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### WORKING PAPER

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#### WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a Regulation on preventing the dissemination of terrorist content online - comments by Member States on Commission compromise proposals circulated on 6 March 2020

Delegations will find in Annex further comments from Member States on the above mentioned proposal together with courtesy translation to EN of the FR comments.

**Submission in response to Working Paper 2669/2020 INT of 6/3/20**

**From:** Irish Delegation  
**To:** Croatian Presidency  
**Subject** Drafting Proposals EC following technical meeting of 3/3/20 with EP

Ireland thanks the Presidency for its efforts in the technical meeting with EP, and recognises the significant progress made in a number of areas. We welcome the pragmatism informing compromises arising from this meeting – Ireland accepts many of these in the spirit of cooperation, and with a view to advancing the proposed Regulation to a swift conclusion.

However, Ireland considers it important to communicate our strong reservations in relation to certain of the compromise proposals, whose acceptance, we believe, would fundamentally undermine the ability of Member States to effectively implement and operationalise the Regulation in its objective of preventing the dissemination of terrorist content online.

Ireland has, as have all parties to the proposed Regulation, been working constructively and in a spirit of cooperation towards this end. The below observations and suggestions are provided to build on the progress made by the Presidency, and in the regard we offer specific wording for the compromise proposals concerned. We welcome further discussions and we are amenable to provide further detail as required.

In essence, Ireland considers that effective and efficient controls for cross-border removal order transactions are essential to security interests, safeguarding fundamental rights, and to maintaining mutual trust between Member States.

Detailed responses to these drafting proposals are provided below.

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### **Article 1: Scope of the regulation – compromise text for new para in Article 2**

We broadly support the text circulated regarding the determination of ‘terrorist content’, and the importance of taking account of the respective freedoms and principles of information dissemination.

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### **Article 2: Definition of terrorist content Compromise text for article 2(5) c)**

While we have previously underlined the importance of retaining the term ‘promoting’, in the spirit of compromise, we accept ‘soliciting’, and recognise its consistency with EU Directive 2017/541.

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### **Article 4 and 4a: cross border removal orders**

Ireland notes the preamble paragraph justifying the compromise proposals, in terms of the need to keep in mind, *“the overall objective of the provision, namely to have an effective tool to ensure the swift removal of terrorist content that is disseminated at a large scale across many platforms and affecting the security interests throughout Europe, the protection of fundamental rights and the need to provide legal certainty.”*

We consider this description of the overall objective at variance to the most recent Council text, where the overall objective of the proposed Regulation *“aims at ensuring the smooth functioning of the digital single market in an open and democratic society, by preventing the misuse of hosting services for terrorist purposes. The functioning of the digital single market should be improved by reinforcing legal certainty for hosting service providers, reinforcing users’ trust in the online environment, and by strengthening safeguards to the freedom of expression and information.”* [10.1, WK 371/2020 INIT of 15/1/20]

**Article 12** : Ireland welcomes the compromise text’s use of ‘competent authorities’ as an acceptance that each Member State may designate more than one competent authority in order to operationalise the proposed Regulation. This is an important issue for Member States, and we welcome the compromise arrived at by the Presidency and the Parliament.

**Article 17** : As with the proposed compromise text for Article 12 above, Ireland recognises this text permits multiple competent authorities, and again welcome this compromise. In this same spirit of compromise Ireland can support the pragmatic proposal to restrict the issuing of removal orders to a single competent authority per Member State.

However, Ireland has strong reservations in relation to the wording of this Article specifying the type of body that can perform the tasks under this Regulation, where,

*“Each Member State shall designate one or more judicial authorities, functionally independent administrative authorities or authorities subject to regular independent review in relation to the tasks performed under this Regulation...” (emphasis added).*

The current drafting may be interpreted as not taking account of the fact that Ireland is a Common Law jurisdiction, and as such Ireland neither designates its law enforcement authority (LEA) as a judicial authority nor does it have, as is the case in other EU Member States, a separate judicial LEA. Consequently, the Irish LEA is effectively excluded from performing the tasks as a CA per the above the compromise text.

