



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online - A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 {COM(2018) 640 final}.

Preventing and countering terrorism both offline and online is a priority for the Commission and the proposal complements the work of the European Union Internet Forum to reduce access to terrorist content online. Despite the progress achieved through voluntary cooperation, terrorist content online remains a clear and present danger to our societies. Terrorist propaganda is spread across multiple platforms, increasingly smaller ones, and disseminated at great speed: one third of all links to Da'esh propaganda, for example, are shared within the first hour of being released.

To address these challenges, the Commission proposal aims at preventing the misuse of hosting services for terrorist purposes, protecting the security of our citizens and ensuring the smooth functioning of the digital single market. The proposal establishes a definition of terrorist content for preventative purposes and sets obligations on hosting service providers to act upon removal orders and referrals and to put in place proportionate proactive measures. The proposal also sets out strong and robust safeguards to ensure the protection of fundamental rights, in particular freedom of speech.

The Commission is pleased that the Bundesrat shares the view that action at Union level is required to prevent the spread of terrorist content in an effective manner, in particular given that terrorist content is most harmful in the first hours after it is disseminated.

The Commission notes the concerns of the Bundesrat on a number of issues and is pleased to have this opportunity to provide clarifications that will hopefully allay the Bundesrat's concerns.

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First, as regards the legal basis, the Commission considers that Article 114 of the Treaty on the Functioning of the European Union is the most appropriate legal basis to harmonise the conditions for hosting service providers to provide services across the Digital Single Market and to address existing and future differences between Member State provisions that might otherwise obstruct the functioning of the internal market. The proposed measures will increase legal certainty and foreseeability, increase trust of users in online services and ultimately provide an appropriate regulatory environment for the development of innovative online services while safeguarding fundamental public interests. As in other European Union acts based on Article 114 of the Treaty on the Functioning of the European Union (such as the Anti-Money Laundering Directive¹ or the Directive on the security of network and information systems²), objectives such as the prevention of criminal activities or more broadly public security are not in contradiction with the chosen legal basis.

Second, the Commission assures the Bundesrat that the impact of the proposed Regulation on hosting service providers, and in particular smaller ones, has been assessed carefully when preparing the proposal. It is useful to recall that it is primarily smaller hosting service providers that are increasingly exploited for terrorist purposes, this being the reason why the Commission considered it important to have also smaller hosting service providers covered by the proposal without any exceptions for instance from the 1 hour rule. It is also important to point out that the requirements to publish transparency reports, set up complaint mechanisms and to preserve removed content are essential to protect fundamental rights and therefore need to be put in place by all companies. On a more general note, the Commission would like to highlight that the proposed provisions ensure proportionality for instance when stipulating that proactive measures and sanctions need to take due account of the financial resources of the provider in question.

The Commission considers that the 1-hour time limit for all companies to remove terrorist content upon receipt of a removal order is of utmost importance given the speed at which terrorist content spreads across hosting service providers, in particular in the first hours of being released. A mere requirement for expeditious removal as foreseen in Article 14 (1) of the e-Commerce Directive³ – and as suggested by the Bundesrat – would not be sufficiently effective. The Commission also takes note that the Council has in the meantime proposed to address possible concerns by limiting the 24/7

¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance); OJ L 141, 5.6.2015, p. 73–117.

² Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union; OJ L 194, 19.7.2016, p. 1–30.

³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'); OJ L 178, 17.7.2000, p. 1–16.

availability of the point of contact to those hosting service providers exposed to terrorist content, as evidenced by the receipt of a removal order.

Third, the Commission would like to clarify that it is primarily for hosting service providers to determine proactive measures, taking into account the exposure to terrorist material, the specificities of their services as well as the financial resources and this to make sure that – as pointed out by the Bundesrat – hosting service providers are able to adopt the most appropriate measures. It is only after a dialogue between the hosting service provider and the competent authority about the necessary proactive measures, and where the authority considers that the proposed measures are insufficient, that specific proactive measures can be imposed on a hosting service provider. This decision should not in principle lead to a general monitoring obligation. Only for overriding security reasons and after having struck a fair balance between the public interest objectives and the fundamental rights involved, the Member State could if necessary derogate from Article 15 (1) of the e-Commerce Directive⁴.

Fourth, the Commission would like to clarify that removal orders are subject to review procedures before the relevant national authorities as well as judicial redress before the court of the Member State whose authorities issued the removal order. It is only where hosting service providers have taken a decision to remove terrorist content because it is incompatible with their own terms of service (e.g. based on proactive measures or following a referral) that complaint mechanisms would have to be established by the hosting service provider pursuant to Article 10. The Commission considers that this distinction is appropriate, reflecting that it is only in relation to removal orders that public authorities have taken a binding decision establishing that a certain piece of content constitutes terrorist content.

Finally, as regards competent authorities, the proposal allows Member States to decide how many and which type of authorities they wish to designate for carrying out the tasks set in the Regulation. While the Commission expects that Member States will in principle designate only one authority for each task (or for more than one task), it is important to maintain this flexibility for Member States.

The Bundesrat's Opinion has been forwarded to the relevant Commission services.

Discussions between the Commission and the co-legislators, the European Parliament and the Council, concerning the proposal are now underway. The Council adopted a General Approach on 6 December 2018 and the European Parliament has started the preparation of its report. Given the importance and urgency of adopting this proposal, the Commission remains hopeful that an agreement will be reached as soon as possible.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'); OJ L 178, 17.7.2000, p. 1–16

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

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First Vice-President*

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Member of the Commission*