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NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	15336/18
Subject:	Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online - state of play

I. INTRODUCTION

1. On 6 December 2018, the Council agreed on a general approach¹ on the proposal for a Regulation on preventing the dissemination of terrorist content online². The proposal was submitted by the Commission on 12 September 2018, following a call from the European Council of June 2018 for legislation to improve the detection and removal of content inciting hatred and to commit terrorist acts.

¹ 15336/18

² 12129/18 + ADD 1-3

2. On 17 April 2019, the European Parliament (EP) reached a first-reading position³ on the Commission proposal.
3. A four-columns comparative table, setting out the Commission proposal (column 1), the EP position/amendments in respect of the Commission proposal (column 2) and the Council negotiation mandate (column 3) has been issued as WK 9231/19. Changes compared to the Commission proposal are marked as follows: new text in ***bold italics***; text deleted from the initial Commission proposal in ~~striketrough~~.
4. The European Economic and Social Committee was consulted by the Council by letter of 24 October 2018 and delivered its opinion on the proposal on 12 December 2018⁴ during its December plenary session.
5. On 12 February 2019, the European Data Protection Supervisor sent ‘formal comments’ on the draft Regulation to the EP, the Commission and the Council⁵. On the same day, the European Union Agency for Fundamental Rights, following a request from the EP on 6 February 2019, issued an opinion on the proposal⁶.

II. EP FIRST-READING POSITION - MAIN DIVERGENCES

6. The EP has introduced a number of amendments. Some are mainly of a technical/editorial nature, some diverge only either from the Commission proposal or the Council general approach, and others diverge from both the Commission proposal and the Council general approach. With this note, the Presidency wishes to draw your attention to those of the EP’s amendments which differ most from the Council’s general approach, at this stage limited to the Articles, in chronological order:

³ See 8663/19 (Information note from GIP2 (Inter-institutional Relations) to COREPER presenting the outcome of the EP's first reading)

⁴ OJ C 110, 22.3.2019, p. 67 (15729/19)

⁵ Ref. 2018-0822 D2545 (WK 9232/19)

⁶ FRA opinion - 2/2019 (WK 9235/19)

Article 1 - Subject matter and scope

- In Article 1, the EP makes several references to ‘*public* dissemination of terrorist content online’. The requirement for the dissemination to be ‘public’ was not included in the general approach. This same approach can also be seen, for example, in the definition of ‘hosting service provider’ and ‘content provider’ in Article 2.
- The Council wished to emphasise the importance of fundamental freedoms by adding a reference to Article 6 of the Treaty on European Union in paragraph 3 of Article 1. In paragraph (1b), the EP also emphasises the importance of fundamental freedoms by adding ‘in accordance with Union law providing suitable safeguards for freedom of expression and the freedom to receive and impart information and ideas in an open and democratic society’. In the same vein, the EP has added a new paragraph 2b, where in addition to a reference to the obligations set out in the Treaty on European Union, the EP refers to obligations set out in national legislation.
- In paragraph 2a, the EP has added a provision that exempts from the scope of the Regulation ‘content which is disseminated for educational, artistic, journalistic or research purposes, or for awareness raising purposes against terrorist activity, nor to content which represents an expression of polemic or controversial views in the course of public debate’. In the general approach, this issue was dealt with in recital 9.
- In paragraph 2c, the EP refers to the horizontal framework established by Directive 2000/31/EC and has added a provision stating that ‘This Regulation is without prejudice to Directive 2000/31/EC’, (E-Commerce Directive)⁷. In the Council general approach, it was deemed necessary to include a specific reference only to Article 14 of Directive 2000/31/EC.

Article 2 - Definitions

- The EP has added a new first point (-1) to include a definition of ‘information society service’, referring to the E-Commerce Directive.

⁷ OJ L 178, 17.7.2000, p. 1

- In point 1, the definition of ‘hosting service provider’ (HSP) has been amended. The EP’s definition of HSP would apply only to services provided to the public at the application layer. The definition also excludes electronic communications services and cloud infrastructure providers and cloud providers. However, neither ‘cloud infrastructure provider’ nor ‘cloud provider’ has been defined.
- In point 2, the EP has amended the definition of ‘content provider’ by requiring that the ‘content provider’ also makes the content available to the public.
- In point 4, the EP has deleted the definition of ‘terrorist offences’.
- The definition of ‘terrorist content’ in point 5 as amended by the EP is aligned more closely with the wording of the relevant criminal offences in Directive (EU) 2017/541 on combating terrorism⁸ (incitement/public provocation, soliciting another person/recruitment and instructing/training). The definition also adds a new requirement for the online content to cause a danger that terrorist acts may be committed intentionally; the Commission proposal (not amended by the Council’s general approach in this regard) provides for such a requirement only in the case of glorification. The EP has added a new category of terrorist content, i.e. content that depicts the commission of a terrorist act (again under the condition that this causes a danger that terrorist acts may be committed intentionally). The addition in the Council’s general approach of **5(aa) ‘threatening to commit a terrorist offence’** is not reflected in the EP’s changes (which refer only to acts under Article 3 (a) – (i) of the Terrorism Directive and not Article 3(j) which concerns threats).
- The EP has deleted the definition of ‘referral’ in point 8 (also deleting Article 5 and any other reference to referrals).
- The EP has added a new definition as point 9a: ***‘competent authority’ means a single designated judicial authority or functionally independent administrative authority in the Member State.***