It is also important to note that, as part of Ireland’s preparations for implementing the proposed Regulation, it was found that a significant majority of EU Member States that have established Internet Referral Units, have located these in their respective LEAs. In this respect we note that the exclusion of LEAs from performing the tasks of a CA may be an issue for several Member States.

As such Ireland requests clarification if the exclusion of LEAs from serving as a competent authorities under the proposed Regulation is a deliberate request of the Parliament, and if so we would like further elaboration on the Parliament’s arguments behind this so that we may fully understand their reasoning and concerns.

Consistent with our aim to build on progress to date, we propose two alternative wordings:

(a) Each Member State shall designate one or more judicial authorities, **independent law enforcement authorities**, functionally independent administrative authorities or authorities subject to regular independent review in relation to the tasks performed under this Regulation competent to:

or

(b) Each Member State shall designate one or more authorities subject to regular independent review in relation to the tasks performed under this Regulation competent to:

\*

#### **Article 4a**

Ireland has strong concerns that this proposed article does not reflect a fair or balanced compromise of the previously held Council and Parliament positions. The purpose of the proposed new process – a request for reassessment – is to introduce *“further guarantees ... to ensure impartial decisions in full respect of fundamental rights.”* Yet this compromise process can be interpreted as unduly onerous for CAs issuing or receiving removal orders, and risks undermining the efficiency and effectiveness of the time-critical, cross-border removal

order process essential to the Regulation as “an effective tool to ensure the swift removal of terrorist content”. For the sake of clarity these concerns are detailed as follows:

**Paragraph 1** details a process proposing that removal orders may be issued across borders, where removal orders are copied to the host CA, and to Europol to allow Europol fulfil its monitoring role for annual reporting purposes (per the compromise text for article 13);

**Paragraph 2** requires host CAs responsibility to ‘reassess’ received removal orders to:

- 1) determine whether it has “reasonable grounds to believe that the removal order unduly limits the exercise of fundamental rights set out in the Charter of Fundamental Rights”
- 2) (and if so) request the issuing CA to “to reassess its removal order”; and
- 3) Inform the HSP concerned accordingly.

**Paragraph 3** then proceeds to require the issuing CA “without undue delay” to:

- 1) re-assess the removal order;
- 2) determine whether to withdraw or adapt it; and
- 3) inform the host-CA and HSP in question “of the decision taken and the reasons for that decision”

**Paragraph 4** provides HSPs with a right to request the host CA to request a reassessment per the process described in paragraph 2 above.

Ireland’s strong concerns as to implementation and operation of such a process are:

- Regarding paragraph 2’s ‘request for reassessment’ process, how is the host CA to determine the ‘reasonable grounds’ that would trigger a request to the issuing CA to reassess a removal order that “unduly limits the exercise of fundamental rights”?
- How much time would a host CA have to determine whether a received removal order should be subject to a request for reassessment?
- What liability is a host CA potentially exposed to where it is tasked with “reinforcing” (read safeguarding) fundamental rights concerns 1) on its own initiative; or 2) following a complaint by the receiving HSP; or 3) where it does not issue a request for a removal order that is latterly the subject of some form of contention or controversy; or 4) where it refuses or does not act on a request from a HSP to request a reassessment; or 5) where an issuing CA refuses to address a ‘request for reassessment’ from a host CA on behalf of a HSP?

- What action can a HSP take in the meantime? Can the HSP take immediate action to remove the notified content, in line with the original aim and intention of the instrument, or is it obliged to wait until the host CA undertakes its reassessment, in which case undermining the aim of the instrument to ensure swift removal of terrorist content online. If a HSP removes content immediately upon receipt of the removal order, and a host CA later determines that the removal order was a breach of fundamental rights, where does liability lie?
- How would a circumstance where contention arises between an issuing CA and a hosting CA in relation to a 'request for reassessment' be addressed?
- How much time would the issuing CAs be given to process requests from host CAs – and taking account of paragraph 3's reference to "without undue delay"?

