referred to “must implement” “measures enabling the blocking of other access accounts to their services which may be held by the convicted person”.

It should be noted that Article 5 explicitly provides that the decision to convict the user is served by the judge on the platforms concerned.

In the present case, the operative part of Article 5 is based on a judicial injunction targeting an individual by name. In view of this strictly nominal dimension targeting a single individual, it does not appear to the French authorities that the question of the prevention of any obligation of “general monitoring” of content is effective.

Article 6 of the DSA also explicitly provides for the possibility for a judicial or administrative authority, in accordance with the legal system of the Member State, “to require the service provider to terminate or prevent an infringement”.

Article 5 also provides that the online service providers concerned "shall implement measures to prevent the creation of new accounts by the same person": this obligation must be regarded as a mere best efforts obligation (and not to achieve a result) and is therefore in practice a mere option; it is not subject to any penalty.

In the light of the foregoing, and in particular of the judicial guarantees provided for, it does not appear that the French legislature intended to exceed the limits laid down by the rule prohibiting a general obligation to monitor content as laid down by the DSA. By way of reference, Article 23 of the DSA, which also introduces measures to suspend accounts, confers on platforms, outside any legal proceedings, the power to decide on a suspension of service, without derogating from the prohibition of a general obligation to monitor content.

However, in order to address the Commission’s concern, the French authorities are open to modifying the terms of this provision in the next stages of the parliamentary debate.

2. Brief reply to comments

In the above-mentioned letter, the Commission notes that several provisions of the notified draft empower some French authorities to issue injunctions to block access to services that reproduce manifestly illegal content in whole or in part. In this respect, the Commission recalls the terms of Article 9 of the DSA Regulation which require, as regards the intermediary service provider’s obligation to inform the authority of any follow-up action taken to the injunction, compliance with minimum conditions in the content of these injunctions. 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.

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The French authorities are open to full cooperation and close discussion with the Commission services with a view to an effective outcome, reconciling their strategic priorities in full respect of EU law.

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European Commission
Contact point Directive (EU) 2015/1535
email: grow-dir2015-1535-central@ec.europa.eu