Council of the European Union
General Secretariat

Brussels, 13 March 2020

WK 2919/2020 INIT

LIMITE

CT
ENFOPOL
COTER
JAI

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

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 comments from Member States on the above mentioned proposal.

TABLE OF CONTENTS

(Please refer to page numbers on bottom right of page)

BRITTAIN Elizabeth

From:	Helena.DOBERER@bmeia.gv.at
Sent:	jeudi 12 mars 2020 13:05
To:	marijan.jelinek@mvep.hr; kmamic@mup.hr
Cc:	[DL] JAI TWG; ADSERBALLE Anne Cecilie
Subject:	AW: TCO - Proposals from EC following technical meeting with EP 3 March 2020
Categories:	Red Category

Dear all,

Thank you for the good progress which has been achieved and all your work on this file.
Please let me highlight some of our concerns that you might take into consideration in the discussions with the Parliament.

Art. 1
The determination of fundamental rights mentioned in this Article is deemed very broad and vague, especially in light of the new Article 9a. Such a formulation might still undermine the effectiveness of the regulation.

Art. 4a "Request from the host Member State for reassessment"
The assessment of fundamental rights may cause a considerable amount of work for the competent authority and undermines again the main purpose of the Regulation that the Host-MS pursues the criminal prosecution according to its rules.

Art. X – Specific measures
The new wording "*and with a view to avoiding the removal of material which is not terrorist content*" is considered misleading as it could be understood that HSP are not obliged to take care of any other content which is illegal or harmful. AT rejects the new proposals in Para. 2; they are perceived too broad and vague and permitting too much scope for interpretation for the HSP.

Best regards,
Helena

Permanent Representation of Austria to the EU
Department Home Affairs

Helena Doberer
Counsellor

+32 2 2345 290
Mobil +32 473 537 193
Avenue de Cortenbergh 30, 1040 Bruxelles
helena.doberer@bmeia.gv.at
bmeia.gv.at
facebook.at/Aussenministerium | twitter.com/MFA_Austria | instagram.com/mfa_austria

BRITTAIN Elizabeth

From: Dimana DOYNOVA <dimana.doynova@bg-permrep.eu>
Sent: jeudi 12 mars 2020 17:01
To: Marijan.Jelinek@mvep.hr; kmamic@mup.hr; [DL] JAI TWG
Cc: imaleksandrov.14@mvr.bg
Subject: New COM proposal

Dear Marijan,
Dear Colleagues,

After carefully analyzing the new COM proposal package, my experts in Sofia just informed me that the proposed definition for competent authority is still not workable for us and therefore we cannot accept it. Strong concerns we have also as regards to para 4 of the merged article and the requirement for the competent authority to issue a decision.
For all the rest we can again be flexible.

Best regards,
Dimana

Dimana Doynova
JHA Counsellor
Permanent Representation of the Republic of Bulgaria to the EU
Square Marie-Louise 49, Brussels 1000
Phone: +322 230 9422
GSM: +32475634039
E-mail: Dimana.Doynova@bg-permrep.eu

From: Dimana DOYNOVA
Sent: Monday, February 17, 2020 4:43 PM
To: Marijan.Jelinek@mvep.hr; kmamic@mup.hr; twg@consilium.europa.eu
Cc: imaleksandrov.14@mvr.bg
Subject: BG comments - TCO

Dear Colleagues,

Following the discussions at our last JHA Counsellors meeting on 13 February, please find below the comments I received from Sofia, which concern the new merged article on specific measures:

- In para 4 we prefer to delete the requirement for the competent authority to issue a decision. Instead, we think, it would be better to strengthen the objective factors. If there are clear objective criteria that define when a hosting service provider is exposed to terrorist content, a decision issued by the competent authorities will not be necessary - providers will be automatically obliged by the Regulation to take the respective specific measures. An objective factor for us, for example, could be if the HSP has received 3 or more removal orders in the last 12 months.

- In para 7 we support the proposal "*within a reasonable time period*" to be replaced with *"within a month"* or even better *"within 40 days"*.

For the rest of the proposals discussed at the meeting last week, we could be flexible.

Czech comments on TCO Drafting Proposals

Article 1

This particular proposal is rather different from the EP position, as the purposes of dissemination are not dominant, and the all content is still considered within the framework of the Regulation.

*Anyway, **CZ may accept the EP proposal** (line 7 of the 4-collumn table).*

Article 2

This particular proposal is rather different from the EP position; in effect, the word „promoting" is changed to word „supporting". While it is doubtful that EP would consider this text as compromise, CZ may accept both the Commission proposal and the the EP proposal (line 26) which is more aligned to the Directive 2017/541(EU).

Articles 4 and 4a

*Here, the proposal basically attempts to balance cross-border effects with very limited (and possibly unsatisfactory to EP) changes proposed in relation to Articles 1, 2 and further less important changes, such as introduction of Article 9a and changes to Article 13. It is doubtful that EP would consider this text as compromise. **Due to points 3 and 4 below, CZ does not agree with this compromise.***

On particular points:

1 – see Article 1 above

2 – see Article 2 above

*3 – in Article 12 (line 121), EP wanted "strong guarantees of independence", while the Council is not offering even impartiality. In Article 17 (line 147), the new type of authorities is not existent in Czech system. CZ **is against such wording**; CZ could, however, accept either EP position (line 147 and 152) on "decisions subject to judicial control (review)" or the Commission wording without the word "regular".*

*4 –Technically, the new wording does not broaden the purposes for reassessment, as it replaces the "fundamental interests of the State" by the "fundamental rights"; both should be included. While the Commission wording is moving in the right direction, **CZ supports EP proposal instead** as it compatible with the position of the Czech Parliament.*

5 – Acceptable, in fact, probably necessary anyway.

6 – Acceptable as a part of compromise package.

Article X

CZ is rather flexible to proposals in paragraphs 1-4 and 6.

CZ does not understand why the obligation to report in paragraph 5 needs to be of unlimited duration.

Article 9a

CZ may accept these proposals.

Article 18

CZ supports both changes in paragraph 2. (end of file)

BRITTAIN Elizabeth

From:	Martin Bank Nutzhorn Villaume <mabaje@um.dk>
Sent:	jeudi 12 mars 2020 13:01
To:	JAI INTERNAL SECURITY
Cc:	Marijan Jelinek; ADSERBALLE Anne Cecilie; Karen Sofie Hove
Subject:	SV: TCO - Proposals from EC following technical meeting with EP 3 March 2020

Dear all,

First of all, Denmark would like to once again thank the Commission and the Presidency for their efforts to reach a compromise with the EP on the TCO-proposal.

Denmark does not have any strong concerns with the proposed wording in the Commission's compromise proposal per se, but would like to note that the Commission's compromise proposal does not solve the Danish constitutional issue which is Denmark's main priority in the negotiations.

Furthermore, we hope that the proposed wording of Article 4a does not change the wording of recital 27 in the Council's general approach, as it is our opinion that the competent authorities should inform, coordinate and cooperate with each other before issuing removal orders to hosting service providers in order to e.g. avoid interferences with ongoing investigations.

