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NOTE

From: Presidency/General Secretariat of the Council
To: Permanent Representatives Committee

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Subject: Proposal for a Regulation of the European Parliament and of the Council
on a Single Market for Digital Services (Digital Services Act) and amending
Directive 2000/31/EC
- Draft progress report

I. INTRODUCTION

1. On 15 December 2020, the Commission submitted the above-mentioned proposal for a Regulation of the European Parliament and the Council¹. The proposal is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU).
2. The proposal for a Regulation aims to contribute to the proper functioning of the internal market for intermediary services by setting out uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected.

¹ Doc. 14124/20 + COR 1 + ADD 1.

3. The European Economic and Social Committee provided its opinion on the proposal on 27 April 2021.²
4. In the European Parliament, the Committee on the Internal Market and Consumer Protection (IMCO) has not yet voted on its report.
5. In the statement of 25 March 2021, the members of the European Council invited the co-legislators to work swiftly on the Digital Services Act and the Digital Markets Act, with a view to strengthening the Single Market for digital services by creating a safer digital space and a level playing field to foster innovation and competitiveness.

II. WORK CONDUCTED IN THE COUNCIL PREPARATORY BODIES

6. The examination of the proposal by the Working Party on Competitiveness and Growth started on 16 December 2020 under the German Presidency and has since continued with the objective to present a progress report before the end of the Portuguese Presidency.
7. In its 21 meetings, which were held during the German (1 meeting) and Portuguese Presidencies, the Working Party has particularly concentrated its discussions on the general architecture, scope and substantial provisions, as well as the overall enforcement system of the future Regulation, completing the analysis of the whole text.
8. The impact assessment accompanying this proposal was examined in detail during two Working Party meetings on 6 and 12 January 2021. The examination showed that delegations generally supported the aim of the proposal, as well as the methods, criteria and policy options identified by the Commission.
9. The discussions at the Working Party level have now reached a stage where it seems appropriate to present to the Permanent Representatives Committee (COREPER) an overview of progress reached so far in view of informing of it the Competitiveness Council, meeting on 27 May 2021.

² INT/929 – EESC-2021.

III. MAIN POLITICAL ISSUES

10. Based on the discussions at Working Party level held so far, the Presidency has identified a strong and general support among the Member States for the level of ambition of the proposal, its overall objectives and the need for swift approval. In particular, Member States have contributed to a time-intensive and constructive debate. In this context, the following points have been recognised as the most sensitive political and legal issues:

a) Enforcement and enforceability

Member States expressed their commitment to preserving the main principles of the e-Commerce Directive³, in particular the internal market clause of Article 3 of that Directive (also referred to as the country-of-origin principle). This is one of the key principles to ensure the smooth functioning of the internal market by ensuring free movement of information society services between Member States. Member States have also expressed their general support to the liability provisions that have been incorporated from the e-Commerce Directive into the Digital Services Act proposal.

The need for effective implementation of the proposed Regulation was also reiterated, as well as greater coordination between Member States, their competent authorities and the Commission. Some Member States called for a greater involvement of the country of destination, as well as for a better cross-border cooperation among Digital Services Coordinators (DSCs), joint investigations and requests for Commission intervention.

Several Member States have raised concerns and doubts on the scope and effectiveness of the mechanisms laid down in Articles 8 and 9 of the proposal. Several Working Party meetings were dedicated to clarifying the conditions for national judicial or administrative authorities to issue orders, including across borders, to a provider of intermediary services to act against a specific piece of illegal content or to provide specific item of information in accordance with the applicable national law.

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

The Commission described the legal implications of such orders in cross-border cases and explained the enforceability of the proposed rules in this context. However, some Member States continue to ask for additional explanations on the practical enforceability of the orders in a cross-border context and their impact on the country-of-origin principle.

For the enforcement of the proposed Regulation a new system of supervision would be set up, laying down different powers and requirements for the DSCs and competent authorities, for the network of DSCs at Union level ("the Board") and for the Commission. Questions were raised also concerning the practical functioning of the multi-layered supervisory system, as well as its impact on the existing national administrative structure.

