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NOTE

From:	Presidency
To:	Delegations
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online - state of play and compromise proposals to be further discussed

I. INTRODUCTION

1. Due to COVID-19, the negotiations on most legislative files, including the proposal for a Regulation on preventing the dissemination of terrorist content online¹ (TCO) have been suspended for the past months.
2. The fourth political trilogue on the TCO-proposal, which had been planned for 18 March 2020, had to be postponed. The political trilogue needs to be resumed as soon as possible.
3. Since the beginning of the year, four technical trilogues were held: 23 January, 3 and 18 February and 3 March 2020, and five JHA Counsellors meetings¹: 17 and 31 January, 13 and

¹ Commission proposal 12129/18 + ADD 1-3 submitted on 12 September 2018, following a call for legislation from the European Council of June 2018 to improve the detection and removal of content inciting hatred and to commit terrorist acts. Council general approach reached on 6 December 2018. First-reading position reached by the European Parliament (EP) on 17 April 2019, see 8663/19 (information note from GIP2 (Inter-institutional Relations) to COREPER presenting the outcome of the EP's first reading); EP mandate confirmed by the plenary on 10-11 October 2019.

27 February and 5 March 2020. Delegations have worked constructively and in a spirit of cooperation throughout the process, reacting quickly to proposals tabled².

II. STATE OF PLAY

4. Following the first three political trilogues (17 October, 20 November and 12 December 2019), and bearing in mind that "*Nothing is agreed until everything is agreed*", there is provisional agreement on Article 7 (Preservation of content and related data); Article 10 (Complaint mechanisms); Article 16 (Legal representative); Article 20 (Exercise of delegation); Article 22 (Implementation report); and Article 23 (Evaluation).
5. An updated 4-column table³ will be issued as soon as possible following the EP' meeting of 3 July 2020. Agreed text marked is marked in green - other parts of the text have been provisionally agreed, such as part of Article 1 (Subject matter and scope), most of Article 8 (Transparency obligations for hosting service providers), and Article 13 (Cooperation between hosting service providers, competent authorities and where appropriate competent Union bodies).
6. Following a request from the European Parliament (EP), the title of the Regulation could be changed to "Regulation on addressing preventing the dissemination of terrorist content online".

² See Wks 1838/2020, 2217/2020 + ADD 1 (EP package proposal and the rapporteur's suggestions for a compromise package on certain elements), WK 2085/2020 + ADD 1. WK 2669/2020 (Commission compromise proposals). WK 2919/2020 + ADD1 (Member States' comments).

³ For the most recent version, see WK 371/2020.

7. The updated 4-column table takes into account the discussions at the meetings mentioned in point 2 and the written comments received from Member States in between the technical meetings. Changes compared to the Commission proposal are marked, deleted text in ~~strikethrough~~, new text in **bold** and underlined).
8. The text marked in blue is considered provisionally agreed at the technical meetings and to be confirmed at the next trilogue. Text falling in this category is the following, Article and line number indicated below. In some cases, [minor] parts of this text will appear in yellow, "to be further discussed", *i.e.* terminology or parts linked to Articles still under discussion.
- Article 1 (Subject matter and scope), point (a) (l. 73)
 - Article 2 (Definitions), paragraphs (1), (2), (3), (4), (5) (a), b), d), da) and e)) and (6) (L. 83⁴ – 94 (with text in para (2) having been more closely aligned to Directive (EU) 2017/541 on combating terrorism⁵), 96, 97, 98)
 - Article 8a(1) (Transparency obligations for competent authorities)⁶ (ll. 171, 172, 173,175 with the exception of L 174 referring to information about referrals)
 - Article 9a (Effective remedies)⁷ (l. 179-180)

⁴ Please note that l. 83) is to be read together with corresponding recitals (10), (10a) and (10b) in l25, further clarifying the notion of "hosting service providers" and "dissemination to the public" which are marked in yellow.