Given the 'request for reassessment' process's potential for delay, complication, contention, and the potentially corrosive effect it may have on the principle of mutual trust on which this proposed Regulation is based, Ireland strongly advocates for the original wording from the Council's general approach to be retained.

Ireland is acutely aware of Parliament's concerns for 'further guarantees' to ensure that impartial decisions are made in full respect of fundamental rights, and in this respect we consider that such guarantees/safeguards are best reinforced before a Removal Order issues from a CA. This can be achieved by way of strict adherence to a standardised template, and by rigorous oversight of the cross-border Removal Order process, before removal orders are issued to ensure that it is operated in a fair, transparent and consistent manner. For this instrument to have real added-value by way of direct cross-border applicability, the underlying principle across all EU instruments of mutual legal trust must be observed and upheld. Ireland accepts that there are some concerns among Member States that this principle is being eroded, but this new instrument is not the place to address such fundamental issues and concerns.

In this respect Ireland notes that the compromise texts establishes a monitoring and reporting role for Europol in respect of the removal orders process, and we propose that this role could be expanded as a means to avoid unnecessary and avoidable contention and complication.

Accordingly, and to assist the Presidency in advancing the Regulation to a swift conclusion, we propose the following text:

- (1) Where the competent authority issuing a removal order is not the competent authority of the Member State in which the main establishment of the hosting service provider is located, the former competent authority shall transmit a copy of the removal order to the latter competent authority **for information purposes only**, and to Europol, at the same

time as it transmits the removal order to the hosting service provider in accordance to Article 4(5).

- (2) ~~Where the competent authority of the Member State in which the main establishment of the hosting service provider is located~~ **Europol** has reasonable grounds to believe that the removal order unduly limits the exercise of fundamental rights set out in the Charter of Fundamental Rights, it shall request the issuing competent authority to reassess the removal order, and inform the hosting service provider concerned, accordingly.
- (3) Upon receipt of such a request from Europol, the competent authority issuing the removal order shall, without undue delay, reassess the removal order and shall, where necessary, withdraw or adapt it. It shall inform the competent authority of the Member State in which the main establishment of the hosting service provider is located, as well as the hosting service provider concerned, of the decision taken and the reasons for the decision.
- (4) Hosting service providers having received a removal order from a competent authority other than the competent authority in which its main establishment is located shall be entitled to request ~~the latter authority~~ **Europol** to initiate the procedure referred to in paragraph 2.

This suggested text may benefit from further detail as regards timelines and, in the form of a protocol, the elaboration of an optimal design for the Removal Order process to ensure an efficient, effective and consistent application by all parties concerned. In the interest of transparency and safeguarding fundamental rights, a consultative role for the EU Fundamental Rights Agency in the design of standardised templates and in mapping the process may be desirable.

**Additional paragraph to Article 13** : Ireland agrees with the compromise text, and proposes that it is extended to account for an expanded remit for Europol in the proposed Regulation.

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### **“Specific measures” Article x**

Ireland has previously expressed our concerns regarding the onerous administrative responsibilities paragraphs 4 and 5 of Article x would place on a competent authority, particularly when classification on the grounds set out in Article x is based on objective factors.

However, in the spirit of compromise, and to progress the proposed Regulation to a swift conclusion, Ireland is willing to accept these proposals in the expectation that a similar degree of reciprocity is accorded to our strong concerns in relation to Article 17 and Article 4a as detailed above.

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**Judicial redress – Article 9a** : Ireland accepts the revised version of this Article in a similar spirit of compromise and pragmatism to that of Article x.

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**Sanctions under Article 18 – Article 18 (2)** : Ireland broadly accepts the compromise text.

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*Cyber –  
Criminal Justice Policy  
Department of Justice and Equality  
13/3/20*



Warsaw, 12<sup>th</sup> March 2020

**Polish written comments concerning 'Drafting proposals' prepared by European Commission following technical meeting with EP 3 March 2020**

On the proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online

Please find Poland's written comments on the draft compromise proposals, which were circulated by e-mail on 6<sup>th</sup> of March 2020.

