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From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online

Delegations will find in the Annex a courtesy translation of the comments from France.

**Note with comments — Comments by France following the meeting of JHA TCO counsellors on 29 September 2020**

**With regard to the partial rejection of the Avia Law by the Constitutional Council:**

On 24 August, the French Constitutional Council published a commentary on its decision No 2020-81 of 19 June 2020 rejecting the law aimed at combating hate content on the Internet (the ‘Avia Law’).

- Firstly, the Council reiterates that in its Decision No 2009-580 of 10 June 2009, it recognised **the importance that of online public communication services have for the exercise of freedom of expression and communication**. It reiterates that it subjects infringements of that freedom to the most stringent degree of review, that of a full review of proportionality, and that consequently, only infringements that are necessary, appropriate and proportionate to the pursued objective are considered possible. Online platforms, which guarantee the exercise of this freedom online, therefore also benefit from this protection against infringements that are considered to be disproportionate.
- Next, it is clear from the Council’s case-law analysis of its decisions on freedom that **the key point** of its decision to reject the law is **the absence of the manifest nature of the content to be removed within the hour, and the discretion left to the administration**. The Council states that its review of the proportionality of the interference with the freedom of expression takes into account ‘the certainty or, on the contrary, the uncertainty as to the lawfulness of the conduct or message that is liable to be sanctioned. The more the legal characterisation of the messages or conduct in question is likely to give rise to debate, assessment or controversy, the greater the risk that the infringement will be deemed disproportionate.’ To illustrate the fact that the administration’s discretion does not present a sufficient guarantee, the Council cites a decision of the administrative court of Cergy-Pontoise of 4 February 2019, which annulled several decisions of the administration taken in application of Article 6-1 of the Law of 21 June 2004, after having ruled that since the acts in question were not acts of terrorism, the publications did not constitute offences of provocation or justification for committing such acts.

- It is **in connection with that finding** that the Council states that the one-hour period allowed to the publisher or host to comply with a request from the administration does not allow it, **even by challenging it through an emergency appeal procedure, to have its legality examined before having to comply**, failing which it would be subject to a severe criminal penalty of up to one year's imprisonment and a fine of EUR 250 000. Thus, it seems that the need for an appeal arises from the discretionary power of the administration to decide which content is to be regarded as illegal, and thus removed within the hour. However, as the definition of terrorist content is much more precise in the TCO Regulation, the margin of discretion left to the supervisory authorities is considerably restricted. The problem with the sanctioning regime, which the Council describes as a 'severe criminal penalty', also seems to be linked to the risk of arbitrary administration and the uncertainty that this creates for platforms, in the context of the one-hour withdrawal, since the Council had already validated a similar sanction regime in its Decision No 2011-625 of 10 March 2011.

It was therefore also necessary to take into account the decision of the Constitutional Council in order to consider how France could continue negotiations on the draft Regulation on preventing the dissemination of terrorist content online.

After thorough analysis, it appears that the impact of this decision is modest and does not fundamentally call into question our guidelines, in that the draft Regulation offers greater safeguards of proportionality than the Avia law.

The French authorities request that the following four red lines be maintained:

- Withdrawal of the content within one hour from receipt of the removal order, without giving suspensive effect to an appeal against such an order (Article 4);
- The cross-border and enforceable nature of such an order (the possibility for any competent authority to issue a removal order irrespective of the place of establishment of the hosting service provider (HSP)); The French authorities therefore reiterate that it is preferable to align the text with the position adopted in the general approach, granting the power to issue a removal order to all Member States.
- Proactive measures that may be imposed on HSPs (Article 6, preventive measures to limit the appearance or reappearance of terrorist content);
- Under Article 17, the possibility for each Member State to decide on the nature of its competent authority and thereby preserve our model (non-independent administrative authority subsequently checked by an independent administrative authority).

### More particularly, in the area of referrals (Article 5)

Beyond the fact that this system (combined with removal orders from the competent authorities under Articles 4 and 17) makes it possible to include European agencies (in particular Europol's EU IRU) and to boost synergies and better cooperation in combating the dissemination of terrorist content online, this point contributes to the effectiveness of the system.

Assessing referrals from Europol and the competent authorities against their own terms and conditions as a matter of priority is a swift and effective means of alerting providers to the possible presence of terrorist content on their platforms. Lastly, referrals under Article 5 are an intermediate system between referrals from individuals with reference to the terms and conditions of HSPs, which are not dealt with in the draft Regulation, and removal orders. That being the case, referrals under Article 5 constitute an instrument which would allow progressive degrees of public response and ensure proportionality, principles by which France and many other Member States set great store, and which were the focus of close attention during negotiations within the Council. The proposed deletion of Article 5 should therefore be revisited.

### **With regard, in particular, to the compromises proposed by the Presidency:**

In general, the French authorities thank the Presidency for all of the proposed compromises. These are a step in the right direction and reassert our key focal points. In particular, we support the Presidency's amendment to Article 4(1a), which introduces an exception to prior contact 12 hours before a first order is sent (e.g. cases of particular urgency such as live streaming).

However, since adjustments appear to be necessary, we would also highlight the following points:

### **Regarding scope:**

The French authorities consider that the formula '*to a potentially unlimited number of persons*' as proposed poses difficulties; this wording gives rise to confusion in so far as it may suggest that the concept of public dissemination is limited to cases of dissemination targeting the entire Internet public.