⁵ OJ L 88, 31.3.2017, p. 6.

⁶ New article proposed by the EP.

⁷ New article proposed by the EP. Member States agree on the need effective legal remedies for hosting service providers and content providers to challenge a removal order in accordance with the Charter of Fundamental Rights. Nevertheless, some underline that this obligation should not imply an obligation for Member States to create a specific remedy for challenging a removal order.

9. The text marked in yellow are parts to be further discussed at the trilogue:
- Article 1(2c) (l. 78): EP Proposal - "*This Regulation is without prejudice to Directive 2000/31/EC and Directive (EU) 2018/1808*"; L 76: EP proposal to exclude content disseminated for education, artistic, journalistic and research purposes from the scope of the Regulation
 - Article 2 (Definitions) (L 95 related to the promotion of the activities of a terrorist group, L 97 related to live transmissions of terrorist attacks)
 - Articles 3, 6 and 9 (see section on compromise proposals below)
 - Articles 4 (4a and 4b) (see compromise proposals below)
 - Article 12 (Capabilities of competent authorities) (l. 190)
 - Article 17 (Designation of competent authorities) (l. 216)
 - Article 18 (Penalties), paragraph 1 (l. 224) and paragraphs 3 and 4 (ll. 238-245).

III. COMPROMISE PROPOSALS TO BE FURTHER DISCUSSED

10. On 21 February 2020, the EP rapporteur presented a package proposal⁸ which was discussed in the JHA Counsellors meeting on 27 February 2020.[Following the JHA Counsellors meeting on 3 March, the Commission was asked to submit compromise proposals⁹ on Article 2 (Definition of terrorist content), Articles 3/6/9 (Specific measures), Articles 4 and 4a (Cross-border removal orders), Article 12 (Competent authorities), Article 9a, Article 13 and Article 17 (Designation of competent authorities), Article 18 (Penalties)
11. The following is a summary of the written comments submitted by Member States¹⁰. Below is a best effort summary of the comments submitted.

⁸ WK 2217/2020 ADD1

⁹ WK 2669/2020

¹⁰ WK 2919/2020 + ADD1 + ADD2

12. Article 2: Defining the scope of terrorist content

To respond to concerns by the EP about an overly broad definition of terrorist content unduly interfering with e.g. the freedom of press, the COM compromise proposal suggested further language reflecting the specific protection of content disseminated for inter alia journalistic or research purposes.

In the comments, most Member States were able to support the compromise text as proposed by the Commission, with one indication that a reference should be made to “lawful” content to ensure clarity that protection is not extended to illegal content. One Member State indicated their preference to keep the text as proposed by the European Parliament.

Furthermore, to address concerns by the EP about the concept of promotion of terrorist groups, the Commission proposed compromise text for article 2(5) c) which suggested the deletion of "promoting" and adding "to otherwise supporting its activities".

One Member State found that this change would make the definition too broad. Five Member States were able to support the compromise proposal, one suggested to add “supporting the criminal activities”, whereas one Member State preferred to keep “promoting”.

13. Articles 3/6/9: Specific measures

The Commission's proposal to merge the three articles dealing with hosting service providers' duties of care and proactive measures, Article 3 (Duties of care), Article 6 (Proactive measures) and Article 9 (Safeguards in relation to proactive measures) was welcomed by both Member States and the EP. It has been provisionally agreed to change "proactive" to "specific". This has been reflected in the 4-column table.

Following discussions in the technical meeting of 3rd March, on 6 March 2020, the Commission submitted a revised compromise proposal taking into account also elements of the package proposal submitted by the EP on 21st February.

Overall, Member States were supportive of the compromise proposal with eight Member States responding accordingly, with some caveats regarding two paragraphs. Some Member States considered that the changes in paragraph 4, where the Member State of main establishment has to inform the hosting service provider via decision, following, **two or more final** removal orders that it is considered exposed to terrorist content as too burdensome. One Member State also found that the changes to paragraph 6, which note that hosting service providers have the ability to decide on additional measures, would be too limiting of Member States power. One Member State suggested to re-introduce a reference to a “dialogue” in paragraph 6.

