



Council of the European Union
General Secretariat

Brussels, 01 February 2021

**Interinstitutional files:
2020/0361 (COD)**

WK 1436/2021 INIT

LIMITE

**COMPET
MI
JAI
TELECOM**

**CT
PI
AUDIO
CONSOM
CODEC**

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

NOTE

From: IT Delegation
To: Working Party on Competitiveness and Growth (Internal Market - Attachés)
Working Party on Competitiveness and Growth (Internal Market)

Subject: Questions from IT delegation: Digital Services Act - Chapters I and II

Italy

Questions and comments regarding the Digital Services Act

A) General questions:

1- The proposed Regulation introduces a "horizontal" regulatory framework, valid for all categories of illegal content, products, services and activities conveyed through online intermediation services. Article 1, paragraph 5, clarifies that the provisions of the Regulation are not intended to replace the specific sectoral provisions, but rather aim to provide a general framework for the application of the specific measures adopted in recent years (including the AVMS Directive and the New Copyright Directive). The consistency between the sectorial Directives and the DSA, however, is not perfect: for example:

- the rules on VSPs (articles 28 and 28b) of the AVMS Directive are not equipped with an effective sanctioning system for any violation of the rules that oblige VSPs to implement adequate measures to protect minors or to counter hate speech. Can we therefore imagine that the Digital Service Coordinator, in this case, could use the sanctioning protection of the DSA, much more incisive? Or will it be necessary to wait for a revision of the AVMS Directive?
- Can article 11 (the provision regarding the intermediary providers not established in the EU) apply also to the video and content sharing platforms referred to in the AVMS and Copyright Directives?

2- enforcement powers of NRAs that are not DSCs: in case an NRA has already enforcement powers towards online intermediaries, what does it happen if the role of DSC is played by another NRA from the same Member State? Will it still be able to use the enforcement powers exerted so far?

3- compatibility of articles 59 and 42: since the sanctioning procedure regarding LOPs is specifically described in Section 3 of Chapter IV and provides for the involvement of the EU Commission, it must be considered that Article 42, which entrusts sanctioning powers indiscriminately with respect to all services online intermediation to the DSCs of the country of establishment, does not also concern LOPs. Is that interpretation correct?

4- legal framework applicable to the Commission's investigation: it is not clear whether, in order to establish the unlawfulness of the conduct of a LOP (Section 3 of Chapter IV), the Commission should refer to the legal framework of the country of establishment or should base its action exclusively on the rules of the Regulation.

5- In respect of SWD(2020) 348 final document part 1 - the glossary - very large online platforms means *"online platforms with a significant societal and economic impact by covering, among their monthly users, at least 10% of the EU population (approximately 45 million users)."*

It would be useful to receive more detail as regards the percentage as criterion used to identify "very large online platforms" and why it has been decided that 10% as minimum value.

B) Specific questions

Whereas:

1. Please clarify the term *immaterial* in the context of Whereas 12) “... *In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is consistent with Union law and what the precise nature or subject matter is of the law in question.*”

Chapter I - General provisions

2. In respect of Art.2(d), what is considered as a “significant number of users”? How and by which means is it possible to identify whether the activities target one or more Member States?
3. Do reverse proxy providers fall within the definition of caching or mere conduit (Art 1, co. “f”)?
4. Are online platforms a subgroup of hosting provider? Do hosting obligations also apply to them?

Chapter II - Liability of providers of intermediary services

1. Could you explain the liability regime and the meaning of “under the authority or the control of the provider” stated in art. 5, par. 2?
2. Articles 8 and 9 provide that all providers of intermediary services shall, upon the receipt of an order to act against a specific item of illegal content or to provide a specific item of information, issued by the relevant national judicial or administrative authorities, [...] inform the authority issuing the order of the effect given to the orders, [...]. Our interpretation is that these articles also apply to orders issued by the National Regulatory Authorities. Is that correct?
3. The same articles 8 and 9, in their comma 2, letter (c), provide that “orders issued by the relevant national judicial or administrative authorities shall be drafted in the language declared by the provider”: could such a provision eventually cause some difficulties?
4. Why is the mere conduit no longer obliged, upon obtaining such knowledge or awareness, to act expeditiously to remove or to disable access to the illegal content upon obtaining such knowledge or awareness? (art. 3)

Chapter III - Due diligence obligations for a transparent and safe online environment

1. Clarification on the language to use for article 11 and 14. In particular, the provisions of Article 10 on the “points of contact” shall apply to Article 11?
2. Article 14 obliges the providers to put in place mechanisms to allow third parties to notify the presence of alleged illegal content. It would be useful to specify further what are the action mechanisms that providers shall put in place.
3. Article 14 (c) “*the name and an electronic mail address of the individual or entity submitting the notice, except in the case of information considered to involve one of the*

offences referred to in Articles 3 to 7 of Directive 2011/93/EU;”. Could you confirm that the aim is to ensure anonymity in case of submission of notice related to offences referred to in Articles 3 to 7 of Directive 2011/93/EU?

4. Could the Digital Service Coordinator act as out-of-court dispute resolution body referred to in Article 18, as well as the organisation that must perform the independent audit referred to in Article 28?
5. Paragraph 5 of article 17 states that the decisions are not solely taken on the basis of automated means. What are the criteria for accepting the complaint referred to in art. 17?

Chapter IV - Implementation, cooperation, sanctions and enforcement

1. Is it possible to better clarify the respective roles/levels of intervention of the administrative authority (mentioned in articles 3, 4 and 5) and the Digital Service Coordinator (mentioned in article 38)?
2. Article 46 provides that “Digital Services Coordinators may participate in joint investigations, [...] concerning providers of intermediary services operating in several Member States. Which legal framework (of which Member State) will be applied, then?