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From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Subject: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council on the adoption of a Regulation of the European Parliament and the Council to address the dissemination of terrorist content online

Delegations will find attached document COM(2021) 123 final.

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning the

**position of the Council on the adoption of a Regulation of the European Parliament and
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position of the Council on the adoption of a Regulation of the European Parliament and the Council to address the dissemination of terrorist content online

1. BACKGROUND

Date of transmission of the proposal to the European Parliament and to the Council (document COM/2018/640 final – 2018/0331(COD))	12 September 2018
Date of Council agreement on a negotiation mandate	6 December 2018
Date of the position of the European Parliament, first reading	17 April 2019
Date of trilogue 1	17 October 2019
Date of trilogue 2	20 November 2019
Date of trilogue 3	12 December 2019
Date of trilogue 4	24 September 2020
Dates of trilogue 5	29 October 2020
Date of trilogue 6 (final)	10 December 2020
Date of political agreement in the Committee of Permanent Representatives	16 December 2020
Date of the LIBE Committee of the European Parliament voted to endorse the compromise agreement	11 January 2021
Date of adoption of the Council first reading position	16 March 2021

2. OBJECTIVE OF THE PROPOSAL FROM THE COMMISSION

Terrorist attacks on EU soil have demonstrated how terrorists misuse the internet to groom and recruit supporters, to prepare and facilitate terrorist activity, to glorify in their atrocities and urge others to follow suit and instil fear in the general public.

Terrorist content shared online for such purposes is disseminated through hosting service providers that allow the upload of third party content. Terrorists and their supporters have misused not only large social media platforms, but increasingly also smaller providers offering different types of hosting services accessible in the European Union. This misuse of certain online services highlights the particular societal responsibility of hosting service

providers to protect their users from exposure to terrorist content and the grave security risks this content entails for society at large.

The Commission proposal was to establish a harmonised legal framework to prevent the misuse of hosting services for the dissemination of terrorist content online, to guarantee the smooth functioning of the digital single market, whilst safeguarding public security and protecting fundamental rights.

The proposed Regulation aims at providing clarity as to the responsibility of hosting service providers in taking all appropriate, reasonable and proportionate actions necessary to ensure the safety of their services and to swiftly and effectively detect and remove terrorist content online. Such actions include the removal of content within one hour from receiving a removal order and specific measures to be taken by hosting service providers in a proactive manner to protect their services.

At the same time, the proposed Regulation contains a number of safeguards designed to ensure full respect for fundamental rights, such as freedom of expression and information, in a democratic society. These safeguards include obligations of transparency as well as complaint mechanisms to ensure that content providers can challenge the removal of or disabling of access to their content, in addition to judicial redress in line with Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the EU.

The obligations on Member States contained in the proposed Regulation will contribute to these objectives, by empowering competent authorities, increasing predictability and transparency, guaranteeing adequate safeguards and ensuring that non-compliance by hosting service providers can be sanctioned through effective, proportionate and dissuasive penalties.

3. COMMENTS ON THE POSITION OF THE COUNCIL

The Council's position reflects the political agreement reached between the European Parliament, the Council, and the Commission on 10 December 2020. The most important differences between the Commission proposal and the politically agreed text are the following:

- *Scope*: Clarification that material disseminated for educational, journalistic, artistic or research purposes or for the purposes of preventing or countering terrorism is not to be considered terrorist content, and that an assessment is to determine the true purpose of dissemination.
- Clarification that the Regulation is without prejudice to the e-Commerce Directive¹ and the Audiovisual Media Services Directive², as well as that for audio-visual media services the latter directive prevails in cases of conflict. A recital clarifies that this

¹ 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 (OJ L 178, 17.7.2000, p. 1–16).

² Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ L 303, 28.11.2018, p. 69–92).

leaves the obligations for video-sharing platform providers under the Regulation unaffected.

- Specification that the Regulation applies solely to hosting service providers that disseminate information to the public, i.e. to a potentially unlimited number of persons.
- *Definitions*: The definition of ‘terrorist content’ excludes material that “promotes” the activities of terrorist groups and is aligned more closely with the relevant offences in the Directive on combating terrorism³.
- *Removal orders*: The deadline of maximum one hour for hosting service providers to remove/disable access to terrorist content is maintained, but the competent authority needs to inform the hosting service provider 12 hours in advance of the first removal order, except in cases of urgency. In addition, in cases of objectively justifiable technical or operational reasons making it impossible to comply with the removal order, the deadline will be suspended.
- *Right of scrutiny/ procedure for cross border removal orders*: While all Member States are entitled to issue removal orders to any hosting service provider, irrespective of its place of establishment, a new article on procedures for cross-border removal orders (Article 4) enables the competent authority of the ‘host’ Member State (that is, the Member State where the hosting service provider is established or has its legal representative) to scrutinise a removal order to determine whether or not it contains manifest or serious breaches of fundamental rights or the Regulation. Hosting service providers and content providers have the right to request a review of the removal order by that competent authority, in which case that authority is obliged to carry out the scrutiny and set out its findings in a decision. Where the scrutiny leads to findings of manifest or serious breaches, the removal order ceases to have legal effect and the hosting service provider is no longer under an obligation to remove the material and should in principle reinstate it.
- *Specific measures*: The content of Articles 3, 6 and 9 of the proposal has been adjusted and merged into one article setting out the obligations of hosting service providers to put in place specific measures to address the dissemination of terrorist content. These obligations apply only to those hosting service providers that the competent authority has found to be exposed to terrorist content. Although the competent authorities can require hosting service providers to take additional measures, the choice of the specific measures to address terrorist content remains with the hosting service providers, which cannot be obliged to use automated tools.
- *Referrals*: The article on referrals (that is, a mechanism for the submission of notices alerting hosting service providers of terrorist content for the providers’ voluntary consideration against their terms and conditions) contained in the Commission proposal has been deleted. However, a recital clarifies that the instrument of referrals remain at the disposal of Member States and Europol.

³ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (OJ L 88, 31.3.2017, p. 6–21).

- Competent authorities: Member States are to designate competent authorities in accordance with the requirements of the Regulation, including making sure that those authorities do not seek or receive instructions and that they act in an objective and non-discriminatory manner, ensuring full respect for fundamental rights.
- Penalties: The article on penalties includes the explicit possibility for Member States to decide whether or not to impose penalties in individual cases, taking account of circumstances such as the nature and size of the hosting service provider concerned, the degree of its fault for the breach and the technical and organisational measures that it may have taken to ensure compliance with the requirements of the Regulation.
- Final provisions: the time period for the entry into application of the Regulation was extended to 12 months after its entry into force, while the time period for the evaluation of the Regulation was shortened to two years after entry into application.

The Commission considers that, overall, the political agreement reached, as reflected in the Council position, preserves the principal objectives of the Commission proposal mentioned above. In particular, the agreed text constitutes a balanced approach ensuring that terrorist content online is tackled effectively, that a comprehensive set of safeguards to protect fundamental rights is provided for and that hosting services providers active on the internal market are subject to uniform and proportionate rules.

4. CONCLUSION

The Commission accepts the position taken by the Council.