⁸ OJ L 88, 31.3.2017, p. 6

Article 3 - Duties of care

Several amendments have been made to this Article:

- The EP has added a new paragraph 1a providing that the duties of care shall not amount to a general monitoring obligation;
- Paragraph 2, requiring the HSPs to include in their terms and conditions, and to apply, provisions to prevent the dissemination of terrorist content, has been deleted. The amendment made in the Council general approach prohibiting the HSP to store terrorist content is not included in the EP's amendments;
- A new paragraph 2a, requiring HSPs to inform competent authorities about terrorist content online and to remove it expeditiously has been added, as well as a new paragraph 2b, stating that if a HSP is a video-sharing platform under Directive (EU) 2018/1808 (the Audiovisual Media Services Directive)⁹, it shall tackle the dissemination of terrorist content online in accordance with that Directive.

Article 4 - Removal orders

- The EP has made an amendment to paragraph 1 with the effect of restricting the right to issue a removal order with EU-wide effect to the competent authority '*of the Member State of main establishment of the hosting service provider*'. The new paragraph 1a states that any other Member State can only request '*access to be disabled to terrorist content and enforce this request within its own territory*'.
- The EP has amended the provisions concerning the timeframe for removing the terrorist content. A new paragraph 1b requires the competent authority to contact the HSP at least 12 hours before issuing a first removal order and inform it about the procedures, etc.
- In paragraph 3 point a, the EP has added that the identification of the competent authority has to be done via an electronic signature.

⁹ OJ L 303, 28.11.2018, p. 69

- In paragraph 3 point b, the EP requires the competent authority to provide a detailed statement of reasons with the removal order. The EP has also deleted paragraph 4, which allowed competent authorities to provide reasons in two stages: standardised information contained in the removal order template (automatically available in all EU languages) and more detailed reasons upon request (which would need to be translated into the language chosen by the HSPs).
- In paragraph 3 point f, the EP has added the requirement to provide more detailed information about redress.
- The EP has amended paragraph 8, allowing HSPs to refuse to execute the removal order where the removal order does not contain sufficient information. The Commission proposal (as maintained in the general approach) limited this to cases where the HSPs could not comply with the removal order because information necessary ‘to execute the order’ was missing.

Article 4a - Consultation procedure

- The EP has inserted a provision on ‘Consultation procedure for removal orders’ for MSs having issued a removal order against HSPs established outside their territory and with effects only in the issuing MS. This consultation procedure lays down rules for contacting the competent authorities of the Member State where the main establishment of the HSP is located and for the processing of this removal order.

New Article 4b - Cooperation procedure for issuing an additional removal order

- A new Article 4b on ‘Cooperation procedure for issuing an additional removal order’ sets out the procedure for the competent authority in cases where the HSP does not have its main establishment or legal representative in that MS to request the Member State where the HSP has its main establishment to issue a removal order with EU-wide effects. The requested competent authority would take a decision in principle within 1 hour; where more time is needed the requested competent authority would ask the HSPs to disable access to the content temporarily for 24 hours.

Article 5 Referrals

- The EP has deleted all provisions on referrals.

Article 6 - Proactive measures

- The EP has renamed ‘Proactive measures’ ‘Specific measures’. These measures would be voluntary for the HSPs, and the corresponding recital 16 to this article clarifies what is to be understood by "specific measures", i.e. regular reporting, increase of human resources as well as exchange of good practices. In addition, the EP has deleted paragraphs 2 and 3, which contained provisions on reporting about the proactive measures and the cooperation obligation on HSPs (i.e. dialogue between HSPs and competent authorities to determine mutually agreeable proactive measures). In paragraph 4, the EP has added that before competent authorities can impose specific additional measures, the HSP must have received ‘*a substantial number of removal orders*’ (Note also that in Article 19, the EP has added a new paragraph 1a to empower the Commission to adopt delegated acts on ‘*what corresponds to a significant number of uncontested removal orders*’). The EP has also added in Article 6(4) that ‘*The competent authority shall not impose a general monitoring obligation, nor the use of automated tools.*’.