Article 1: Scope of the regulation

We do not express objections concerning compromise proposals.

Article 2: Definition of terrorist content

We do not express objections concerning compromise proposals.

Article 4 and 4a: cross border removal orders

We support to search for compromise proposals on the procedure for issuing removal orders, without unduly interfering with issues relating to state sovereignty. Therefore we support solutions that would strengthen the powers of the competent authority where the host provider's main establishment/legal representative is located. In this instance we can support wording that was drafted by the European Commission, as it reinforce the role of the host MS.

Article 12 and 17: Capacities of the competent authorities and Designation of competent authorities

We do not express objections concerning compromise proposals.

"Specific measures" Article x

In case of paragraph 4 of the proposal. The threshold for considering that the host provider is exposed to terrorist content should be formulated in a more flexible way. Since it is for the competent authority to assess whether or not the host provider is exposed to terrorist content, there is no need to specify the exact number of removal orders received. Therefore, in this case it would be preferable to use a more flexible formula - e.g. using word 'several' instead of 'two or more'.

If a majority of countries consider that an objective factor needs to be indicated (the exact number of final removal orders received by the host provider in question during the course of the year), there should be higher threshold to consider hosting service provider to be exposed to terrorist content.

Judicial redress

We do not express objections concerning compromise proposals.

Sanctions under Article 18

Support for amendments.

We agree that smaller companies may not be able to comply with the removal order within time limit of 1 hour. Applying the same approach to global corporations as well as to small companies operating

locally (European SMEs) is problematic. Removal or blocking of content by every hosting service provider within 1 hour or establishing a contact point ready for reaction and available in 24/7 mode will cause significant costs for smaller market players. Thus it should be taken into consideration to do no harm to competitiveness of small European companies. This objective factors need to be taken into consideration while deciding whether or not to impose a penalty.

## Note de commentaires

Commentaires de la France sur le projet de règlement relatif à la prévention de la diffusion de contenus à caractère terroriste en ligne – compromis de la Présidence diffusés suite à la réunion des conseillers JAI TCO du 5 mars.

D'une manière générale, les autorités françaises estiment que les compromis proposés vont dans le bon sens et viennent réaffirmer certains principes fondamentaux.

**À la lecture des compromis proposés par la Présidence, les autorités françaises souhaitent faire valoir les points suivants :**

**S'agissant de l'article 1 (*champ d'application*) :**

S'agissant de l'ajout d'un paragraphe sur la prise en compte de la liberté d'expression et de la création artistique pour l'appréciation du caractère terroriste du contenu, si les autorités françaises estiment que ce type de langage aurait plutôt sa place dans son considérant elles **demeurent néanmoins flexibles sur ce point.**

**S'agissant de l'article 2 (*définition des contenus terroristes*) :**

S'agissant de la définition des contenus terroristes, si les autorités françaises accueillent favorablement l'alignement de la définition sur la directive 2017/541, **elles indiquent leur préférence pour le maintien du texte de l'orientation générale du Conseil** et en particulier pour ce qui concerne la « promotion » des activités d'un groupe terroriste.

**S'agissant des articles 4 et 4a (*effet transfrontière des injonctions de suppressions*) :**

Les autorités françaises estiment que cette procédure est globalement satisfaisante. Toutefois, elle peut laisser à penser à l'opérateur qu'il n'est pas obligé de retirer le contenu terroriste visé par l'injonction tant que son autorité compétente ne s'est pas prononcée, voire tant que l'autorité émettrice n'a pas confirmé sa décision. Pour éviter que ne s'installe une telle pratique qui viendrait directement en contradiction avec l'impératif de retrait du contenu terroriste dans le délai d'une heure, il convient de préciser que la procédure de réexamen ne dispense pas l'opérateur d'exécuter l'injonction dans les conditions de délai fixées à l'article 4. **Sous réserve de la prise en compte de cette précision, les autorités françaises accueillent favorablement ce compromis.**

