

## Message 304

Communication from the Commission - TRIS/(2021) 01633  
Directive (EU) 2015/1535  
Translation of the message 303  
Notification: 2021/0045/D

Observations from the Commission (article 5, paragraph 2, of Directive (EU) 2015/1535). These observations do not have the effect of extending the standstill period.

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1. MSG 304 IND 2021 0045 D EN 29-04-2021 29-04-2021 COM 5.2 29-04-2021

2. Commission

3. DG GROW/B/2 - N105 04/63

4. 2021/0045/D - SERV60

5. article 5, paragraph 2, of Directive (EU) 2015/1535

6. Within the framework of the notification procedure laid down by Directive (EU) 2015/1535, the German authorities notified to the Commission on 28 January 2021 an amendment to the Network Enforcement Act with regard to information for scientific research. (hereinafter 'the notified draft'). In the notification message, the German authorities justify the notified draft by the public interest in more transparency on the functioning of certain online platforms and the process of content dissemination, notably through independent research, as also clarified in the replies from the German authorities to the Commission's request for additional information. The German authorities also stress the necessity of such measures improving the possibilities of gathering findings for the prevention of criminal offences, including for combating incitement to hatred and for consumer protection.

### General remarks

The Commission notes that the general objective of the notified draft is broadly aligned with the European Union's policy on the transparency of online platforms' content moderation practices.

Precisely for this reason, the European Commission presented on 15 December 2020 a proposal for a regulation, referred to as the Digital Services Act ("DSA"). The notified draft concerns a matter, which is covered by this proposed Regulation for a Digital Services Act, which includes specific provisions aimed at ensuring that vetted researchers can access data held by certain online platforms, including as regards their content moderation policies.

Furthermore, Commission's policy in this area is further laid down in the European Democracy Action Plan and the Code of practice against disinformation. More broadly, access to data for researchers is an important policy objective in the Union's research policy agenda.

The Commission takes the view that access to data for independent research can be an important vehicle for ensuring that independent and scientifically robust insights can be collected about the evolution and severity of online systemic risks. Such independent research can contribute with the appropriate expertise for bridging information asymmetries between online platforms and the general public, regulators and civil society. At the same time, the Commission stresses the very delicate nature of data disclosures, with can be manipulated for malicious use, potentially to the detriment of data subjects and citizens at large, the legitimate interests of service providers, as well as of public policy and public security objectives.

The delicate balance between these objectives and the significant risks that need to be mitigated in establishing such data disclosure obligations prompted the Commission to solicit from the German authorities additional information. The replies of the German authorities were considered, together with the notified draft and its explanatory notes, in particular for analysing the appropriateness, necessity and proportionality of the measures proposed in the notified draft.

The Commission notes that despite several amendments, doubts still persist as to the compatibility of the national legislation with fundamental rights established in the EU Charter and with the fundamental principles underpinning the single market rules, such as the "country of origin" principle under the E-commerce Directive 2000/31/EC. In order to give a uniform solution to the legitimate need to tackle illegal content online, the European Commission has proposed a Regulation on the Digital Services Act, which is now being negotiated by the Council and the European Parliament, and which takes fully into account the necessary balance with fundamental rights at stake. The service providers in scope of the notified draft constitute information society services as defined in Article 1(b) of Directive (EU) 2015/1535 and therefore also within the meaning of Article 1 and 2 of the e-Commerce Directive 2000/31/EC. The German authorities provided their interpretation of the compatibility of the notified draft with the E-Commerce Directive in the explanatory notes of the notified draft, equally considered by the Commission in issuing the present comments.

### Compatibility with Article 3 of the E-Commerce Directive

Article 3(1), (2) and (3) of the e-Commerce Directive

Article 3(1) and (2) of the e-Commerce Directive contain the internal market principle for information society services. Under paragraph 1, Member States are required to ensure that information society services provided by providers established in their territory comply with the applicable provisions of their respective national law which fall within the coordinated field. Paragraph 2 adds that Member States may not, for reasons falling within the

coordinated field, restrict the freedom to provide such services from another Member State. The German authorities are reminded that this provision remains unchanged by the proposed Digital Services Act, and any national laws -adopted before or after the adoption of the Digital Services Act- need to be in conformity with Union laws, including the country of origin principle established in the e-Commerce Directive.