Best regards,

MARTIN BANK NUTZHORN VILLAUME / MABAJE@UM.DK
COUNSELLOR / JUSTICE AND HOME AFFAIRS
DIRECT (+32) (0) 2 233 08 11 / MOBILE (+32) (0) 497 05 84 33

PERMANENT REPRESENTATION OF DENMARK TO THE EU
RUE D'ARLON 73 / B-1040 BRUSSELS
PHONE (+32) (0) 2 233 08 11 / EU.UM.DK

Fra: JAI INTERNAL SECURITY
Sendt: 9. marts 2020 15:07
Emne: FW: TCO - Proposals from EC following technical meeting with EP 3 March 2020

Dear colleagues,

TCO - Drafting Proposals

Article 1: Scope of the regulation

Compromise text for new para in Article 2:

"When determining whether an item of information provided by a content provider constitutes 'terrorist content' within the meaning of point (5) of paragraph 1, account shall be taken in particular of the freedom of expression and information, the freedom of the arts and sciences as well as the freedom and pluralism of the media, in order to ensure that information disseminated for educational, journalistic, artistic or research purposes or for the purposes of preventing or countering terrorism is adequately protected in accordance with Union law."

FI supports this compromise. This compromise was discussed in the JHA Counsellors meeting on 11 December 2019. This addition would be taken to cover the concerns expressed in the EP amendment 45. It would give guidance to authorities and HSP's when determing whether a content is terrorist or not. According to our notes, many of the MS saw this kind of compromise to go in good direction.

Article 2: Definition of terrorist content

Compromise text for article 2(5) c)

Changes compared to EP proposal in red

(5) 'terrorist content' means one or more of the following material:

c) soliciting a person or a group of persons to participate in the activities of a terrorist group *within the meaning of Article 2(3) of Directive (EU) 2017/541,* ***including in relation to supplying information or material resources, funding its activities in any way*** ~~within the meaning of Article 4 of Directive (EU) 2017/541~~***, or otherwise supporting its activities.***

FI seems to be ok.

Article 4 and 4a: cross border removal orders

The following provisions should be understood as addressing concerns against cross border removal orders (including the risk of diverging or excessive interpretations of what constitutes terrorist content, redress possibilities for affected parties and more generally the role of the host MS), while keeping 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:

1. Overall **strengthening of fundamental rights safeguards**, including the protection of content with artistic, journalistic etc purposes (see above);
2. A **uniform definition of terrorist content aligned to the Terrorism Directive** (see remaining issue re "promotion" above);
3. Further **guarantees for the issuing/competent authorities** to ensure impartial decisions in full respect of fundamental rights.

TCO - Drafting Proposals

Compromise text for Articles 12 and 17

Article 12: Capacities of the competent authorities

"Member States shall ensure that their competent authorities have the necessary capability and sufficient resources to achieve the aims and fulfil their obligations under this Regulation ***in a manner that is objective, non-discriminatory and in full respect of fundamental rights."***

Article 17: Designation of competent authorities

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*** *competent to:*

[point (a) to (d)]

However, as regards point (a), Member States shall ensure that a single authority is competent to issue removal orders pursuant to Article 4.

FI this can be accepted.

4. **Reinforcing the role of the host MS** by clarifying that they may in addition to security interests also evoke fundamental rights concerns with the issuing Member State, either on their own initiative or following a complaint by the HSP that has received a removal order from another MS. This latter aspect will also strengthen the effective exercise of rights of the HSPs

Would the COM proposal on article 4 a replace the respective Article in the General Approach. If so, would it be possible to include also the reference to the fundamental interests of the host MS as well?

"... has reasonable grounds to believe that the removal order unduly limits the exercise of fundamental rights set out in the Charter of Fundamental Rights or the removal order may impact fundamental interests of that Member State,..."

In para 2 it is not defined from where the competent authorities can receive the initiative to evoke the concerns. If need be para 4 can be added. However, para 2 should leave the decision on whether there are reasonable grounds for submitting a request to the issuing authority.

Compromise text for Article 4a

Request from the host Member State for reassessment

(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 and to Europol, at the same time as it transmits the removal order to the hosting service provider in accordance with Article 4(5).

(2) Where the competent authority of the Member State in which the main establishment of the hosting service provider is located 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 having received such a request, 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 that 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 to initiate the procedure referred to in paragraph 2.

5. **Judicial redress** possibilities in Article 9a (as proposed by the EP) as well as strengthened complaint procedures

6. In addition to transparency requirements for competent authorities in article 8a (as proposed by the EP) make use of Europol's role to support MSs and issue yearly reports on how removal orders have been used.

Additional paragraph to Article 13

(5) On the basis of the copies of the removal orders transmitted to it in accordance with Article 4a(1), Europol shall provide an annual report , including an analysis of the types of content subject to removal orders transmitted to the hosting service providers pursuant to this Regulation.

"Specific measures" Article x

Compromise text (in bold EP proposed changed compared to original COM proposal; in bold underlined or strike through new proposals)

1. Hosting service providers shall include in their terms and conditions, and apply, provisions to address the misuse of their service for the dissemination of terrorist content online. They shall do so in a diligent, proportionate and non-discriminatory manner, and with due regard in all circumstances to the fundamental rights of the users and take into account the fundamental importance of the freedom of expression and information in an open and democratic society ***and with a view to avoiding the removal of material which is not terrorist content****.*

2. Where a hosting service provider is exposed to terrorist content ***in accordance with paragraph 4****, it shall take specific measures to protect their services against the dissemination of terrorist content.*

Those measures may include ~~***, in particular, one or more***~~ ~~*of*~~ *the following: FI this is ok in case point c is also kept. As the technology keeps developing, we should not exclude any measures from the toolbox of the HSP's.*

(a) ~~***easily accessible and user friendly***~~*mechanisms for users to report or flag to the hosting service provider alleged terrorist content* ***or other mechanisms to increase the awareness of alleged terrorist content on its services, including user moderation****;*

TCO - Drafting Proposals

*(b) **technical means or operational measures** ~~mechanisms~~ to detect, identify and expeditiously remove or disable access to content that is considered terrorist content**, including content which has previously been removed or to which access has been disabled because it is considered to be terrorist content**; FI is this in line with the Facebook decision? Shouldn't the HSP take down content which has been previously considered to be terrorist content already before it has received 2 removal orders as required by para 4.*

*(c) ~~mechanisms addressing the reappearance of content which has previously been removed or to which access has been disabled because it is considered to be terrorist content.~~ **any other measure that the hosting service provider considers appropriate to address the availability of terrorist content on its services.***

The decision as to the choice of tools remains with the hosting service provider, provided that the requirements resulting from this Regulation and in particular para 3 are met.