It must be possible to assess the public nature of the dissemination on a case-by-case basis, with due regard in particular for the visibility parameters and the potential audience, which need not be unlimited. By way of example, French case-law has held that content posted on a *Facebook* wall open only to 'friends' is not public since it is accessible only to a limited number of persons approved by the account holder (Court of Appeal of Versailles, Third Chamber, 18 June 2015, 13-03453); **on the other hand, however, where it is also accessible to 'friends of friends' - the number of whom cannot be controlled**, and who do not constitute a community of interests - such content is public. (Court of Appeal of Douai, 11 September 2014, no 14/02540).

Lastly, we would point out that it seems inconsistent to take the approach within the ‘terrorist’ Regulation of systematically excluding messaging services from the group of actors targeted by public orders, while at the same time, in the context of the new proposal for a Regulation to combat child sexual abuse online, to derogate from the ePrivacy Directive in order to explicitly provide that the same messaging services may voluntarily adopt proactive measures to detect such content.

#### **Definition of terrorist content:**

We are opposed to the insertion of paragraph 5a providing for an exception for artistic, educational, journalistic or research content or counter-narratives, since it seems that this provision would be more appropriate in the form of a recital.

#### **Articles 4, 4a and 4b - Removal orders and cooperation/consultation procedure:**

The proposed amendment to Article 4 reinforcing the obligation to state reasons “*((b) a statement of reasons explaining why the content is considered terrorist content, at least, by **and** reference to the **relevant** categories of terrorist content listed in Article 2(5);)*” does not seem desirable and we would consider it preferable to go back to the original version: “*(b) a statement of reasons explaining why the content is considered terrorist content, at least by reference to the **relevant** categories of terrorist content listed in Article 2(5)*”.

In this respect, we could be flexible vis-à-vis the inclusion of the ‘manifestly illegal’ nature of the content for orders under Article 4, but in return for dispensing with the reinforcement of the obligation to state reasons. Furthermore, we would like to point out that the inclusion of a reference to the ‘manifestly illegal’ nature of the content would, for us, be the counterpart to the deletion of Article 5 on referrals, thus providing an additional proportionality factor.

#### **Specifically regarding Article 8a, concerning transparency obligations:**

It is provided that the hosting service provider may oppose an order by invoking fundamental rights, and that the competent authority must then confirm the order, which will not be executed until it has done so. This gives rise to the following comments from our point of view:

It does not seem legitimate to give a private digital service provider the role of assessing the compliance of an order with fundamental rights. Moreover, this ‘right of recourse to the competent authority’ has suspensive effect, yet it is imperative to prioritise the effectiveness of the order and, in particular, the removal of content within one hour; a suspensive appeal would deprive it of any effect.

We would therefore suggest amending the wording as follows (added text in bold and deletion of the phrase in square brackets):

*“8a. If the hosting service provider has reasonable grounds to believe that the removal order manifestly and seriously breach the fundamental rights and freedoms set out in the EU Charter of Fundamental Rights, it may request the issuing competent authority to review the issued removal order without undue delay, **without prejudice to the obligation of the hosting service provider to comply with the removal order within the deadline set out in paragraph 2.** The hosting service provider shall inform the competent authority of the Member States of main establishment about this request at the same time. The issuing competent authority shall decide on the request without undue delay and inform the hosting service provider and the competent authority of the Member State of main establishment. [...]”*

We are against the proposed amendment of Article 4a(3).

Under the Council text, the authority which issued the removal order decides whether the observations of the authority of the host country as regards the impact on the host country’s fundamental interests should be taken into account. Here, the Presidency proposes strengthening the host country’s power of scrutiny; the issuing authority would be required to either adapt or withdraw its order in light of the concerns raised.

With regard to Article 4b, we would stress that the concept of ‘enforcement’ is ambiguous and we would ask the Presidency for clarification. We can perhaps agree to the Member State in which the HSP is established being able to refuse enforcement, particularly where it considers an order to be disproportionate or prejudicial to fundamental rights, but not to it having to give its approval for the order from the issuing Member State to take effect. This would create an additional opportunity for the host country not to take any action in the event of a violation of a fundamental right. As it is, there is no justification for such a turnaround, and it significantly limits the prerogatives of the Member State issuing the removal order.

### **Article 12 – Capabilities of competent authorities**

We do not support the proposed wording of paragraph (2), which indicates that the authority competent for issuing a removal order may not take instructions; this is tantamount to requiring a functionally independent authority. Likewise, the Presidency indicates that it is in favour of the authority competent for issuing the order being independent, as requested by the European Parliament, and it proposes that this principle be enshrined in Article 2 instead of Article 17. We are against this proposal.

### **Article 18 – Penalties:**

We think it is important to take into account the size and nature of the operator when determining the severity of the penalty. Nevertheless, the current wording of the compromise (‘when deciding whether to impose a penalty’) means the operator might be exempt from penalties, depending on its size and nature, which is not acceptable given that one of our objectives is to prevent the migration of content. We are therefore not in favour of this compromise proposal, and would suggest deleting the words ‘when deciding whether to impose a penalty’.

However, we reiterate our support for the European Parliament’s request that only systematic and persistent infringements be penalised.

### **Lastly, regarding preventive measures:**

This seems very problematic to us, as this system should be based on a duty of care requiring the establishment of an effective moderation system, with the option of auditing measures and orders or penalties in the event of non-compliance. The introduction of penalties solely for individual non-removals does not seem appropriate to us: it is the system of moderation as a whole which should be evaluated and, where applicable, required to make improvements.

In connection with the above, we are opposed to the following proposed amendment to Article 1(1a): ‘duties of care... in order to [...] *address* the dissemination...’, as this covers measures of an ‘ex post’ nature only, and excludes preventive measures such as proactive detection and staydown.