The notified new obligations relevant for this assessment fall within the coordinated fields of the e-Commerce Directive as defined in its Article 2(h), as they concern the obligations for online platforms to disclose certain data to researchers. The obligations under the notified draft are, in addition, not covered by any of the fields listed in the Annex to the e-Commerce Directive, which are exempted pursuant to its Article 3(3). The notified draft requires a social network service provider with more than 2 million users in Germany to give access to data on the use and specific workings of automated procedures for detecting content to be removed or blocked, as well as on the dissemination of content which has attracted complaints for alleged illegality or which was otherwise removed or blocked by the service provider. The disclosure follows from the submission by the researchers of a 'security concept' to the service provider including five types of information. Service providers may refuse access on two potential conditions: their legitimate interests considerably outweigh the public interest of the research, or the data subjects' legitimate interests are encroached upon and the public interest does not outweigh the data subjects' interests. Service providers are entitled to reimbursement for the data access, under certain conditions.

With regard to the territorial scope of the notified draft, the German authorities clarified in the explanatory notes of the notified draft that '[t]he addition of § 5a of the Network Enforcement Act to the references in § 1(2) of the Act means that only social network providers that have at least two million registered users in Germany (regardless of where their registered office is located)'.

Against this background, the Commission's view is that the obligations set out in the notified draft could constitute a restriction to the cross-border provision of information society services, in violation of Article 3(2) of the e-Commerce Directive, in as much as they would apply to the social network services providers established in other Member States. In the light of the case law of the Court of Justice, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.

In the explanatory notes to the notified draft, the German authorities claim that, 'if the envisaged right of access under § 5a of the Network Enforcement Act were to fall within the 'coordinated field' described in the e-Commerce Directive and this were to be considered a restrictive effect, which is fundamentally prohibited under Article 3(2) of the e-Commerce Directive, the conditions for the exemption under Article 3(4) of the e-Commerce Directive would in any case be met'.

Article 3(4) of the e-Commerce Directive

As regards necessity of the measures, the German authorities refer in the explanatory notes of the notified draft to the prevention of criminal offences, including the fight against incitement to hatred, and consumer protection. The German authorities provided, in their reply to the Commission's request for further information, further references to existing academic literature on the necessity for further access to data for researchers. At the same time, data needed for research purposes is diverse, and ranges from general transparency reports, to web scraping, to data crowdsourced from users, to data disclosed by online platforms. In the Commission's view, it is not clear that any, some or all independent research on 'the nature, scope, causes and effects of public communication on social networks and how providers deal with this' would directly be necessary for a public policy objective to prevent, investigate, detect or prosecute criminal offences or a consumer protection objective.

In the Commission's view, such independent research is desirable and should be stimulated, including through regulatory means, to ensure public scrutiny of platforms' policies and tools, establish a solid and accountable transparency in platforms' governance, and further awareness and scientific evidence in the overall evolution of societal risks online. This concurs with the objective stated by the German authorities in their replies to the Commission's request for additional information, with regard to 'providing more transparency on the functioning of the respective platforms and the process of disseminating content on them, as well as independent research findings'.

However, the Commission's view is that the explanation provided by the German authorities is not sufficient to justify that the measures proposed in the notified draft to facilitate independent scientific research in compliance with paragraph 3 of the notified draft are proportionate for the public policy and consumer protection objectives referred to by the German authorities in the explanatory note.

As regards the targeted nature of the measures, the Commission does not consider that the explanation provided by the German authorities is sufficient to show that this requirement is met in the case at hand. It notes that the notified draft applies generally to virtually any social network with more than 2 million users in Germany, whereas the requests for data access would follow a case by case assessment of appropriateness, generally done by the platform itself in line with the conditions set at paragraph 5 of the notified draft. It is not clear that all service providers covered are linked to the objective invoked by the German authorities or present a serious and grave risk to that objective, as is required under point (ii) of Article 3(4)(a).

Further, it is not clear that the proportionality requirement would be met, given the wide-ranging potential requests the service provider would receive.

In particular, it is unclear from the notified draft how the proportionality of the requests would be established, or how repetitive, abusive requests would be supervised, sanctioned and/or disincentivised. The security concepts submitted by researchers to platforms would be submitted to the competent Data Protection Authorities (DPAs). DPAs are competent for data protection issues but, in particular where this involves DPAs of other Member States, other security considerations or abusive requests would remain outside of their regulatory remit.

The German authorities explained in their replies to the Commission's request for additional information the grounds on which the requested 'qualified information' can be considered proportionate, appropriate and necessary for the specific research conducted, pointing to the provisions of paragraphs 3 to 5 of the notified draft. It appears from this that the service provider is primarily entrusted with the assessment of the request, following information submitted by the researchers.