3. Any specific measure or measures that a hosting service provider takes pursuant to paragraph 2 shall meet all of the following requirements:

*(a) they shall be effective in mitigating **~~and managing~~** the level of exposure to terrorist content;*

*(b) they shall be targeted and proportionate, taking into account, in particular, the seriousness of the level of exposure to terrorist content as well as **the technical and operational capabilities, financial strength, the number of users of the hosting service provider and the amount of content they provide;***

(c) they shall be applied taking full account of the rights and legitimate interest of the users, in particular users' fundamental rights to freedom of expression and of information, to respect for private life and to protection of personal data;

(d) they shall be applied in a diligent and non-discriminatory manner;

(e) where they involve the use of automated tools, appropriate safeguards shall be provided to ensure accuracy and to avoid the removal of information that is not terrorist content, in particular through human oversight and verification.

*4. For the purposes of paragraph 2, a hosting service provider shall be considered to be exposed to terrorist content, where the competent authority of the Member State of its main establishment has informed the hosting service provider, through a decision based on objective factors, such as the hosting service provider having received two or more **~~non contested~~ final** removal orders in the previous 12 months that it considers the hosting service provider to be exposed to terrorist content.*

FI would still like to point out that this is a huge change to the General Approach and moves the burden to ensure that the HSP's are not misused for terrorist purposes to the authorities. It seems that the removal orders can be issued by any MS, which is good. Considering that the appeals processes may take time, is it necessary to require final removal orders? It is a bit unclear whether there should always be 2 removal orders or is this just on example (words "such as" are used). It would be good that the specific measures could be imposed in some cases also earlier in case there is a lot of terrorist content available on services of a given HSP, e.g. Christchurch case.

TCO - Drafting Proposals

5. After having received the decision referred to in paragraph 4 and, where relevant, paragraph 6, a hosting service provider shall report to the competent authority on the specific measures it has taken and that it intends to take in order to comply with the requirement laid down in paragraphs 2 and 3. It shall do so within three months of receipt of the decision and ~~thereafter~~ on an annual basis thereafter.

6. Where, based on the reports referred to in paragraph 5 and, where relevant, any other objective factors, the competent authority considers that the measures that a hosting provider has taken do not meet the requirements of paragraphs 2 and 3, the competent authority shall address a decision to the hosting service provider requiring it to ***~~adjust those measures or to~~ take ~~certain additional~~ the necessary*** *measures so as to ensure that those requirements are met.* ***The decision as to the choice of tools remains with the hosting service provider, provided that the requirements resulting from this Regulation and in particular para 3 are met.***

7. A hosting service provider may, at any time, request the competent authority to review and, where appropriate, adjust or revoke the decisions referred to in paragraphs 4 and 6. The competent authority shall, within ***three months*** *~~a reasonable time period~~ of receipt of the request, take a reasoned decision based on objective factors on the request and inform the hosting service provider accordingly.*

8. Any requirement to take measures pursuant to this Article shall not entail a general obligation on hosting services providers to monitor the information which they store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.

TCO - Drafting Proposals

Judicial redress

In order to integrate references to judicial redress (proposed by EP in relation to specific measures pursuant to a new article x), it is proposed to amend Article 9a as follows:

Article 9a *Content providers, whose content has been removed or access to which has been disabled following a removal order, and hosting service providers that have received a removal order pursuant to Article 4,* ***or a decision pursuant to Article X([para 4), (6) and (7)]*** *shall have a right to an effective remedy. Member States shall put in place effective procedures for exercising this right.*

Sanctions under Article 18

The fact that smaller companies may not be able to comply with the removal order in 1h will be taken into account under the sanctions. In addition to the criteria that already include gravity duration, intention, financial strength, the EP proposes a reference to the nature and size of the company (see AM 140). Article 18(2) could be further amended to clarify that the criteria are not only relevant when determining the nature and level of the penalty but also when deciding whether or not to impose a penalty at all.

FI can support the compromise to art 18(2). Same kind of compromise was introduced to the discussion in the JHA Counsellors meeting during FI Presidency.

Article 18 (2) *Member States shall ensure that, when* ***deciding whether to impose a penalty and when*** *determining the type and level of penalties, the competent authorities take into account all relevant circumstances, including:* *(a) the nature, gravity, and duration of the breach;* *(b) the intentional or negligent character of the breach;* *(c) previous breaches by the legal* ***or natural*** *person held responsible;* *(d) the financial strength of the legal* ***or natural*** *person held liable;* *(e) the level of cooperation of the hosting service provider with the competent authorities;* *EP AM 141* ***(e a) 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.***

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* ».**

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 – suite de la réunion des conseillers JAI TCO des 27 février et 5 mars 2020.

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 le Parlement européen, les autorités françaises affirment leur soutien s'agissant des points suivants :

S'agissant des mesures préventives *(article 6 nouveau)*

La nouvelle rédaction (diffusée lors de la réunion du 31 janvier 2020) proposée au sujet des mesures spécifiques nous convient. Les autorités françaises saluent donc le compromis proposé, consacrant l'aspect obligatoire de ces mesures tout en préservant l'équilibre avec le respect des droits fondamentaux. **Sous réserve de la prise en compte des éléments ci-après, elle donnera donc un avis favorable à cette proposition de compromis.**

- les autorités françaises sont défavorables à l'article 6 §8 proposé par le rapporteur, en ce qu'il interdit à l'autorité nationale compétente de demander aux hébergeurs d'utiliser des outils de détection automatisée (*"Any requirement to take measures pursuant to this Article shall not entail a general obligation on hosting services providers to monitor the information which they store, nor a general obligation to actively seek facts or circumstances indicating illegal activity, **nor an obligation to use automated tools**."*)

- les autorités françaises s'interrogent sur l'absence de référence à la plateforme de signalement de contenus illicites (IRU) d'Europol qui sera amenée à jouer un rôle de plus en plus important dans la lutte contre les contenus illicites en ligne au niveau européen.

S'agissant de la coopération entre les FSH, les autorités compétentes et organes de l'Union *(article 13 paragraphe 2)*

Les autorités françaises estiment qu'il conviendrait de préciser certains aspects s'agissant de la coopération entre autorités compétentes sur les mesures spécifiques. Le fait que les autres autorités nationales aient la possibilité formuler des demandes de retrait ("*removal requests*") envers des hébergeurs qui ne leurs sont pas rattachés traduit le fait que les pays de destination peuvent disposer d'informations et/ou d'éléments d'appréciation qui échappent au pays d'origine et qui pourtant sont nécessaires à une lutte efficace contre les contenus terroristes en ligne. Ainsi, lorsqu'un hébergeur établi dans un État membre développe des services spécifiques au public d'un autre État membre, il est évident que les citoyens de ce dernier État sont mieux à même de détecter les contenus terroristes qui pourraient s'infiltrer dans ces services et qu'ils informeront de l'existence de ces contenus leur autorité compétente et non celle de l'État membre d'origine. De même, certaines paroles ou images peuvent sembler anodines aux agents de l'autorité nationale d'origine, là où des agents de l'autorité nationale de destination verront immédiatement que, dans leur contexte national auquel ce contenu est destiné, ces paroles ou ces images font clairement référence à de précédentes prises de position pro-terroriste identifiables sans difficulté par le grand public. Il est donc nécessaire que les autorités compétentes des États membres de destination puissent indiquer à l'autorité compétente de l'Etat membre d'origine que l'hébergeur ne leur semble pas remplir ses obligations de prendre des mesures spécifiques. Cette autorité compétente doit alors analyser cette demande et y répondre, soit favorablement, soit sous la forme d'un refus *motivé*.

