

Message 304

Communication from the Commission - TRIS/(2021) 01574
Directive (EU) 2015/1535
Translation of the message 303
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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 0038 D EN 27-04-2021 28-04-2021 COM 5.2 27-04-2021

2. Commission

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

4. 2021/0038/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 26 January 2021 an amendment to the Copyright Service Provider Act (hereinafter 'the notified draft') with regard to a right of access to certain data for research organisations in the context of the transposition of Article 17 of Directive (EU) 2019/790 on copyright in the Digital Single Market (hereinafter: 'DSM Copyright Directive').

In the notification message and in the replies to the Commission's request for additional information, the German authorities justify the notified draft by the public interest in having more transparency around the functioning of online content-sharing service providers and the process of content distribution, notably through independent research. The German authorities stressed the importance of the measures included in the notified draft in view of the significant role these services play in the use of creative content and in the formation of public opinion. An examination of the relevant provisions of the notified draft has prompted the Commission to issue the following comments.

General remarks

In the notification message, the German authorities explain that the aim of the notified draft is to enhance transparency and generate sound empirical basis for independent research concerning the use of procedures for the automated and non-automated recognition and blocking of content by online content-sharing service providers, with a broader objective to guarantee freedom of expression. The German authorities emphasise in particular the need for assessing the impacts of Article 17 of the DSM Copyright Directive on the use of "filtering technologies". 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, as clarified in the Commission's proposal for the Digital Services Act, as well as 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 functioning of online services. Such independent research can contribute with the appropriate expertise for bridging information asymmetries between online platforms and the general public, regulators and civil society. The Commission would like to point out that Article 17 of the DSM Copyright Directive does not mandate the use of technology. Indeed, in the view of the Commission, Member States should not in their implementing laws mandate either the use of a technological solution nor impose any specific technological solutions on online service providers. Article 17 strikes a delicate balance between the need to prevent copyright infringements and the need to protect users' freedom of expression online. At the same time, the Commission stresses the very delicate nature of data disclosure obligations, which may be manipulated for malicious purposes, potentially to the detriment of data subjects and citizens at large, of the legitimate interests and trade secrets 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.

Having examined the notified draft and its explanatory notes, as well as the replies of the German authorities, the Commission has some concerns on whether some of the measures included in that draft could constitute an undue restriction to the freedom to provide information society services protected within the internal market. Those concerns are set out below.

Applicability of Directive 2000/31/EC

Apart from being online content-sharing service providers pursuant to the DSM Copyright Directive, the service providers in scope of the notified draft are 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 Directive 2000/31/EC (the "e-Commerce Directive"), which constitutes the horizontal framework for information society services, is applicable to the relevant provisions of the notified draft. (proposal; The provisions of these legal instruments are therefore

applicable to the relevant provisions of the notified draft).

Moreover, in their reply, the German authorities confirm that the notified draft would apply not only to domestic service providers but also to those established abroad insofar as they offer or provide their services in Germany. The German authorities explain in their reply to the Commission's questions that they consider the notified draft to fall outside the scope of the coordinated field of Article 3 of the e-Commerce Directive because the field of copyright is horizontally excluded from the 'country of origin principle' as per the Annex to that Directive. While it is true that pursuant to the Annex of the e-Commerce Directive a derogation from its Article 3 applies to the field 'copyright', the Commission considers that the measures included in the notified draft do not obviously belong per se to the field of copyright, even if they are connected to a copyright-related mechanism (i.e. Article 17 of the DSM Copyright Directive).

Under the notified draft, service providers would need to "grant access to data on the use of procedures for the automated and non-automated recognition and blocking of content". This obligation on service providers is linked to copyright only indirectly. It rather concerns the technologies applied by the service provider, i.e. the take up or pursuit of the activity of information society services more in general. Also, the obligation is not limited to copyright-protected content, given that the filtering technologies of online content-sharing service providers may also go beyond such content by their nature. This obligation would thus fall within the coordinated field of the e-Commerce Directive as set out in its Article 2(h)(i) and, consequently, have been assessed against this Directive.

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 (or 'country of origin') 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 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 notified draft requires an online content-sharing service provider, as defined by the DSM Copyright Directive, to give access to data on the use of procedures for the automated and non-automated recognition and blocking of content to authorised parties in accordance with § 60d(2) of the Copyright Act for the purpose of scientific research, insofar as this does not conflict with the overriding interests of the service provider that are worthy of protection.

The 'authorised parties in accordance with § 60d(2) of the Copyright Act' are 'research organisations', defined pursuant to the DSM Copyright Directive, which contains a definition for the purposes of text and data mining. The service provider needs to provide access to data on the request of the research organisation.

According to the explanatory notes, the data to be provided in this regard notably includes information on the filtering technologies used, the type of content that is recognised and, if applicable, blocked by these filtering technologies. The German authorities further specified in their reply to the Commission's questions the types of research such data should enable:

- how and to what extent online content-sharing services recognise content protected by copyright or related rights;
- how and to what extent online content-sharing services distribute such content or prevent the dissemination of some content by reference to (alleged) infringements of copyright;
- how online content-sharing services ensure that users can rely on exceptions and limitations, in particular by using quotations or creating parody and pastiche, including how they deal with users' complaints.