The Working Party also addressed the issue of effective enforceability of the proposed Regulation vis-à-vis structurally infringing service providers with their place of establishment outside the Union who offer their services in the Union, but do not comply with the obligations of the proposed Regulation. Additional discussions on this matter are needed in future negotiations.

b) *Content moderation*

Member States recognised the importance of content moderation online and the need for the newly proposed rules to avoid negative impacts on fundamental rights. It is important to harmonise the due diligence obligations and the exemptions from liability for providers of intermediary services. Furthermore, Member States broadly supported the new notice-and-action procedures and redress mechanisms for users, and the fact that the proposed Regulation refers to illegal content as defined by national or Union law. They also supported the asymmetric approach of the proposal, introducing graduated obligations for service providers subject to their size and the impact of their services.

With regard to very large online platforms, the obligation to conduct assessment of significant systemic risks (Article 26) was widely supported. In addition, some Member States stressed the need to reinforce the protection of fundamental rights, especially the freedom of expression. Furthermore, certain Member States inquired whether the measures foreseen are sufficient for tackling disinformation.

Member States broadly supported the introduction of the know-your-business-customer obligation in Article 22 of the proposal, and some of them suggested to broaden the scope of this obligation in order to include also other types of providers of intermediary services as well as to extend it to micro and small enterprises.

Certain Member States called for adding clarifications as to the possibilities of national authorities to issue "stay-down orders", which would oblige online platforms to prevent the content that was established as illegal and consequently taken down from reappearing. Some Member States considered this to be particularly important for the fight against counterfeit or non-compliant goods in online marketplaces.

c) Scope and Objective

Some Member States raised questions on the scope of application of the proposal, in particular the relation between the proposed Regulation and the existing Union legislation. To that end, the Commission explained that the proposed Regulation should act as a horizontal piece of legislation, complementing existing instruments of sectorial legislation which act as *lex specialis*. In addition, the proposed level of harmonisation of the Regulation, the legal basis of which is Article 114 TFEU, was welcomed by most Member States. In order to ensure greater legal certainty, Member States asked for further clarifications with regard to Article 1 on the subject matter and scope of the proposal. Some Member States also called for additional clarifications on the interplay between the proposed rules and the existing exclusions from the scope of the e-Commerce Directive.

To avoid disproportionate burdens, micro and small enterprises are exempt from the scope of application of certain obligations of the proposed Regulation, whereby the definition of such enterprises is based on the Annex to Recommendation 2003/361/EC⁴. Some Member States asked for the definition of micro and small enterprises to be adapted to the digital environment and not based solely on the criteria of the size and turnover of these enterprises. Additionally, concerns were raised that the currently proposed exemption of the micro and small enterprises would not tackle the dissemination of illegal content via smaller service providers, hence some Member States called for a risk-based approach.

d) Other

In addition to the above, some Member States expressed the need for a wider discussion on and/or reconsideration of the following issues:

- possible widening of the scope of the proposal;
- whether the clause of voluntary actions against illegal content (Article 6) is sufficient to allow for meaningful action on the provider side and if additional safeguards against misuse would be needed;
- the extension of the status of trusted flaggers to all entities that submit notices, demonstrate expertise and have a high rate of accuracy when flagging illegal content, without the need to represent collective interests;
- the protection of trade secrets of service providers with regard to data access and investigations;
- the provisions on out-of-court dispute settlement mechanism, its structure of fees and the alignment of these provisions with the relevant existing legislation;
- the date of application of the proposed Regulation.

⁴ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

11. While significant progress has been achieved during the Portuguese Presidency, in-depth discussions on the content of the proposal continue in a series of further meetings of the Working Party for Competitiveness and Growth. Therefore, taking into account the complexity of the proposal, its importance for the single market and for creating a safer and trusted online environment as well as its interrelation with other instruments of Union law, further work at technical level is required before the Council can take a political decision, for which the present report is an important contribution, identifying key political issues.
12. The Presidency considers that this progress report presents a balanced summary of main political issues identified during the examination of the proposal, and could therefore be forwarded on to ministerial level after its presentation in the COREPER.

IV. CONCLUSION

13. The COREPER is invited to take note of the present progress report from the Presidency, with a view to submitting it to the Competitiveness Council at its meeting on 27 May 2021.