En revanche, les autorités françaises s'opposent aux compromis proposés s'agissant des articles suivants :

S'agissant du champ d'application *(article 1)*

Les autorités françaises s'accommodent de l'inclusion de la notion de diffusion au public sous réserve qu'une définition claire de celle-ci soit formulée. En effet, elles rappellent ici leurs éléments transmis à la Présidence (WK2085 AD1) et la nécessité d'avoir un règlement le plus englobant possible et qui répond à l'objectif de prévenir la diffusion des contenus à caractère terroriste. À cet égard il n'est pas acceptable que certains services dont les fonctionnalités permettent de diffuser à plusieurs centaines de milliers d'individus des contenus terroristes soient exclus du champ de ce règlement.

Les autorités françaises font part de leurs interrogations sur le compromis proposé à l'article 1 et l'articulation avec la directive SMA. Pour mémoire, la directive SMA prévoit que les services de médias sociaux peuvent être assimilés à des plateformes de partage de vidéo s'il est avéré que la « fourniture de programmes et de vidéos créées par l'utilisateur » constitue, à défaut de l'objet principal, une « fonctionnalité essentielle » du service de médias sociaux en question.

Les autorités françaises soulignent que ces obligations ne peuvent concerner par définition que des contenus audiovisuels, et non les autres contenus (écrits, images, sons) ; la proposition du Parlement européen pourrait donc engendrer une exclusion des plateformes de réseaux sociaux. Les autorités françaises font part de sa grande vigilance à cet égard, en ce qu'elle considère essentiel d'assurer un haut niveau de protection des populations à l'égard des contenus terroristes. Elles considèrent donc utile de reformuler la proposition du Parlement européen et d'exclure la mention sans préjudice de la directive 2018/1808 SMA.

S'agissant plus particulièrement de la mention de la directive e-commerce, les autorités françaises sont d'avis de conserver la rédaction initiale du Conseil et d'éviter d'inscrire que le projet de règlement est sans préjudice de la directive e-commerce. En effet d'une part il n'y a pas de hiérarchie juridique entre les deux textes et d'autre part le projet de règlement va plus loin que la directive qui mentionne seulement une mise en jeu de la responsabilité des plateformes dès lors que les fournisseurs de service et d'hébergement suppriment rapidement un contenu dès lors qu'ils en ont connaissance.

S'agissant de la définition du contenu terroriste *(article 2)*

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.**

S'agissant des injonctions de retrait *(article 4)*

En préambule, les autorités françaises réaffirment leur position et leurs points de vigilance s'agissant des injonctions de suppression à savoir :
- Respect du délai d'une heure ;
- L'injonction transfrontalière est exécutoire dès son émission, même si nous pouvons admettre que l'Etat membre d'implantation en soit informé simultanément (voire : et qu'il puisse demander à l'Etat membre émetteur de réexaminer son injonction).

Sur l'effet transfrontalier des injonctions de retrait

Les autorités françaises réaffirment qu'il est préférable de se ranger à la position de l'orientation générale octroyant la capacité d'injonction à tous les États membres.

Sur la motivation des injonctions de retrait :

De plus, la proposition du Parlement européen de prévoir que les autorités compétentes fournissent une **motivation "détaillée" à l'appui de chaque injonction de retrait ne peut être acceptée**. En effet, l'expérience de la plateforme PHAROS française montre que, ne serait-ce qu'à l'échelle de la France, des milliers de contenus terroristes en ligne sont détectés chaque année et devront faire l'objet d'injonctions de retrait. Ce mécanisme devra donc nécessairement être utilisé en masse, ce qui est incompatible avec la rédaction de motivations détaillées. Sauf à employer des ressources humaines

démesurées, les autorités nationales devront donc choisir entre, soit limiter les injonctions de retrait à une fraction des contenus terroristes détectés, soit accepter que leurs injonctions de retrait soient dénuées de force coercitive, faute de pouvoir remplir toutes les conditions formelles posées par l'article 4-2. Les autorités françaises font donc valoir sa ferme opposition à cet ajout qui priverait de fait l'essentiel du Règlement de sa portée opérationnelle.

S'agissant des raisons techniques

L'introduction des raisons techniques comme motif justifiant que le fournisseur de services d'hébergement puisse se **soustraire à son obligation de retrait dans un délai d'une heure n'est pas acceptable** car la définition desdites raisons techniques est trop imprécise et évasive. Eu égard à l'incidence de cette définition, à la fois sur l'objectif du retrait en une heure, et sur les sanctions des hébergeurs, les autorités françaises s'opposent donc à ce compromis.

Sur la nature de l'autorité compétente pour émettre des injonctions de retrait *(article 17)*

Conformément à l'orientation générale adoptée par le Conseil, le choix de l'autorité compétente, administrative ou judiciaire, pour émettre des injonctions de retrait devrait être laissé aux États membres. En effet, certains pays disposent déjà d'une telle autorité et de procédures efficaces mises en place pour signaler les contenus à caractère terroriste qui ont apporté des résultats, en lien notamment avec Europol (c'est le cas de la plateforme PHAROS pour la France souvent érigée en exemple). Cette autorité compétente devra respecter la protection des données personnelles et faire l'objet d'un contrôle par une autorité indépendante. En ce sens, les autorités françaises accueillent favorablement ce compromis sous réserve de la suppression de l'ajout *« National competent authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them by this Regulation ».* En effet, cet ajout revient à exiger une autorité fonctionnellement indépendante.

Enfin, les autorités françaises se montrent flexibles s'agissant des compromis suivants :

S'agissant des signalements *(article 5)*

Outre le fait que ce dispositif (en complément des injonctions de retrait émanant des autorités compétentes aux articles 4 et 17) permet d'inclure les agences européennes (notamment l'EU IRU d'Europol) et de favoriser des synergies et une meilleure coopération dans lutte contre la propagation des contenus terroristes en ligne, **les autorités françaises considèrent que ce point participe à l'efficacité du dispositif.**

Évaluer en priorité des signalements venant d'Europol et des autorités compétentes à l'aune de leurs propres CGU constitue un moyen efficace et rapide d'alerter les fournisseurs quant à la présence éventuelle de contenus terroristes sur leurs plateformes. Enfin, les autorités françaises attirent l'attention sur le fait que les signalements de l'article 5 constituent un régime intermédiaire entre les signalements des particuliers se référant aux CGU des FSH (qui ne sont pas traités dans le projet de règlement) et les injonctions de retrait. En cela, les signalements de l'article 5 sont un outil de gradation de la réponse publique et de proportionnalité, principes auxquels la France et de nombreux États membres sont attachés et qui furent des points d'attention majeurs lors des négociations au Conseil. Les autorités françaises estiment donc utile de reconsidérer une telle suppression de l'article 5.