**S'agissant de l'article 13 (*renforcement du rôle d'Europol*) :**

Europol a un rôle crucial à jouer dans le fonctionnement du dispositif, notamment en mettant des outils technologiques à disposition des États membres et des opérateurs (notamment les plus petits d'entre eux). Dans cette perspective, il fait sens de confier à cette agence le soin de dresser le bilan annuel des injonctions de retrait. **Les autorités françaises accueillent donc favorablement ce compromis.**

**S'agissant de l'article nouveau portant sur les mesures spécifiques :**

L'ajout au premier paragraphe d'une phrase précisant que les opérateurs doivent lutter contre les contenus terroristes en ligne tout en évitant de retirer des contenus qui ne sont pas terroristes part d'une bonne intention, celle d'éviter la sur-censure. Toutefois, elle contredit le principe de la liberté du commerce et de l'industrie, qui veut qu'un opérateur peut librement définir dans ses conditions générales d'utilisation les limites des contenus qu'il souhaite sur son site ou son application, et retirer tout ce qui va au-delà. Ainsi, un gestionnaire de forum consacré au cinéma peut légalement exclure tous les contenus qui ne touchent pas au cinéma, etc. Il ne fait donc pas sens d'interdire aux opérateurs de retirer des contenus qui ne sont pas terroristes. En outre et surtout, cette prescription viendrait à l'encontre de la nécessité de retirer les autres contenus illicites, à commencer par les contenus pédophiles. Il conviendrait donc, soit de supprimer cette phrase, soit de la reformuler pour indiquer que, si la lutte contre les contenus terroristes n'interdit pas de retirer des contenus autres que terroristes, ces retraits ne peuvent être justifiés en se réclamant de cette lutte.

Au paragraphe 6, l'impossibilité pour l'autorité compétente de prescrire des outils prive sa décision de tout caractère décisoire. Ne demeure plus qu'un constat, celui du manquement aux obligations imposées par le règlement, constat qui en soi n'a ni caractère décisoire ni effet juridique, faute de sanction à ce stade. Le souci de ne pas imposer le recours à des outils automatisés finit donc par vider la décision de l'autorité compétente sur les mesures spécifiques de sa substance. Il serait préférable de prévoir que, dans sa décision, l'autorité compétente doit toujours veiller à laisser à l'opérateur une alternative au recours à des outils automatisés. Cette restriction plus ciblée permettrait de sauvegarder la plus grande partie du contenu positif de la décision d'imposer des mesures spécifiques.

**Sous réserve de la prise en compte de ces deux précisions, les autorités françaises accueillent favorablement ce compromis.**

**S'agissant de la nature de l'autorité compétente (articles 12 et 17) :**

La proposition de compromis de la Présidence permet aux États membres de choisir entre trois modes d'organisation : une autorité judiciaire, une autorité administrative fonctionnellement indépendante ou une autorité soumise à un contrôle indépendant. Cette dernière option permet de préserver modèle français retenu pour la plateforme PHAROS. Cette proposition de compromis permet donc de maintenir notre plateforme et qui a fait la preuve de son efficacité et de sa robustesse pour la sauvegarde des libertés fondamentales. **Les autorités françaises accueillent donc favorablement ce compromis.**

**S'agissant de l'article 18 (sanctions) :**

La prise en compte de la taille et la nature de l'opérateur est importante aux yeux des autorités françaises lorsqu'il s'agit de gradation de la sanction.

Néanmoins, ce compromis tel qu'il est formulé, peut exonérer de sanctions (« *when deciding whether to impose a penalty* ») l'opérateur selon sa taille et sa nature, ce qui n'est pas acceptable dès lors que nous poursuivons l'objectif d'éviter la migration de contenus.