Further, it appears that a service provider may request reimbursement of up to EUR 5.000 for data access granted, and may exceed this amount for exceptionally high costs of data disclosures. At the same time, it follows from paragraphs 4 and 8 of the notified draft that the service provider must, upon request, submit an estimate of the costs for disclosure at their own expense. It is likely that, at this point in the process, the service provider would also need to carry out an assessment of the security concept, not least in light of the refusal criteria listed in paragraph 5 of the notified draft.

While in the parallel notification submitted by the German authorities 20021/39/D, it is stated, in 4a(1), that 'the administrative authority specified in §4 shall monitor compliance with the provisions of this Act', it is unclear how and if the Federal Office for Justice would be empowered to supervise and potentially sanctions abuses from researchers, in addition to the compliance of the service providers with the obligations stated in the notified draft. From the above considerations, it appears that the notified draft is likely to create restrictions to the free cross-border provision of information society services. The Commission questions whether the notified measures qualify as proportionate for the pursuit of an objective that could justify a derogation from the home state control principle. The Commission also questions whether the notified draft meets the requirements of targeting.

Furthermore, pursuant to the procedure set out in Article 3(4) of the e-Commerce Directive, it is imperative that Member States follow the mandatory procedural steps, i.e. requesting the Member State of establishment of the targeted services to act and to notify subsequently to that Member State its intention to take measures, as is required under point (b) of Article 3(4).

#### Implications for the General Data Protection Regulation

The notified draft includes among the types of data that may be disclosed 'information on which users have interacted with the content', while on the other hand it also states that any data 'shall be sent in anonymised or at least pseudonymised format, where this is possible without jeopardising the purpose of the research'. It is not perfectly clear whether the general requirement to anonymise or at least pseudonymise would also apply to that kind of data. In any case, the practical application of this requirement to anonymise or at least pseudonymise disclosed data has important implications for the proportionality of the proposed measure (on proportionality in general, see also above).

#### Alignment with the Commission proposal for a Digital Services Act

Finally, the Commission notes the convergence of the measures included in the notified draft with a series of measures proposed by the Commission in its proposal for a Digital Services Act. This includes primarily the mandated access to data for researchers in Article 31 of the proposed Digital Services Act, but also further transparency and disclosure measures aimed at ensuring public access to information that is particularly useful for researchers. This includes, for example, the transparency reports for very large online platforms (Article 33), the publicly maintained database of statements of reason for content removed or to which access was disabled (Article 15(4)), or repositories of advertisements served on very large online platforms and metadata on their delivery (Article 30). The Commission would like to remind the German authorities that, pursuant to the general obligations laid down in Article 4(3) TEU, Member States should defer implementation of envisaged measures which concern a matter which is covered by a proposal for a legislative act in order to prevent compromising the adoption of binding acts in the same field. A solution to the problems that NetzDG intends to tackle should be jointly examined within the context of the legislative procedure at Union level.

The Commission stresses the need for a common, EU-wide intervention in particular as regards conditions for granting access to data for researchers. This becomes evident in assessing the scope and legal implications of the notified draft, which covers all platforms with over 2 million users in Germany, including those not established in Germany, and potentially grants access to data to researchers established outside of Germany. The latter are then subject to supervision by their Data Protection Authorities of establishment, but it remains unclear what authorities are empowered to supervise their compliance with other requirements in the notified draft, or if indeed their research topics and scope of data requested are limited to those related to the provision of the service in Germany.

As regards service providers, the framework provided by the Commission's proposal for the Digital Services Act follows the internal market principle enshrined in the E-Commerce Directive. It grants competence to the authority in the country of establishment of the service provider, both for vetting researchers and issuing reasoned data access requests to service providers. The Commission is entrusted with similar powers, with a particular attention to ensuring that the all EU relevant research can be conducted.

The Commission furthermore recalls that once the definitive text has been adopted, it has to be communicated to the Commission in accordance with Article 5(3) of Directive (EU) 2015/1535 and that, once the Regulation on a Digital Services Act is adopted, Member States are under Union law not required to - and are in fact prevented from - legislating in the area and in relation to the objectives pursued by the harmonizing rules of the EU legislation. Member States therefore in general will not be allowed to adopt parallel national provisions on the matters falling within the scope and the areas addressed by the Digital Services Act, ie which are regulated by its provisions, since this would affect the direct and uniform application of the Regulation.

The Commission invites the German authorities to take the above comments into account. The Commission services are open to a close cooperation and discussion with the German authorities on possible solutions to the identified issues in full respect with EU law.

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