S'agissant des sanctions *(article 18)*

Les autorités françaises insistent sur le fait que les ajouts proposés alourdissent l'article. En effet, la rédaction de l'article 18 telle qu'obtenue lors de l'orientation générale fournit déjà des garanties de proportionnalité. De même, il convient de garder à l'esprit que la sanction intervient en fin d'un processus de médiation au cours duquel un dialogue s'instaure et une prise en compte des difficultés inhérente aux petites structures peut être raisonnablement attendue.

Council of the European Union

Brussels, 10 March 2020
(OR. fr)

SN 1871/20

LIMITE

NOTE	
From:	General Secretariat of the Council
To:	Delegations
Subject:	Comments by France concerning the draft Regulation on preventing the dissemination of terrorist content online

Note with comments

Comments by France concerning the draft Regulation on preventing the dissemination of terrorist content online, following the meetings of JHA TCO counsellors on 27 February and 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 European Parliament, the French authorities can confirm their support for the following points:

Preventive measures *(new Article 6)*

We are satisfied with the new proposed wording (distributed at the meeting of 31 January 2020) on specific measures. We commend the compromise proposed, which enshrines the obligatory nature of these measures whilst striking a balance with respect for fundamental rights. **We will therefore issue a positive opinion on this compromise proposal, subject to the following points being taken into account.**

- We are opposed to Article 6(8) proposed by the rapporteur, in that it bans the competent national authority from requiring hosting service providers to use automated detection tools (*'Any requirement to take measures pursuant to this Article shall not entail a general obligation on hosting services providers to monitor the information which they store, nor a general obligation to actively seek facts or circumstances indicating illegal activity,* ***nor an obligation to use automated tools****.'*)

- We wonder why no reference is made to Europol's Internet Referral Unit (IRU), which will play an increasingly significant role in the fight against unlawful online content at the European level.

Cooperation between HSPs, competent authorities and Union bodies *(Article 13(2))*

We feel that certain aspects relating to cooperation between competent authorities on specific measures should be clarified. The fact that other national authorities are able to make removal requests to hosting service providers which are not associated with them reflects the fact that the countries of destination may have access to information and/or background data which is not available to the country of origin but which is necessary to effectively combat terrorist content online. Thus, where a hosting service provider established in one Member State develops services specific to the public of another Member State, it is clear that the citizens of the latter State are better able to detect terrorist content which might infiltrate those services and that they will inform their competent authority of the existence of such content and not the competent authority of the Member State of origin. Similarly, some words or images may seem innocuous to the officials of the national authority of origin, whereas officials from the national authority of destination will immediately see that, in the national context for which that content is intended, the words or images clearly refer to previous pro-terrorist stances which are easily identifiable by the general public. It is therefore necessary for the competent authorities of Member States of destination to be able to inform the competent authority of the Member State of origin that the hosting service provider does not appear to them to be fulfilling its obligations to take specific measures. That competent authority must then analyse and respond to that request, either favourably or in the form of a *reasoned* refusal.

On the other hand, we are opposed to the compromises proposed in relation to the following articles:

Scope (*Article 1*)

We can agree to the inclusion of the concept of dissemination to the public, provided that a clear definition thereof is drawn up. In this connection, we would like to highlight the comments we sent to the Presidency (WK 2085 ADD 1) and the need to have a regulation that is as comprehensive as possible, and which meets the objective of preventing the dissemination of terrorist content. In this respect, it is unacceptable that certain services whose functionalities allow the dissemination of terrorist content to several hundred thousand individuals be excluded from the scope of this Regulation.

We would like to voice our doubts about the compromise proposed in Article 1 and the link to the Audiovisual Media Services (AVMS) Directive. For the record, the AVMS Directive provides that social media services may be treated as video-sharing platforms if 'providing programmes' and 'user-generated videos' constitutes, if not the principal purpose, 'an essential functionality' of the social media service in question.

We must stress that, by definition, those obligations can only relate to audiovisual content, and not to other kinds of content (text, images, sound); the European Parliament's proposal could therefore lead to social media platforms being excluded. The French authorities would like to underline that we are very attentive to this issue, since we consider it vital to ensure that the public are granted a high level of protection from terrorist content. We therefore consider it appropriate to reword the European Parliament's proposal and to remove the words 'without prejudice to Directive (EU) 2018/1808' (AVMS Directive).

As regards the reference to the e-Commerce Directive in particular, we are in favour of keeping the Council's initial wording, and not stating that the draft Regulation is without prejudice to the e-Commerce Directive. Firstly, there is no legal hierarchy between the two texts, and secondly the draft Regulation goes further than the Directive, which merely refers to platforms' liability coming into play when service and hosting providers take down content quickly when they become aware of it.

Definition of terrorist content (*Article 2*)

As for the definition of terrorist content, although we welcome the fact that the definition is in line with Directive 2017/541, **our preference would be for the text of the Council's general approach to be kept**.

Removal orders (*Article 4*)

Firstly, we would like to reaffirm our position and focal points in terms of removal orders, namely:

- Compliance with the one-hour deadline;

- Immediate enforceability of the cross-border order once it is issued, while we can accept the Member State of establishment being informed of it at the same time (and even being permitted to ask the issuing Member State to reconsider its order).

The cross-border effect of removal orders

The French authorities 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.

Statements of reasons for removal orders

In addition, **we are unable to accept** the European Parliament's proposal to stipulate that the competent authorities must provide a **'detailed' statement of reasons to substantiate each removal order**. In fact, the experience of France's PHAROS platform has shown that, if only in France, thousands of pieces of online terrorist content are detected every year and will have to be subject to removal orders. This mechanism will therefore need to be used en masse, which is incompatible with the drafting of detailed statements of reasons. Unless excessive human resources are used, the national authorities will therefore have to choose between either limiting removal orders to a fraction of the terrorist content detected, or accepting that their removal orders will be devoid of coercive force because they fail to meet all the formal conditions laid down in Article 4(2). We are therefore strongly opposed to this addition, which would *de facto* deprive the core of the Regulation of its operational scope.

Technical reasons

The introduction of technical reasons as a justification for the hosting service provider to be able to **evade its obligation to remove content within one hour is not acceptable** as the definition of those technical reasons is too imprecise and vague. In view of the negative impact of this definition,

both on the objective of removing content within one hour, and on the penalties imposed on hosting service providers, we therefore oppose this compromise.

Nature of the authority competent to issue removal orders *(Article 17)*

In accordance with the Council's general approach, the choice of the administrative or judicial authority competent to issue removal orders should be left to the Member States. Certain countries already have such an authority and effective procedures in place for reporting terrorist content which have yielded results, in particular as regards Europol (such as France's PHAROS platform, for example). This competent authority will have to comply with the protection of personal data and be subject to control by an independent authority. Bearing this in mind, we welcome this compromise, subject to the deletion of the addition '*National competent authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them by this Regulation*'. This addition effectively amounts to requiring an operationally independent authority.

