Message 791

Communication from the Commission - TRIS/(2024) 3018

Directive (EU) 2015/1535

Notification: 2024/0188/DE

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 2024 0188 DE EN 05-08-2024 11-11-2024 COM REACTION COM 05-08-2024

2. Commission

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

4. 2024/0188/DE - SERV30 - Media

5.

6. Within the framework of the notification procedure laid down in Directive (EU) 2015/1535, the German authorities notified to the Commission on 3 April 2024 the draft 'Staatsvertrag über den Schutz der Menschenwürde und den Jugendmedienschutz in Rundfunk und Telemedien (Jugendmedienschutz-Staatsvertrag – JMStV)' (hereinafter, the 'notified draft'). On 4 July 2024, the Commission issued a detailed opinion with comments to which the German authorities replied on 5 August.
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 German authorities for their reply and take note of the additional explanations regarding the national procedures. However, the Commission services would like to make the following remarks.
E-Commerce Directive
The Commission services take note of the proposed amendments to the Section 2(1) of the JMStV, which introduce a reference to the procedure laid down in Article 3(4) of Directive 2000/31/EC (the e-Commerce Directive) in order to derogate from the principle of the country of origin set out in Articles 3(1) and (2). The Commission services note that such procedure would be triggered for the enforcement actions on the basis of the notified draft to be taken by the competent national authorities against a service provider established outside of Germany.
However, the Commission services would like to point out that a mere reference to the derogation mechanism is not sufficient to address the concerns set out in the detailed opinion. In particular, as it stands, the notified draft constitutes a general and abstract measure which applies indistinctively to providers of telemedia or operating systems established in Germany and other Member States, while it subjects the enforcement of the applicable measures to the procedure laid down in Article 3(4) of the e-Commerce Directive and conditional to overriding reasons of general interest.
In this regard, as pointed out in the detailed opinion, the CJEU has recently clarified that general and abstract rules that apply indistinctively to providers established in other Member States, such as the notified draft, do not fall within the scope of Article 3(4) of the e-Commerce Directive and are therefore not able to derogate from the country-of-origin principle. The CJEU has also clarified that, in those cases, verification that those measures are necessary to satisfy overriding reasons in the general interest is not required.
The Commission services thus consider that the grievances set out in the detailed opinion regarding the e-Commerce Directive have not been addressed satisfactorily.
Digital Services Act

The Commission services take note of the German authorities reply to the grievances set in the detailed opinion regarding the incompatibility of the notified draft with Regulation (EU) 2022/2065 (the Digital Services Act or DSA).
In this regard, the Commission services welcome the proposed amendment from the German authorities to exclude from the scope of the notified draft online intermediary service providers within the meaning of Article 3(g) of the DSA, insofar as the DSA does apply.
The German authorities furthermore note in their replies that the provisions of the notified draft do not create general monitoring for providers of intermediary services insofar as they are excluded from the scope of application under Section 2(2) of the notified draft in conjunction with Section 7 of the Telemedia Act.
However, the Commission services recall that, as stated in the detailed opinion, the full harmonization effect of the DSA prevents Member States from adopting or maintaining national measures that overlap or supplement the provisions of the DSA. Therefore, the Commission services note that the notified draft may not supplement the provisions of the DSA in the fully harmonized areas, regardless of whether these are perceived as general, including the protection of minors from harmful content online.
In their response to the detailed opinion, the German authorities provide further information and uphold their arguments as concerns the further grievances based on the DSA.
Following the exclusion of intermediary service providers under Article 3(g) of the DSA from the scope of the notified draft, and the fully harmonization effect of the DSA, the Commission services consider those further arguments unnecessary.
However, for completeness, the Commission services would like to note the following.
The Commission services do not question the fact that Member States may be required, in accordance with their national laws, to entrust certain competences to the relevant national authorities for the fulfilment of their supervisory and enforcement tasks under the DSA. However, those national measures shall not overlap or supplement the provisions of the DSA in the fully harmonized areas, which are of direct effect and applicability.
Despite the exclusion from the notified draft's scope of intermediary services, the Commission services do not agree with the interpretation of the German authorities that Article 28 DSA is a general clause on the protection underage media users. The Commission services reiterate that the DSA has fully harmonised the due diligence obligations and responsibilities of online intermediary services, including video-sharing platforms, under Chapter III. As a result, Member States are prevented from adopting national measures, that would overlap or contradict the fully harmonising framework of the DSA. The Commission services recall that the protection of minors on online intermediary services was widely discussed in the legislative process for the adoption of the DSA, and Article 28 DSA is the direct result of the EU co-legislation procedure. Article 28 of the DSA empowers the Commission to adopt guidelines concerning its application. The Commission services have started the preparatory work for the adoption of those guidelines (1). Introducing or maintaining overlapping national measures in this field would also run counter to the objective of the EU co-legislators of having comprehensive EU wide guidelines on Article 28 of the DSA.
Concerning the interplay between the DSA and the AVMSD, as recalled by the German authorities in their reply, Recital 10 of the DSA states that "This Regulation should be without prejudice to other acts of Union law regulating the provision of information society services in general, regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing the harmonised rules set out in this Regulation […]". The Commission would also like to reiterate its views on the relationship between the DSA and the AVMSD as expressed in the underlying detailed opinion as well as in the context of the TRIS notification 2023/554/IT and 2023/462/FR.
The Commission services moreover reiterate their views as concerns the monitoring and enforcement system, while they acknowledge that the proposed amendments to the notified draft exclude form its scope intermediary service providers under Article 3(g) of the DSA. The Commission services take note of the explanations provided concerning the interplay between the notified draft and orders pursuant to Article 9 of the DSA. In particular, the Commission services take note of the description of the intended interplay between the need for national provisions on the illegality of content, such as the notified draft, and the possibility of cross-border injunction proceedings by the DSA to combat illegal content. However, the Commission would like to note that the DSA does not regulate the territorial scope or cross-border enforcement of such orders.
The Commission's services remain open to a close cooperation and discussion on possible solutions to the identified issues, in full respect of Union law.

(1) Commission launches call for evidence for guidelines on protection of minors online under the Digital Services Act |

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