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Subject: Combating illegal content online in the context of the digital services act proposal
- Policy debate

I. Background and state of play

On 15 December 2020, the Commission submitted the Digital Services Act package of proposals, which includes the proposal for a Regulation on a Single Market For Digital Services (Digital Services Act¹ – DSA) and the proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act² – DMA).

¹ <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>

² <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>

The first reading of the DSA proposal has recently been completed by the Working Party on Competitiveness and Growth, which has been examining the proposal since December 2020. Most delegations still have scrutiny reservations on the text. A progress report was presented to the Competitiveness Council on 27 May 2021, and a first redraft of the text by the Presidency following the examination of the first round of comments by Member States is expected to be issued in June.

The DSA proposal contains provisions of great importance for the area of Justice. It raises the question of the right balance between the removal of illegal content and the protection of fundamental rights, specifically the freedom of expression, as enshrined in the Charter of Fundamental Rights of the European Union and in the European Convention on Human Rights. It also includes procedural rules for the removal of illegal content³ online and safeguards for users whose content has been erroneously deleted by intermediary service providers. Accordingly, it aims to promote a shift in the system for detecting and removing content that is deemed illegal, setting out due diligence obligations for service providers to ensure effective procedures are in place to counter illegal content as well as address systemic risks where very large platforms are concerned.

Another important aspect of the proposal concerns closer cooperation with and among competent public authorities, while other aspects that may be of relevance for the Justice area include territoriality, jurisdiction and cross-border effects, and the relation and interaction between the DSA and other existing instruments (for instance, the Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online and the draft e-evidence instruments, as well as the Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography).

In this context, the Portuguese Presidency of the Council decided to include the DSA proposal as an item on the agenda of the informal videoconference of the Ministers of Justice, which took place on 11 March 2021. On that occasion, several Member States deemed it necessary to closely cooperate with the competitiveness structures, so that provisions that are relevant for Justice are adequately addressed during the negotiations. The Presidency concluded that it was essential that the Justice and Home Affairs strand of the Council continued to follow the ongoing debate.

³ [‘illegal content’ means any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law \(Article 2 \(g\)\).](#)

In the informal CATS meeting on 10 May 2021, the Presidency once again highlighted the great importance of the DSA proposal for the area of Justice and Home Affairs. A fruitful discussion on the topical issues of orders to act against illegal content and orders to provide information (Articles 8 and 9 of the proposal) and the notification of suspicions of criminal offences (Article 21 of the proposal) followed. Delegations took the view that, at a minimum, the rules enshrined in Articles 8 and 9 could be usefully clarified and they underlined the need to ensure that the wording of the proposed Regulation is clear to all stakeholders regarding its impact on criminal justice. On this point, the Commission replied that, in substance, the proposed Regulation is as a *lex generalis* and that the orders' conditions and requirements laid down therein are without prejudice to other Union acts, including in the area of criminal justice, providing for similar systems for acting against specific types of illegal content or for providing information in specific sectors (Articles 1(5), 8(4) and 9(4)). Furthermore, many delegations criticised the wording of Article 21 and noted that the notion of a 'serious criminal offences involving a threat to life or safety of persons involving a threat to live or safety of person' was not defined in the draft Regulation and could lead to legal uncertainty.

The state of play regarding these subject-matters is outlined below.

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

The purpose of these provisions is to establish certain, minimum elements that cross-border orders (the provisions will also apply to national orders) to act against illegal content or to produce information need to include. Such orders may be addressed directly by a competent authority in a Member State to a service provider in another Member State. The DSA proposal also aims to oblige service providers to inform the issuing authority about the action taken. The DSA proposal does not provide for a legal basis for issuing the order or enforcing its execution. Therefore, the basis for issuing or executing the order may come from Union *lex specialis* or national law. The DSA proposal contains harmonised rules on the enforcement of the obligation on the intermediary service provider to provide feedback on an order.

Questions have been raised as to whether a deadline should be considered for this feedback requirement, bearing in mind that deadlines for the removal of specific illegal content or for the production of a specific item of information would 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).

It has also been discussed whether it would be appropriate to make it compulsory for service providers to follow such orders. However, it has also been noted that orders of this type may already be binding through *lex specialis* legislation or national law and that the DSA may not be the right vehicle for such empowering provisions, given its horizontal nature. Some of the questions raised may be resolved by a clearer drafting of the enacting provisions and the recitals in the DSA proposal.

In particular, concerns raised regarding the exact impact of the ‘without prejudice’ clause in relation to national procedural criminal law in accordance with Union law foreseen in Articles 8(4) and 9(4) show that the drafting of a new system of orders could be further clarified to ensure that existing EU instruments in the area of judicial cooperation are not affected as regards actions against illegal content.

Some delegations have also insisted on the need to clarify that Article 9 should not apply to production and preservation orders as proposed in the draft Regulation on European Production and Preservation Orders for electronic evidence in criminal matters. While Article 1(5) in the DSA proposal makes it clear that the draft Regulation on production and preservation orders will be considered a *lex specialis*, it could be clarified further that Article 9(4) is also without prejudice to that Regulation.

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

Article 21 of the DSA proposal provides in a nutshell that an online platform must 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, is taking place or is likely to take place, and provide all relevant information available.

This provision also raises concerns, namely as regards its scope. Questions have been raised as to whether there is a reasonable justification for exempting small and micro online platforms from the obligation to inform competent authorities of serious criminal offences involving a threat to the life or safety of persons.

On the other hand, the wording only indicates that the authorities should be informed ‘promptly’, without indicating a firm time limit for that information obligation.

Furthermore, it may be seen as necessary to clarify which ‘serious offences involving a threat to life or safety of persons’ are covered by the obligation to inform, for example through the introduction of a list of relevant offences or by giving further examples in a recital.

IV. Questions to Ministers

In light of the issues discussed above, Ministers are invited to share their views, from a criminal justice perspective, on the following questions:

- a) Do you consider that improvements should be made to the wording of the DSA proposal to accommodate the concerns identified with regard to Articles 8 and 9 and relevant to the area of Justice? If so, what specific aspects should be provided for?**

- b) As regards Article 21, do you consider that it is essential to clarify the scope and, in particular, for the purposes of the DSA proposal, the notions of ‘serious criminal offence involving a threat to life or safety of persons’ and ‘promptly’?**