Finally, the French authorities are flexible as regards the following compromises:

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, **we feel that 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 way of alerting providers to the possible presence of terrorist content on their platforms. Lastly, we would draw attention to the fact that 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. We therefore consider it useful to revisit the proposed deletion of Article 5.

Penalties (***Article 18***)

We would stress that the additions proposed make the article more cumbersome. In fact, the wording of Article 18 as agreed in the general approach already provides guarantees of proportionality. It should also be borne in mind that the penalty comes at the end of a mediation process during which a dialogue is established and the difficulties inherent in small organisations can reasonably be expected to be taken into account.

NOTE
from the Hungarian delegation to Terrorism Working Party (TWP)

Subject: Proposal for a Regulation on preventing the dissemination of terrorist content online

Specific comments regarding the draft proposals of the Commission circulated on 6th of March

Article 2: definition of terrorist content (2(5)c))

Hungary can support the new compromise proposal with special regard to the modification regarding the reference to the Article 2(3) of Directive (EU) 2017/541, which is in line with the PGA.

Article 4 and 4a: cross border removal orders ((1)-(4))

Hungary is still scrutinizing these paragraphs, although according to our preliminary position we can be flexible in this regards as the wording has been started to move towards the text of PGA.

Additional paragraph to Article 13

Hungary can accept the wording and the inclusion of the new (5) paragraph.

Specific measures Article x

Article 6 point 1: Overall, we can move forward with the new proposals in this regard.

Article 6 point 2 and 3: Hungary can support the new wording proposals.

Article 6 point 4: We can show flexibility regarding the new wording although we would like to keep our previous position on the fourth paragraph as the wording imposes additional burden on the competent authorities.

Article 6 point 5: Hungary support to keep the text of previous COM compromise proposal (issued on 31th of January 2020).

Article 6 point 6-8: Hungary can accept the wording proposals regarding *points 6., 7. and 8.* of Specific measures, Article x.

Designation of competent authorities – Article 17

We cannot accept the new wording proposals of Article 17 since it is still too restrictive. It is neither guaranteed by the new text that the relevant bodies, which may be designated as competent authorities in the future, are clearly included in the scope of the provision according to the specific Hungarian constitutional system.

We propose the amendment below regarding Article 17:

"Each Member State shall designate one or more judicial authorities, functionally independent administrative authorities ***or authorities subject to regular ~~independent~~ review by judicial or functionally independent administrative authorities in relation to the tasks performed under this Regulation*** *competent to:"*

Explanation: for the above mentioned reasons it is important for Hungary to include review by judicial authority, since this category also includes review by the Prosecution Service.

NOTE
from the Hungarian delegation to Terrorism Working Party (TWP)

Subject: Proposal for a Regulation on preventing the dissemination of terrorist content online

Specific comments regarding the draft proposals on 27th of February 2020 on JHA COUNSELLORS meeting

Line 42, AM 66

After scrutinizing Hungary has the feeling that the new EP proposal is still jeopardizing to reach the cross-border effect, therefore we would support a solution, which is moving towards the text of PGA.

Line 43-44, AM 67, 68

In our opinion, further clarification is needed from the EP on the main difference between these two paragraphs.

Line 45-53, AM 69-74

We can show flexibility regarding these new text proposals.

Line 57, AM 78

In our view, the new text proposal: "including for technical or operational reasons" would generate loopholes and jeopardize the practical application of the TCO regulation. Therefore, we cannot support the new EP proposal in this regard.

Line 58-59, AM 79-80

We can support the new wording proposals.

Line 68-75, AM 83

We do not support the deletion of Article 5 (Referrals), as the application of these measures would increase the efficiency of the content removal. We suggest to keep the text of PGA.

Specific measures [Merging of Articles 3, 6 and 9]

Line 77: Overall, we can move forward with the new EP proposals in this regard. Regarding the first sentence – formerly Article 3(2) – Hungary prefers to keep the text of the general approach, however we can accept the wording "address" instead of "prevent".

Line 78, 83: Hungary support to keep the text of previous COM compromise proposal (issued on 31th of January 2020).

Line 84: We can show flexibility regarding the new wording although we would like to keep our previous position on the fourth paragraph as the new wording imposes additional burden on the competent authorities.

Line 85: Hungary support to keep the text of previous COM compromise proposal (issued on 31th of January 2020).

Designation of competent authorities – Article 17

We cannot accept the new wording proposals of EP regarding Article 17 since it is still too restrictive. It is neither guaranteed by the new text that the relevant bodies, which may be designated as competent authorities in the future, are clearly included in the scope of the provision according to the specific Hungarian constitutional system.

Written comments from the Netherlands on the proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online - 12 March 2020

The Netherlands would like to take this opportunity to submit a few written comments on the Commission compromise proposals, which were circulated by e-mail of 6 March last. We support many of the proposals, but do have some highlights, in particular with regard to the cross-border removal orders and the need for an adequate legal remedy.

Draft proposals	**Position**
Art. 1 (scope)	Support. While it is important to adequately protect content of journalistic, artistic or educational nature or for awareness purposes, we cannot support a blanket exception for such content. This compromise text adequately protects said content while still enabling a case-by-case analysis.
Art. 2 (5)(c)	The Netherlands welcomes the current wording, which is more in line with Directive 2017/541/EC. However, the insertion of 'or otherwise supporting its activities' appears to imply a significantly wider scope without offering guidance on the extent of that scope, e.g. the wording seems to include promoting the activities of a terrorist group. The new text should be further clarified or, if such a clarification cannot be given, reconsidered.
Art. 4 and 4a (cross border removal orders)	While we welcome the compromise text of Article 4a, we think there is room for further strengthening the safeguards, as the decision to uphold a removal order ultimately remains with the issuing MS. As expressed on several occasions, the introduction of a cross-border removal order should be paired with sufficient safeguards to adequately protect fundamental rights, such as the right to an effective remedy. The European Parliament seems to share these concerns. To that end, we have previously opted to introduce a legal remedy in the MS where the HSP is established (cfr. NL written comments of 13 November 2019). Another alternative, more in line with the current compromise proposal, would be to further strengthen the consultation procedure in such manner that the receiving MS can have a decisive say on removal orders from another MS. This would align the proposal with a practice generally accepted in common cross-border disputes, where there is a legal recourse available in the MS that has a strong connection to the matter at hand – which is mostly the MS where the HSP is established. For example: a Dutch citizen can bring any HSP that has an establishment in the Netherlands before a Dutch civil court and ask that online content is taken down. This also applies to HSP's that have their main establishment in another MS. The underlying principle that the MS where the HSP is established should have a role in measures taken is also one of the underlying principles of the E-commerce directive (see Article 3(4) of Directive 2000/31/EC). This could be remedied by further strengthening the role of the receiving MS in the consultation procedure, with an amendment of Article 4(3): (3) Upon having received such a request, 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 that decision~~. This compromise strengthens the position of the receiving Member State without undermining the effectiveness of the cross-border removal order. As it is often clear what terrorist content is, the possibility to reject a removal order will not be often used. Nevertheless, it could bridge the differences between Council and EP.
Art. 12 (capabilities)	Support.
Art. 17 (designation of competent authorities)	We take a positive approach to this compromise text, but the current wording needs clarification, in particular the wording '*authorities subject to regular independent review*'. Would it be sufficient that decisions taken by such authorities are subject to a judicial remedy (within the meaning of Article 47 of the Charter, and thus after an appeal is lodged) or should such independent review be ex proprio motu? We support the addition that a single authority is competent to issue removal orders.
Art. X (specific measures)	We support the compromise proposal, and would like to stress a few specifics: Paragraph 3: strong support. Any specific measures should take into account the technical and operational capabilities, financial strength and the amount of exposure a HSP has to terrorist content. Paragraph 8: while we would prefer a direct reference to article 15(1) of Directive 2000/31/EC, we understand the reasoning for the current compromise text. If the current wording remains, perhaps it could be clarified in a recital that, regardless of the wording, the existing case law about Article 15(1) is applicable.
Art. 18(3)[1]	We strongly support this compromise proposal, which indeed clarifies that the factors (a) through (e a) are not only relevant when determining the nature and level of the penalty but also when deciding whether to impose a penalty at all. In addition, we welcome the clarification that all relevant circumstances should be taken into account, including the interests of smaller-sized HSP's.