Further, the German authorities explained that filtering technologies are also used by service providers to record user behaviour or to offer a user-specific preselection of content. In this context, the explanatory note of the notified draft clarifies that the research based on the data requests is intended to shed light on "the selection and ordering services of algorithms used on platforms, which are often not very transparent". The German authorities confirmed this intention in their reply, explaining that the notified measure is intended to enable research into the ways online content-sharing services analyse user behaviour with regard to content protected by copyright or related rights, pre-select such content on a user-specific basis and display it to other users.

The notified draft allows service providers to refuse access to the data if providing access would conflict with the overriding interests of the service provider that are worthy of protection, and – as explained by the explanatory notes – these interests outweigh the public interest in the research. According to the German authorities, this may be the case, for example, where access to the data would unreasonably prejudice the confidentiality interests of the service provider.

The expenses incurred by the service providers are to be reimbursed by the research organisations "in a reasonable amount". By limiting the reimbursement claim to costs of a reasonable amount, it is ensured that the researchers' access rights do not in practice run dry due to prohibitively high cost reimbursement claims.

Against this background, the Commission's view is that the obligations set out in the notified draft could potentially constitute a restriction to the cross-border provision of information society services, within the meaning of Article 3(2) of the e-Commerce Directive, in as much as they would apply to online content-sharing services established in other Member States. The CJEU has adopted a broad interpretation of what measures have the potential of restricting the freedom to provide services. 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. Thus, a legislation of a Member State which requires a person carrying out an activity under the freedom to provide services from the territory of another Member State to provide information to

research organisations may potentially constitute a restriction on the freedom to provide services, in so far as it gives rise to organisational burden of providing the requested data and potentially additional costs for activities carried out under the rules governing the freedom to provide services.

Article 3(4) of the e-Commerce Directive

Article 3(4) of the e-Commerce Directive provides that Member States may take measures to derogate from paragraph 2 if certain conditions are fulfilled. The German authorities have not argued that the restrictive measures, which derogate from the country of origin principle, are justified in accordance with Article 3(4) of the e-Commerce Directive.

In order to benefit from the derogation in Article 3(4), measures must be justified by one of the objectives in the public interest exhaustively listed in Article 3(4)(a)(i), be necessary and proportionate, as well as targeted at a given information society service which prejudices the objectives or which presents a serious and grave risk of prejudice to those objectives. In addition, before taking the measures in question, the Member State has to follow the procedure set out in Article 3(4)(b).

In this particular case, the German authorities have not provided any information indicating that the procedural conditions, laid down in Article 3(4)(b) of the e-Commerce Directive, have been met. That provision requires, notably, that the other Member State(s) in which the relevant service provider(s) is (are) established did not take (adequate) measures, despite having been asked to do so by the Member State intending to enact the restrictive measures derogating from Article 3(2). The provision in addition requires subsequent notification by that Member State to the other Member State(s) concerned and the Commission.

From the above considerations, it appears that the notified draft could potentially create restrictions to the free cross-border provision of information society services by providers established in other Member States than Germany. It further appears that the relevant conditions for derogating from the prohibition to enact such restrictive measures, in particular the procedural requirements under Article 3(4)(b), have not been met to ensure adequate action by the competent authorities of the home Member State(s) and to allow the Commission to fully assess the compatibility of the measure in question. Without prejudice to the substantive and comprehensive assessment as to whether it could be necessary and proportionate to address certain measures to online content-sharing services to enable independent research into the impacts of Article 17 of the DSM Copyright Directive, the German authorities are invited to consider the compatibility of the notified draft with the conditions established in Article 3 of the e-Commerce Directive, also in view of the specific comments in the following section.

Specific comments on the obligation envisaged by the notified draft

In the Commission's view, the independent research envisaged by the notified draft 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 risks to freedom of expression online.

The Commission also acknowledges that Article 17 of the DSM Copyright Directive imposes certain obligations on Member States – and indirectly on online content-sharing service providers and copyright holders – where content-recognition tools are used (without mandating the use of such technological tools), which relate to freedom of expression. Article 17(7) provides that the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, and it requires Member States to implement the exceptions or limitations for the purposes of quotation, criticism, review, caricature, parody or pastiche. Further, Article 17(9) states that the DSM Copyright Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law. The Commission considers that the main types of independent research envisaged by the notified draft could be useful in monitoring and thus incentivising compliance with these obligations.

In the views of the Commission, however, the envisaged research into the ways online content-sharing service providers “record user behaviour or offer a user-specific preselection of content” and into “the selection and ordering services of algorithms used on platforms” on a “user-specific basis”, as well as the necessary data for such research, are not related to Article 17 of the DSM Copyright Directive.

It is overall unclear from the notified draft how the proportionality of the requests would be established, or how excessive, repetitive or abusive requests would be supervised and disincentivised.

In this context, the Commission notes that Article 17 of the DSM Copyright Directive provides for certain transparency obligations vis-à-vis rightholders (in Article 17(8)) and users' organisations (in Article 17(10)), but a right of access to data for research organisations, as envisaged by the notified draft, is not included in that Article.

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. There are general questions as to whether the notified measures qualify as necessary for the pursuit of an objective that could justify a derogation from the home state control principle. It can also be questioned whether the requirements of targeting and proportionality are met.

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 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 online content-sharing service providers, including those not established in Germany, and potentially grants access to data to researchers established outside of Germany. It is unclear from the notified draft which authorities would be empowered to supervise the activities of the latter.

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 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, the national rules will have to be aligned with that 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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