Council of the European Union
General Secretariat

Brussels, 01 February 2021

Interinstitutional files:
2020/0361 (COD)

WK 1448/2021 INIT

LIMITE

COMPET	**CT**
MI	**PI**
JAI	**AUDIO**
TELECOM	**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:	MT Delegation
To:	Working Party on Competitiveness and Growth (Internal Market - Attachés) Working Party on Competitiveness and Growth (Internal Market)
Subject:	Questions from MT delegation: Digital Services Act - Chapters I and II

Malta's Questions in relation to Chapters I and II of the Draft Digital Services Act (COM (2020) 825)

Chapter I – General Provisions

Question 1

Malta seeks clarification on whether the exclusions from the scope of Directive 2000/31/EC (the "e-commerce directive"), in terms of Recitals 12-16 and Article 1 paragraph 5 (quoted below) of the e-commerce directive, are still equally excluded from the scope of the DSA.

For ease of reference, Article 1 paragraph 5 of the E-commerce Directive reads:

"5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

— the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

— the representation of a client and defence of his interests before the courts,

— gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions."

Question 2

Recital 14 states that Interpersonal Communications Services as defined under Directive (EU) 2018/1972 (European Electronic Communications Code) fall outside the scope of the Regulation. However, this seems not to have been replicated within the articles of the Regulation. Could the European Commission clarify?

Question 3

In Article 1(5), why is Directive (EU) 2018/1972 (European Electronic Communications Code) not listed amongst the legislation that the Digital Services Act is without prejudice to? In relation to the previous question, Malta recognises that the recitals state that Interpersonal Communications Services fall outside of the Act's scope, but it might nonetheless be beneficial to state that the Act is without prejudice to the Code as well, given that the subject matter covered – in particular responsibilities of online intermediaries – might overlap with certain functions undertaken by particular Electronic Communications Providers (such as Internet Access Service Providers).

Question 4

In Article 2(d) related to the definition of 'to offer services in the Union', the term 'a significant number of users in one or more Member States' is subjective. Does this refer to a specific number or percentage of the population? What are the definitive parameters that should be used to objectively decide what 'substantial connection to the Union' is?

Chapter II - Liability of providers of intermediary services

Question 1

A. During the meeting of the working party of 15 January the Commission clarified that if a service provider is established in member state A and is providing its service cross-border by means of an intermediary service provider (ISP) to member state B (and the service consists of providing content that is not subject to an EU harmonised regulatory regime), even though the content of this service is legal and compliant with the laws of member state A, but is deemed (by member state B) to be in violation of member state B's national laws, Member state B, in terms of Article 8 of the DSA, can issue an order to act against the specific item that is illegal at the point of consumption (but not at the point of origin).

If our understanding of the Commission's clarification is correct, what options of redress will be provided to the service provider in Member State A, in terms of Article 8 paragraph (2)(a) of the proposed DSA text (quoted below)? Will redress only be allowed to be sought in the country of consumption or also in the country of origin?

For ease of reference, Article 8 paragraph (2)(a) of the proposed DSA text states:

"2. Member States shall ensure that the orders referred to in paragraph 1 meet the following conditions:

(a) the order contains the following elements:

- *a statement of reasons explaining why the information is illegal content, by reference to the specific provision of Union or national law infringed;*
- *one or more exact uniform resource locators and, where necessary, additional information enabling the identification of the illegal content concerned;*
- ***information about redress available to the provider of the service and to the recipient of the service who provided the content;"***

  (emphasis added)

Question 2

In the circumstance defined in question 1 above, what is expected of an ISP which is obliged to take action against the content provided from within Member State A in this scenario of a conflict of laws?

Question 3

What happens in a scenario where the national law of a Member State which is used as the legal basis to determine that content is illegal, is itself in violation of EU law?

Question 4

- In Article 5(1)(b) relating to Hosting, the statement "acts expeditiously" is open to interpretation. Why did the European Commission not qualify the actual time or time-range in this regard? Will parameters be further defined to precisely determine how fast a hosting service provider should act to remain within the parameters of acting "expeditiously" vis-à-vis the illegal content?

Question 5

- In Articles 8(2)(c) and 9(2)(c), why should orders be written in the "language declared by the provider", instead of being acceptable if writing in any one of the official languages of the EU? In the interest of expeditious action by Member States affected by such illegal content, it would be faster for the MS to simply write to the provider in their national languages. It should be up to the provider to have access to translation services to comply with the Order if they already operate across multiple jurisdictions.