[1] The draft compromise proposal refers to Article 18(2), while the wording relates to 18(3). This seems to be an unintentional oversight.

TCO - Drafting Proposals

Written comments from Sweden are included in red below.

Article 1: Scope of the regulation

Compromise text for new para in Article 2:

"When determining whether an item of information provided by a content provider constitutes 'terrorist content' within the meaning of point (5) of paragraph 1, account shall be taken in particular of the freedom of expression and information, the freedom of the arts and sciences as well as the freedom and pluralism of the media, in order to ensure that information disseminated for educational, journalistic, artistic or research purposes or for the purposes of preventing or countering terrorism is adequately protected in accordance with Union law."

Position of Sweden:

To Sweden, it is a complicated solution to include in the definition and the assessment of whether a particular content is or is not terrorism content also non-substantial circumstances concerning who has handled the content; i.e. the assessment is not limited to the content itself.

It seems to Sweden that finding exceptions for the above legitimate purposes and to protect the above freedoms are rather issues relating to the scope (art 1) of the TCO Regulation as initially proposed by the European Parliament (EP)

While understanding that the proposal of the EP might be perceived as vague, Sweden remains supportive to the proposal of having the text in art 1. Sweden proposes to clarify the EP proposal by inserting the concept "editorial responsibility":

Art 1.2 a. *This Regulation shall not apply to content which is disseminated for educational, artistic, journalistic or research purposes, or under editorial responsibility, 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.*

TCO - Drafting Proposals

Article 2: Definition of terrorist content

Compromise text for article 2(5) c)

Changes compared to EP proposal in red

(5) 'terrorist content' means one or more of the following material:

c) soliciting a person or a group of persons to participate in the activities of a terrorist group *within the meaning of Article 2(3) of Directive (EU) 2017/541,* ***including in relation to supplying information or material resources, funding its activities in any way*** ~~within the meaning of Article 4 of Directive (EU) 2017/541~~***, or otherwise supporting its activities.***

Position of Sweden:

It seems to Sweden that the addition "or otherwise supporting its activities" does not entirely correspond to Directive 2017/541. Sweden therefore proposes that the word criminal as in the general approach is reinserted, i.e.:

"...or otherwise supporting its **criminal** activities."

Article 4 and 4a: cross border removal orders

The following provisions should be understood as addressing concerns against cross border removal orders (including the risk of diverging or excessive interpretations of what constitutes terrorist content, redress possibilities for affected parties and more generally the role of the host MS), while keeping 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:

1. Overall **strengthening of fundamental rights safeguards**, including the protection of content with artistic, journalistic etc purposes (see above);
2. A **uniform definition of terrorist content aligned to the Terrorism Directive** (see remaining issue re "promotion" above);
3. Further **guarantees for the issuing/competent authorities** to ensure impartial decisions in full respect of fundamental rights.

Compromise text for Articles 12 and 17

Article 12: Capacities of the competent authorities

"Member States shall ensure that their competent authorities have the necessary capability and sufficient resources to achieve the aims and fulfil their obligations under this Regulation ***in a manner that is objective, non-discriminatory and in full respect of fundamental rights."***

Article 17: Designation of competent authorities

TCO - Drafting Proposals

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*** *competent to:*

[point (a) to (d)]

However, as regards point (a), Member States shall ensure that a single authority is competent to issue removal orders pursuant to Article 4.

Position of Sweden:

Sweden can support the Commission proposal on Article 17.

4. **Reinforcing the role of the host MS** by clarifying that they may in addition to security interests also evoke fundamental rights concerns with the issuing Member State, either on their own initiative or following a complaint by the HSP that has received a removal order from another MS. This latter aspect will also strengthen the effective exercise of rights of the HSPs

Compromise text for Article 4a

Request from the host Member State for reassessment

(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 and to Europol, at the same time as it transmits the removal order to the hosting service provider in accordance with Article 4(5).

(2) Where the competent authority of the Member State in which the main establishment of the hosting service provider is located 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 having received such a request, 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 that 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 to initiate the procedure referred to in paragraph 2.

TCO - Drafting Proposals

Position of Sweden:

Sweden remains supportive to the last proposals of the EP on removal orders (document of 21 February 2020).

Sweden does not see that the proposal of the Commission strengthens the role of the competent authority in the host MS to the extent necessary to allow for cross-border jurisdiction.

Sweden wishes to take this opportunity to remind the Presidency about the proposals made by NL on strengthening the role of the host MS in the consultation procedure. The proposals of NL were in the opinion of Sweden going in the right direction should a compromise be found to providing for cross-border jurisdiction in the TCO Regulation.

5. **Judicial redress** possibilities in Article 9a (as proposed by the EP) as well as strengthened complaint procedures

6. In addition to transparency requirements for competent authorities in article 8a (as proposed by the EP) make use of Europol's role to support MSs and issue yearly reports on how removal orders have been used.

Additional paragraph to Article 13
(5) On the basis of the copies of the removal orders transmitted to it in accordance with Article 4a(1), Europol shall provide an annual report , including an analysis of the types of content subject to removal orders transmitted to the hosting service providers pursuant to this Regulation.

