STEERING BRIEF – MEETING BETWEEN ROBERTO VIOLA AND [REDACTED], AMAZON WEB SERVICES AT MWC 2019

Context of the meeting:
This meeting was requested by Amazon Web Services (AWS), to discuss the evolution of the European digital economy, in particular cloud related policies and intermediary liabilities for internet service providers.
The meeting is a follow-up of the meeting that took place on 28 November 2018 in Beaulieu. At that meeting it was agreed to sustain a dialogue between CNECT and AWS.

AWS is the largest cloud service provider globally. Together with Microsoft, they own more than half of the market for Infrastructure-as-a-Service cloud services. Gartner predicts that this will become a joint market dominance of 90% in 2020.

AWS’s positions:
Cloud related policies

- AWS is a member of SWIPO, the Cloud Stakeholder Working Group on Data Porting/Switching Providers. AWS is a proponent of the initiative and drives the work foreward.
  - This working group (together with the CSPCERT WG on cloud security certification) will meet again in Madrid the same week as MWC 2019: 26-27 February 2019.

- 4(2)(1)

- AWS is interested in the developments on the supervision of cloud use by the financial sector. 4(2)(1)

The Regulation on terrorist content online

- 4(2)(1)

The P2B Regulation

- In February 2018, at a meeting with DG CNECT, an Amazon representative has expressed the view that the proposal should not be too over prescriptive in order not to stifle innovation. He believed that Amazon was already in line with the measures proposed.
• Amazon has experience in terms of co- or self-regulation, i.e. codes of conduct: counterfeit goods, pro-safe network to assess the risk (product safety), with DIGIT data project.

• Given the service-based scope of the P2B initiative Amazon falls under the scope of the P2B initiative for some of its activities (e.g. Amazon marketplace, Amazon Appstore). Other services are not captured, e.g. Amazon Pay payment platform (which is a supplementary service and which cannot be used to initiate transactions, or to find products and services) or Amazon retail (since it is a non-platform business not fulfilling an intermediation function)

Suggested line to take (aligned with most recent LTT)

Cloud related policies

• The drafting of the codes of conduct on cloud switching and data portability, (SWIPO) for IaaS and for the SaaS are progressing well. These codes have to be completed by mid-2020. The members of SWIPO are entering the final stages of negotiating a governance approach for this working group, and both codes have been subject to public consultation.

• New forms of cloud computing, such as fog and edge computing, are energy intensive, making up already 40-80% of all energy used by datacenters. AWS is using these new forms of cloud in order to better provide services to IoT providers (with products like ‘AWS Greengrass’ which makes it possible to run AWS services locally).

• On the Supervision of cloud use by the financial sector: EBA is an independent authority with the mandate to decide on the right supervisory framework. To add legal certainty for financial institutions wishing to use the cloud, the Commission has committed to actions in the Fintech Action Plan, notably the development of model contract clauses. The Commission is also in dialogue with many financial stakeholders (i.a. through the EBF cloud banking forum) to see how the legal certainty can further be improved.

Proposal for terrorist content

• Scope: the definition of HSP includes three cumulative conditions:
  o The service stores information;
  o The information is provided and stored at the request of the content provider;
  o The information stored is made available to third parties.

• Recital 10 of the proposal clarifies that cloud services are in the scope of the Regulation to the extent they make the information available to third parties and store content at the request of the content provider.

4(3)(1)

The Council’s general approach further clarifies this intent, 4(3)(1)

• The Amazon marketplace (a service provided by Amazon parent company) would be in the scope of the Regulation, as it is hosting third-party sellers’ offers, hence at the request of the content provider, and such content is publicly available.
Platform-to-business (P2B) Regulation

On 13 February, the European Parliament, the Council of the European Union and the European Commission reached a political deal on the P2B Regulation and its adoption is expected still in this political mandate.

The outcome of the negotiations preserves a light touch, two-step approach and strikes the right balance between stimulating innovation and creating fairer and more transparent trading environment online, including offering new possibilities for resolving disputes and complaints.

Instead of a blacklist of unfair commercial practices, as proposed by the European Parliament, the co-legislators agreed on a new article targeting specific banned practices (i.e. retroactive contract clauses, increased transparency on the right to terminate a contract and on access to data after the contract expiry) in order to ensure that contractual relations are conducted in good faith and fair dealing.

As regards provisions on ranking, an agreement was reached to set out the “main” parameters determining ranking (rather than "all", as initially proposed by EP) with a limited set of additional transparency requirements, including on de-ranking in cases of third party notifications.

The new provisions on data access also include rules on data sharing with third parties, with additional transparency provision in the contract terms including information on possible opt-outs.

The final text also includes additional provision on public enforcement, with flexibility for Member States on how to ensure it in practice.

The new rules will apply 12 months after its adoption and publication, and will be subject to review within 18 months thereafter, in order to ensure that they keep pace with the rapidly developing market. The EU has also set up a dedicated Online Platform Observatory to monitor the evolution of the market and the effective implementation of the rules.

The Observatory on the Online Platform Economy, created by a Decision of 26 April 2018, as part of the P2B initiative, plays an important role in this context, as it will monitor the opportunities and challenges of the online platform economy.

The knowledge gathered by the Observatory will support the review of the proposed rules indicating whether there is a need for more far-reaching regulation at EU level. In this way, the work of the Observatory will also support future rule making.

Background notes

State of play on the Proposal on terrorist content online

- **The Council** agreed on a General Approach on the 6th December.
- The text does not modify the definition of ‘hosting service provider’ in Article 1, which includes three simultaneous conditions: (1) service consists of storage of information, (2) the content is stored at the request of the content provider, and (3) the information is made available to third parties.

- **The Council** has further explained this logic through amended language in Recital 10 of the proposal: ‘the information has to be stored at the request of the content provider; only those services for which the content provider is the direct recipient are
in scope. Finally, the information stored is made available to third parties, understood as any third user who is not the content provider.’

- In the Parliament, LIBE is the lead committee, and CULT has been given Rule 54 status. IMCO has also published its draft opinion. The Parliament’s vote is expected for April, if LIBE votes on its report in late March, as currently planned.
- The draft opinions from IMCO and CULT, as well as the rapporteur’s draft report (Daniel Dalton, LIBE) all include specific language to further clarify the focus on publicly available information rather than sharing with third parties.
- The Fundamental Rights Agency has released on 12th February a report as input the EP. The report is highly critical and sanctions on a number of important points the Commission’s proposal for raising substantial threats to the respect of fundamental rights, including freedom of expression and information, right to privacy, right to conduct a business, right to judicial redress. On the definition of hosting service providers, FRA proposes further clarifications to specify under (3) above that the information should be shared with ‘the public’, and not ‘with third parties’.

P2B
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Free flow of Non-personal Data
- The Regulation entered into force on 18 December 2018 and will start to apply on 28 May 2019. The deadline for Member States to repeal data localisation requirements is 30 May 2021.

Contacts:
- [Name], tel. [Number] (Cloud-related policies/CdF)
- [Name], tel. [Number] (Terrorist Content Online)
- [Name], tel. [Number] (P2B)