Message 791

Communication from the Commission - TRIS/(2024) 0683

Directive (EU) 2015/1535

Notification: 2023/0461/FR

Reaction of the Commission to the response of a Member State/Country notifying a draft regarding comments (5.2)/request for supplementary information (INFOSUP)

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1. MSG 791 IND 2023 0461 FR EN 27-11-2023 13-03-2024 COM REACTION COM 27-11-2023

2. Commission

3. DG GROW/E/3 - N105 04/63

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

5.

6. Within the framework of the notification procedure laid down in Directive (EU) 2015/1535, the French authorities notified to the Commission on 24 July 2023 the draft 'Legislative provisions to secure and regulate the digital space' (hereinafter, the 'notified draft'). On 26 October 2023, the Commission issued a detailed opinion with comments to which the French authorities replied on 22 December 2023.

Pursuant to Article 6 (2) of Directive (EU) 2015/1535, the Member State concerned should report to the Commission on the action it proposes to take on such detailed opinions. The Commission should comment on this reaction.

The Commission services would like to thank the French authorities for their reply and take note of the additional explanations and welcomes the proposed amendments to bring their national draft legislation in compliance with EU law. However, the Commission services would like to make the following remarks.

Articles 1, 2, 4, 6, 7, 8 and 10 of the notified draft

As concluded in the detailed opinion, Articles 1, 2, 4, 6, 7, 8 and 10 of the notified draft would apply, without distinction, to providers of "online communication services" established in France and other Member States, which constitutes an undue restriction of Article 3 of the e-Commerce Directive (in particular in view of the recent CJEU case law C-376/22).

The Commission services takes note of the reply received from the French authorities on this point. According to such reply, the French authorities commit to apply those provisions only as regards service providers established in France and third countries, and to only extend their scope of application to service providers established in other Member States on the basis of the derogation mechanism pursuant to Article 3(4) and (5) of the e-Commerce Directive.

The Commission services would like to recall that to ensure legal certainty, this adjustment would need to be adequately reflected in the draft law, as in its current form it applies to any service providers available in France regardless of their establishment. The Commission services further recall that the extension of the above provisions as regards providers established in other Member States would need to fulfil the requirements set out in Article 3(4) and, where appropriate (5), of the e-Commerce Directive.

Article 22(5)(III), (V) and (VIII) of the notified draft

In the detailed opinion, the Commission noted that some of the provisions of the notified draft, in particular Article 22(5)(III), (V) and (VIII), fall within the scope of the DSA, in particular of Articles 6, 16 and 18, insofar as these provisions were found to reproduce or correspond to the same obligations covered by the DSA. These provisions are therefore incompatible with the principle of direct applicability of EU Regulations and the maximum harmonisation effect of the DSA.

The French authorities argue that the reproduction of Articles 16 and 18 of the DSA into national law is necessary in order to improve the readability and the accessibility of the basic Law of 21 June 2004 on confidence in the digital economy (LCEN), that is being amended by the notified draft, as well to avoid elliptical references to it. Furthermore, the French authorities add that the objective of readability of the law, in addition to being considered a constitutional requirement, does not affect the direct applicability of the DSA.

While the applicability of the DSA does not need of national implementing measures, the Commission services nevertheless take note of the objective of the French authorities to improve the readability of the national law. In this regard, and to prevent that the legal uncertainty resulting from reproducing provisions of a Regulation, it is suggested that the notified draft replaces the duplication with a direct reference to Articles 6, 16 and 18 of the DSA. The Commission services also remind the French authorities that Article 89 of the DSA requires that the provisions in the LCEN transposing Articles 12 to 15 of the e-Commerce Directive need to be repealed and replaced with a reference to the DSA by 17th February 2024. The Commission services remain available to provide technical advice to the French authorities concerning their legislative action in this regard.

The Commission services welcome the rationalisation of Article 22(5)(V), i.e., the deletion of some references to the criminal offences under the French Criminal Code, and the deletion of second sentence of Article 22(5)(VIII) of the notified draft.

Provisions of the notified draft aimed at the protection of minors

Furthermore, in its detailed opinion, the Commission recalled that common objectives of the notified draft and the DSA as regards the protection of minors online. The Commission also informed on the on-going cooperation exercise with Member States in the specific area of age verification systems for the implementation of the fully harmonized rules of the DSA. This cooperation is on-going and the Commission services welcome in particular the leading role of France.

In their reply, the French authorities argue that, in light of Article 2, supported by its recital 10, the DSA does not affect the rules laid down in Directive (EU) 2018/1808 (the Audiovisual Media Services Directive, AVMSD). The French authorities indicate that Article 1 of the notified draft, is a complementary measure transposing the AVMSD.

The Commission has already expressed its views on the relationship between the DSA and the AVMSD (including in the context of the TRIS notification 2023/554/IT: “Therefore, due to the full harmonization effect of the DSA concerning the due diligence obligations of online platforms, and in order to preserve the integrity of the Single Market for digital services, Member States are prevented from adopting national measures that would overlap or contradict the fully harmonizing framework of the DSA. Regarding the legality or harmfulness of certain content disseminated to users via online platforms, Member States may adopt legislative provisions determining what type of content is illegal or harmful, including in the implementation of Article 28b AVMSD, provided those provisions comply with Union law”). Furthermore, the Commission services would like to note that the transposition of the AVMSD, which was due by 19 September 2020, is not among the objectives of the draft law. Furthermore, it appears that the provisions of the notified draft law are not limited to audiovisual content provided by providers of video-sharing platforms established in France, as mandated by scope of the AVMSD.

Considering the above, the assessment in the detailed opinion regarding the fact that these provisions fall within the

regulatory field which is fully harmonized by the DSA remains pertinent. In this regard, the Commission services reiterate that all Member States are encouraged to participate in the on-going discussions at EU level, in view that parallel systems at national level would undermine the harmonizing effect of the DSA, create legal uncertainty and would not be effective in protecting minors across the EU.

Articles 4A and 5 of the notified draft

Concerning the obligations set in particular in Article 4A and 5 of the notified draft, in its detailed opinion, the Commission had pointed out that it should be ensured that the interpretation and practical application 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.

In their reply, the French authorities inform that Article 4A was amended and targets only producers of pornographic content, which are not intermediary service providers. The Commission services welcome this clarification.

Concerning the obligation for online service providers to implement measures to prevent the creation of new accounts by a convicted person, under Article 5 of the notified draft, the French authorities clarify that it must be regarded as an obligation of means and not of results, and is in practice a mere option, not subject to any penalty. The Commission services take note of the reply provided by the French authorities, however, would welcome further clarifications in the letter of the law to avoid legal uncertainty, and to inform the Commission services about the envisaged practical implementation of Article 5 of the notified draft.

The Commission services invite the French authorities to take the above observations into account while they remain open to a close cooperation and discussion with the French authorities on possible solutions to the identified issues, in full respect of Union law. This is without prejudice to the possibility for the Commission to commence proceedings pursuant to Article 258 TFEU.

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