"Specific measures" Article x

Compromise text (in bold EP proposed changed compared to original COM proposal; in bold underlined or strike through new proposals)

1. Hosting service providers shall include in their terms and conditions, and apply, provisions to address the misuse of their service for the dissemination of terrorist content online. They shall do so in a diligent, proportionate and non-discriminatory manner, and with due regard in all circumstances to the fundamental rights of the users and take into account the fundamental importance of the freedom of expression and information in an open and democratic society ***and with a view to avoiding the removal of material which is not terrorist content****.*
2. Where a hosting service provider is exposed to terrorist content ***in accordance with paragraph 4****, it shall take specific measures to protect their services against the dissemination of terrorist content.*

TCO - Drafting Proposals

Those measures may include~~, in particular, one or more of~~ the following:

*(a) **~~easily accessible and user-friendly~~** mechanisms for users to report or flag to the hosting service provider alleged terrorist content **or other mechanisms to increase the awareness of alleged terrorist content on its services, including user moderation**;*

*(b) **technical means or operational measures** ~~mechanisms~~ to detect, identify and expeditiously remove or disable access to content that is considered terrorist content**, including content which has previously been removed or to which access has been disabled because it is considered to be terrorist content**;*

*(c) ~~mechanisms addressing the reappearance of content which has previously been removed or to which access has been disabled because it is considered to be terrorist content.~~ **any other measure that the hosting service provider considers appropriate to address the availability of terrorist content on its services.***

The decision as to the choice of tools remains with the hosting service provider, provided that the requirements resulting from this Regulation and in particular para 3 are met.

3. Any specific measure or measures that a hosting service provider takes pursuant to paragraph 2 shall meet all of the following requirements:

*(a) they shall be effective in mitigating **~~and managing~~** the level of exposure to terrorist content;*

*(b) they shall be targeted and proportionate, taking into account, in particular, the seriousness of the level of exposure to terrorist content as well as **the technical and operational capabilities, financial strength, the number of users of the hosting service provider and the amount of content they provide;***

(c) they shall be applied taking full account of the rights and legitimate interest of the users, in particular users' fundamental rights to freedom of expression and of information, to respect for private life and to protection of personal data;

(d) they shall be applied in a diligent and non-discriminatory manner;

(e) where they involve the use of automated tools, appropriate safeguards shall be provided to ensure accuracy and to avoid the removal of information that is not terrorist content, in particular through human oversight and verification.

*4. For the purposes of paragraph 2, a hosting service provider shall be considered to be exposed to terrorist content, where the competent authority of the Member State of its main establishment has informed the hosting service provider, through a decision based on objective factors, such as the hosting service provider having received two or more **~~non contested~~ final** removal orders in the previous 12 months that it considers the hosting service provider to be exposed to terrorist content.*

5. After having received the decision referred to in paragraph 4 and, where relevant, paragraph 6, a hosting service provider shall report to the competent authority on the specific measures it has taken and that it intends to take in order to comply with the requirement laid down in paragraphs 2 and 3. It shall do so within three months of receipt of the decision and ~~thereafter~~ on an annual basis thereafter.

TCO - Drafting Proposals

6. Where, based on the reports referred to in paragraph 5 and, where relevant, any other objective factors, the competent authority considers that the measures that a hosting provider has taken do not meet the requirements of paragraphs 2 and 3, the competent authority shall address a decision to the hosting service provider requiring it to ***~~adjust those measures or to~~ take ~~certain additional~~ the necessary*** *measures so as to ensure that those requirements are met.* ***The decision as to the choice of tools remains with the hosting service provider, provided that the requirements resulting from this Regulation and in particular para 3 are met.***

7. A hosting service provider may, at any time, request the competent authority to review and, where appropriate, adjust or revoke the decisions referred to in paragraphs 4 and 6. The competent authority shall, within ***three months*** *~~a reasonable time period~~ of receipt of the request, take a reasoned decision based on objective factors on the request and inform the hosting service provider accordingly.*

8. Any requirement to take measures pursuant to this Article shall not entail a general obligation on hosting services providers to monitor the information which they store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.

Position of Sweden:

1. Sweden has in particular pointed to legal difficulties in principal in connection with the use of automated tools, but can now welcome the Commission proposal on leaving it up to the hosting service provider to choose the specific ways and means when taking specific measures or when a competent authority decides that such measures are required.

However, Sweden is of the view that safeguards are necessary when automated tools are used. This is also underlined in the opinion of the EDPS on page 7 (WK 9232/2019 INIT). Consequently, Sweden is of the opinion that recital 26 of the general approach on the right for the content provider to receive information in order to be able to contest a removal is key.

Sweden also wishes to provide some drafting suggestions:

(e) where they involve the use of automated tools, effective and appropriate safeguards shall be provided to ensure accuracy and to ~~avoid~~ prevent the removal of information that is not terrorist content, in particular through human oversight and verification.

2. Sweden remains supportive to simplifying point 4 of this compromise. Such simplifications would mean that no decision by a competent authority will be required in order to determine whether a hosting service provider is exposed to terrorist content or not.

TCO - Drafting Proposals

Instead, it is proposed that it will follow directly from a simplified point 4 on the basis of a specified number of removal orders that the hosting service provider has received.

Judicial redress

In order to integrate references to judicial redress (proposed by EP in relation to specific measures pursuant to a new article x), it is proposed to amend Article 9a as follows:

Article 9a *Content providers, whose content has been removed or access to which has been disabled following a removal order, and hosting service providers that have received a removal order pursuant to Article 4, **or a decision pursuant to Article X([para 4), (6) and (7)]** shall have a right to an effective remedy. Member States shall put in place effective procedures for exercising this right.*

Position of Sweden:

Sweden welcomes that the Commissions is proposing a right to an effective remedy for hosting service providers in relation to specific measures. However, Sweden considers that this Article can be further developed and include also an explicit right to an effective remedy for content providers whose content has been removed following specific measures taken by a hosting service provider or a measure taken by a hosting service provider pursuant to a decision based on Article X. The inclusion of such a right would be in line with the text of recital 25 of the general approach and the views expressed by the EDPS in his opinion on page 7 (WK 9232/2019 INIT).

However, since a content provider will not be in a position to understand the formal reason why the content has been removed, unless such information has been provided, it seems possible to simply delete the reference to removal order and thereby making the right to an effective remedy neutral as to the formal reason for removal.

*Content providers, whose content has been removed or access to which has been disabled ~~following a removal order~~, and hosting service providers that have received a removal order pursuant to Article 4, **or a decision pursuant to Article X([para 4), (6) and (7)]** shall have a right to an effective remedy. Member States shall put in place effective procedures for exercising this right.*

Sanctions under Article 18

The fact that smaller companies may not be able to comply with the removal order in 1h will be taken into account under the sanctions. In addition to the criteria that already include gravity duration, intention, financial strength, the EP proposes a reference to the nature and size of the company (see AM 140). Article 18(2) could be further amended to clarify that the criteria are not only relevant when

determining the nature and level of the penalty but also when deciding whether or not to impose a penalty at all.

Article 18 (2)

Member States shall ensure that, when ***deciding whether to impose a penalty and when*** *determining the type and level of penalties, the competent authorities take into account all relevant circumstances, including:*

(a) the nature, gravity, and duration of the breach;

(b) the intentional or negligent character of the breach;

(c) previous breaches by the legal ***or natural*** *person held responsible;*

(d) the financial strength of the legal ***or natural*** *person held liable;*

(e) the level of cooperation of the hosting service provider with the competent authorities;

EP AM 141

(e a) 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.