De ce fait, **les autorités françaises sont défavorables à ce compromis et suggèrent de supprimer la mention « *when deciding whether to impose a penalty* ».**



Brussels, 13 March 2020  
(OR. fr)

SN 1930/20

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#### NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Comments by France on the draft Regulation on preventing the dissemination of terrorist content online - Presidency compromise distributed at the meeting of JHA TCO counsellors on 5 March 2020.

#### Note with comments

Comments by France on the draft Regulation on preventing the dissemination of terrorist content online - Presidency compromise submitted further to the meeting of JHA TCO counsellors on 5 March 2020.

Generally speaking, the French authorities consider that the compromises proposed are a step in the right direction and reassert certain basic principles.

**Upon reading the compromises proposed by the Presidency, the French authorities would like to make the following points:**

#### **Article 1** (*scope*)

As regards the addition of a paragraph to the effect that due consideration should be given to freedom of expression and artistic creation when assessing the terrorist nature of the content - although we believe that the proper place for this sort of language is in a recital, **we nevertheless remain flexible on this point.**

## **Article 2** (*definition of terrorist content*)

Although we welcome alignment of the definition of terrorist content with that in Directive 2017/541, **we would prefer to keep the wording of the Council's general approach**, in particular as regards 'promoting' the activities of a terrorist group.

## **Articles 4 and 4a** (*cross-border effects of removal orders*)

We consider this procedure satisfactory on the whole. However, it may lead the operator to believe that it is not obliged to remove the terrorist content covered by the order as long as its competent authority has not reached a decision or as long as the issuing authority has not confirmed its decision. To avoid any such practices creeping in, which would directly counteract the absolute imperative to remove terrorist content within one hour, it should be made clear that the review procedure does not relieve the operator of their obligation to comply with the order within the time limits set out in Article 4. **Provided this point is specified in the draft, we welcome this compromise.**

## **Article 13** (*strengthening the role of Europol*)

Europol has a vital part to play in making the system work, in particular by providing Member States and operators (especially smaller ones) with technological tools. That being so, it would make sense to task Europol with drawing up the annual report on removal orders. **The French authorities therefore welcome this compromise.**

## **The new article on specific measures**

The intention behind the addition to paragraph 1 of a phrase specifying that operators must combat terrorist content online while avoiding the removal of content which is not terrorist in nature is a laudable one: to avoid over-censorship. Nevertheless, it runs counter to the principle of freedom of trade and industry, according to which an operator may freely define the limits of the content it wants to host on its site or application in its general terms and conditions, and may remove anything that goes beyond those limits. For instance, an administrator of a forum dedicated to cinema may lawfully exclude all content which does not relate to cinema, etc. It therefore makes no sense to forbid operators from removing any content which is not terrorist. Moreover, and most importantly, such a ban would conflict with the need to remove other illegal content, not least paedophile content. This phrase should therefore either be deleted or be reworded to make it clear that although the fight against terrorist content does not mean it is forbidden to remove content other than terrorist

content, the fight against terrorist content cannot be used as justification for removing content other than terrorist content.

In paragraph 6, not leaving the choice of tools to the competent authority means that the decision is a decision in name only. It is merely a statement of fact, a finding that the requirements of the Regulation have not been met, which in itself has neither any decisive effect nor any legal effect, given the lack of penalties at this stage. The concern not to make it mandatory to use automated tools thus ends up depriving the competent authority's specific measures decision of all substance. It would therefore be preferable to provide that the competent authority must always ensure that its decision gives the operator an alternative to the use of automated tools. This more targeted restriction would mean that most of the positive content of the decision would be devoted to imposing specific measures.

**Provided these two points are specified in the draft, we welcome this compromise.**

#### **The nature of the competent authority** (*Articles 12 and 17*)

The Presidency's compromise proposal allows Member States to choose between three ways of organising matters: a judicial authority, a functionally independent administrative authority, or an authority subject to independent oversight. The last option would make it possible to keep the French model chosen for the PHAROS platform. This compromise proposal would therefore allow us to maintain our platform, which has proven itself to be effective and robust in safeguarding fundamental freedoms. **The French authorities therefore welcome this compromise.**

#### **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'.**