Article 8 - Transparency obligations

- The EP has made amendments to the transparency obligations, making the transparency reports obligatory only when the HSP has received a removal order in that year, requiring information to be given in particular if automated technology has been used in cases of re-uploaded content, providing for a statement of the number of orders where the content has not been removed, and adding a provision about redress cases.

New Article 8a - Transparency obligations for competent authorities

- A new Article 8a on ‘Transparency obligations for competent authorities’ has been added, requiring competent authorities to publish annual transparency reports including information about removal orders and measures taken under Article 6(4) but also about the number of identified pieces of terrorist content that led to criminal investigations.

Article 9 – Safeguards in relation to proactive measures

- The EP has amended paragraph 2 to the effect that HSPs need to have human oversight and verification in place for all decisions to remove content, and not only where contextualisation is necessary.

New Article (9a) - Effective remedies

- A new Article (9a) on ‘Effective remedies’ for HSPs and content providers has been introduced, with a requirement for MSs to put in place effective procedures for such remedies.

Article 11 - Information to content providers

- The EP requires HSPs to provide the content provider with ‘concise and comprehensive information’ on the removal, including a copy of the removal order upon request. This would slightly modify the process provided for in the Council general approach (general notice replacing the removed content and more detailed information to the content provider upon request) as paragraph 2 has been deleted.
- In paragraph 3, the EP has added requirements as to when the competent authority can decide on non-disclosure of the information.

Article 14 - Points of contact

- According to the EP amendment to paragraph 1, the HSP shall establish a point of contact when it has previously received one or more removal orders. On the other hand, paragraph 3 on establishing a point of contact in Member States has been deleted.

Article 15 - Jurisdiction

- The EP has not included in its amendments the provision of the Council general approach in paragraph 1 stating that ‘*Any Member State shall have jurisdiction for the purposes of Articles 4 and 5, irrespective of where the hosting service provider has its main establishment or has designated a legal representative.*’

- In line with the Council general approach, the EP has deleted the provision about coercive measures in paragraph 3.

Article 17 - Designation of competent authorities

- The EP requires the national competent authority to be ‘*a judicial or a functionally independent administrative*’ authority (paragraph 1); this is reflected in the changes in Article 12 where the EP has added that MSs’ competent authorities shall offer ‘strong guarantees of independence’.
- The EP has not amended the deadline for informing the Commission about the competent authorities. The EP has kept the six-month timeframe, whereas the Council general approach extended the deadline to 12 months (paragraph 2).
- The EP has also added a requirement for the Commission to ‘*set up an online register listing all those competent authorities and the designated contact point for each competent authority*’.

Article 18 - Penalties

- According to the EP’s amendment to paragraph 1, Member States shall lay down the rules on penalties applicable to ‘*systematic and persistent*’ breaches of the obligations by HSPs under this Regulation.
- The EP has added a specific provision in paragraph 3 (new point e a) requiring Member States, when determining penalties, to take into account also ‘*the nature and size of the hosting service providers, in particular for microenterprises or small-sized enterprises within the meaning of Commission Recommendation 2003/361/EC*’¹⁰.
- In paragraph 4 (setting out a maximum penalty of 4 % of turnover for breaches of obligations related to removal orders), the EP specifies that the failure to comply with the obligations must not only be systematic, but also ‘*persistent*’.

¹⁰ Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises

Article 23 – Evaluation

- The EP has shortened the deadline for carrying out an evaluation (from ‘no sooner than 3 years’ to one year) and requires an assessment of the impact on fundamental rights. The assessment should also look into the necessity, feasibility and effectiveness of creating a European Platform on Terrorist Content Online to use one secure communication channel to send removal orders for terrorist content to HSPs.

Article 24 – Entry into force

- The EP has extended the date of application to 12 months, in line with the Council’s general approach.

III. MEETINGS ENVISAGED/TIME SCHEDULE/WORK AHEAD

7. The Presidency envisages starting trilogues as soon as the new EP is ready, *i.e.* when the first-reading position has been confirmed.
8. Four dates have been provisionally earmarked for discussions by the Terrorism Working Party (TWP) if deemed necessary: 13 September, 24 October, 8 November and 21 November 2019. Meetings in JHA Counsellors format will be held as appropriate and may replace some of the TWP meetings.

In order to prepare for the trilogues, at the meeting of the TWP of 13 September 2019, the Presidency invites the MSs to give their first reactions to the EP’s report and highlight the main concerns and possible room for compromise.

In addition, the Presidency intends to go through the main amendments introduced by the EP to the Articles part.