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NOTE

From:	Presidency
To:	CATS
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Subject:	The proposal for Digital services Act - certain justice aspects - Exchange of views and preparation for Council (JHA)

I. Background and state of play

1. The first reading of the draft Digital Services Act (DSA) has just recently been completed in the competent Council working party (Working Party on Competitiveness and Growth, hereafter 'the competent Working Party'), in which it had been examined since December 2020. It is too early to draw any conclusions from this examination. Most delegations still have scrutiny reservations on the text, and the Presidency has not yet proposed any redrafts of the provisions. A progress report will be presented to the Competitiveness Council on 27 May, and a compromise text by the Presidency following the examination of the first round of comments by MS is expected in June.

2. In the informal meeting of the members of CATS on 8 February this year¹, the Presidency highlighted the high importance of the DSA for the area of Justice and Home Affairs, in particular as regards actions to counter illegal content online. A preliminary exchange on a number of issues of relevance for the Justice area was organised, whereby delegations underlined that they wish to be regularly informed and consulted on developments in the DSA negotiations, in CATS and/or other JHA Working Parties². A number of delegations also suggested that the file should be addressed in a meeting of Justice and Home Affairs Ministers. In addition, delegations discussed a number of concrete questions, including with regard to the proposal of the Commission to maintain the country of origin principle of the e-commerce Directive.
3. It is the intention of the Presidency to include a discussion point regarding justice aspects of the DSA on the agenda of the upcoming meeting of Ministers of Justice on 7 June.
4. Before submitting the issue to ministers, the Presidency proposes to discuss the matter in the informal meeting of CATS on 10 May. In the light of the previous exchanges in the competent Working Party and in the February CATS, the Presidency would propose to focus on certain aspects of the following two subject matters:
 - Orders to act against illegal content and orders to provide information (Articles 8 and 9 in the proposal for a DSA), and
 - Notification of suspicions of criminal offences (Article 21 in the proposal for DSA).

The state of play regarding these subject-matters is outlined below. Delegations are invited to consult the text of the DSA proposal³ while analysing the questions.

¹ See 5522/21.

² WK 2732/2021.

³ 14124/20.

II. Orders to act against illegal content and orders to provide information (Articles 8 and 9)

5. The purpose of the provisions is to put in place common rules on cross-border orders emitted directly from a competent authority in a Member State to a service provider in another Member State (the provisions will also apply to national orders), and that the content and format of these orders is harmonised. The draft DSA as proposed by the Commission obliges the service providers to inform the authority issuing the order about the action they have taken. The DSA itself does not provide for a legal basis for issuing the order nor to enforce the execution of the order. The basis for the issuing or execution of the order may come from another Union act, such as the Regulation on Terrorist Content online, or national law.⁴The DSA contains rules on the enforcement of the DSA obligation on the intermediary service provider to provide feedback on an order.
6. There have been vivid discussions on these provisions in the competent Working Party as well as in public discussion fora, not the least in order to gain a full understanding of their meaning and practical implications. The arguments put forward by delegations often included Justice and Home Affairs considerations, and have in particular touched upon the following issues:
 - The provisions only indicate that the service providers should inform the issuing authorities "without undue delay", specifying the action taken. Questions have been raised as to whether a deadline should be considered for this information requirement, bearing in mind that deadlines for removal of the specific items of illegal content or for the production of specific item of information will be subject to the underlying national and Union laws on the basis of which the orders are issued (which may differ significantly, depending on the type of content or law). However, it should be also noted that the DSA is a horizontal act, acting as *lex generalis*.

⁴ For a presentation by the Commission on the scope of the provisions, see WK 2180/2021.

- It has been discussed whether it would be appropriate - possibly under another legal basis - to render such orders compulsory for the operators to follow. However, it has also been noted that orders of this type may be rendered binding through *lex specialis* legislation (for example the TCO Regulation). In any case, the combination of the absence of attribution of a binding nature to the national orders, on the one hand, and the definition of mandatory minimal procedural requirements (Articles 8(2) and 9(2)), on the other hand, may raise difficulties.
- Some delegations have raised the question if the partial harmonisation of procedural requirements of the orders is sufficient and if it would add any substantial value, given that national law and in some cases other Union legislation will continue to apply to the enforcement of such orders as well as to the definition of what constitutes illegal content.
- The exact impact of the derogations in relation to national procedural criminal law in conformity with Union law contained in Articles 8(4) and 9(4)⁵ has raised questions.
- Some delegations have noted that it must be ensured that the new system of cross-border orders does not affect the existing instruments of judicial cooperation in Europe in cases where they are used to act against illicit content or to obtain information in relation to illicit content.

⁵ *"The conditions and requirements laid down in this article shall be without prejudice to requirements under national criminal procedural law in conformity with Union law."*

- Some delegations have insisted on the need to make sure that Article 9 is consistent with the draft Regulation on production orders (e-evidence). While Article 1(5) in DSA appears to make it clear that the draft Regulation on production orders (e-evidence) will be considered as *lex specialis*, it may not be clear whether the latter Regulation falls under the without prejudice clause of Article 9(4) which leaves some questions open:
 - Will the requirements of Article 9(2) DSA to issue an order be applicable on top of the requirements for a production order defined in the e-evidence instrument knowing that the derogation is provided for in Article 9(4) ?
 - Will the production orders issued in accordance with the e-evidence instrument be subject to the obligation to notify the order to the Digital Services Coordinator of the issuing State, to be then transmitted in copy to all Digital Services Coordinators (Art. 9(3) DSA)?

In other words, the question was raised whether the relation between the orders referred to in Articles 8 and 9 in the DSA and the decisions taken in the framework of criminal procedures will create difficulties. The possible confusion could also be clarified by a more clear drafting of the proposed DSA.

III. Notification of suspicions of criminal offences (Article 21(1))

7. Article 21 of the proposal provides that an online platform shall promptly inform the law enforcement or judicial authorities concerned of a suspicion that a serious criminal offence involving a threat to the life or safety of persons has taken place, and provide all relevant information available.

8. Delegations in the competent Working Party have raised a number of questions regarding this provision, in particular:

- The structure of the DSA means that the obligation in Article 21 would only apply to medium or larger service providers, as it excludes micro and small enterprises. The question has therefore been raised if there is a reasonable justification for exempting small and micro service providers from the obligation to inform the authorities of serious offences.
- The rule in question only indicates that the authorities should be informed 'promptly'. Should the Regulation indicate a firm time limit for the information obligation?
- Is the limitation of the scope of the provision to "*serious criminal offence involving a threat to the life or safety of persons*" appropriate, or could the obligation be given a broader scope? In addition, delegations have suggested that it may be appropriate to define the offences covered by the obligation, for example by the introduction of a list of relevant offences.

IV. Other issues?

The Presidency would not exclude that other issues could also be examined by ministers, in particular with regard to the indirect consequences for the Justice area of the proposal of the Commission to in principle maintain the country of origin principle⁶ of the e-commerce Directive.

Questions to delegations

Delegations are invited to indicate their preliminary views, from a criminal Justice perspective, on

- a) the proposed system for orders to act against illegal content and orders to provide information according to the draft DSA, and**
 - b) the proposed provisions on notification of suspicions of serious criminal offences according to the draft DSA.**
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⁶ The said principle can be summarised as meaning that internet companies are required to comply with the laws of the Member State they are legally established in when operating across the EU.