14. **Articles 4 and 4a: Cross-border removal orders**

The cross border competence of any competent authority to issue removal orders constitutes a "red line"/*sine qua non* for most Member States and without which the added value of a Regulation would be significantly reduced. Many Member States noted that in their view, the swift removal of terrorist content would not be possible without cross-border jurisdiction, *i.e.* that a competent authority can issue a removal order directly to a hosting service provider in another Member State having effects throughout the EU.

The Parliament had presented a compromise proposal which distinguished between cross border removal requests (non-binding) which could be issued by any Member State and which would need to be confirmed by the host Member State and cross border removal orders (binding) which could only be issued by the host Member State. Taking into account proposals to strengthen the role of the host Member State as well as the rights of the HSP, the Commission proposed a to give the host Member States the right to request a formal reassessment of the removal order and the HSP the right to request the competent authorities in the host Member State to launch such a request.

The procedure under Article 4a needs to be seen in combination with other proposed changes that aim at strengthening fundamental rights safeguards, such as the introduction Article 9a explicitly providing for an effective remedy for challenging a removal order, and increased requirements for competent authorities to act in an impartial manner and in full respect of fundamental rights.

One Member State was of the view that this would be a too significant burden as, in their view, the proposal suggests that all removal orders need to be reviewed and was keen to revert back to the general approach or give a third entity, such as Europol, the task of assessing compliance with fundamental rights.

Three Member States voiced support to the Commission proposal without amendments, additionally one Member State noted that they are able to support, provided that the re-assessment procedure does not have suspensive effect on the removal order. Another Member State indicated that “fundamental interests” should also form part of the consideration for the re-assessment procedure. Further, another Member State expressed the need to introduce deadlines for the re-assessment procedure.

Two Member States were of the view that the proposal needs to be strengthened to safeguard the right to an effective remedy/judicial redress, and suggested to provide for a right to “object” to the Member State of main establishment. At the same time, one Member State questioned the legitimacy of one Member State being able to assess another Member States removal orders. Finally, one Member State voiced concerns and support towards the EP position as they were unclear on how cross-border constructions that do not require a validation of the host Member State would work in practice, noting that the text does not explicitly provide for an information management system to ensure that coordination of this sort would be smooth.

The proposal was combined with a proposed change to Article 13 which outlined the obligation for Europol to provide an annual report and an overview of all removal orders. This was welcomed by Member States.

15. The compromise proposal on **Article 17 (Designation of competent authorities)** would allow Member States on the one hand to choose the relevant authority (administrative, law enforcement or judicial authority) but would on the other hand foresee additional safeguards where the competent authority is not a judicial authority or a functionally independent administrative authority (as requested by the EP). Administrative and law enforcement authorities would need to be subject to independent review and complement judicial redress possibilities. The compromise proposal would also go into the direction of the EP by limiting the number of authorities that can issue removal orders to one per Member State.

Three Member States had no objections to the proposals, one Member State welcomed the proposal and another one was positive requesting clarification that judicial oversight could qualify as independent review. Two Member States expressed serious reservations noting that the proposal would not be suitable for their national configurations.

This proposal needs to be seen in combination with the proposal on Article 12 which adds that the designated competent authorities need to fulfil their obligations under this Regulation in a manner that is objective, non-discriminatory and in full respect of fundamental rights .”

None of the Member States objected to the addition.

16. Concerning **Article 18 on penalties**, the co-legislators do not seem to be far from reaching a compromise, the Commission proposal further introduced wording the section on penalties to highlight that Member States have flexibility to decide if to impose a penalty taking into account relevant circumstances. As a further safeguard to microenterprises and small-sized enterprises, the Commission compromise proposal included an explicit provision to ensure that the nature and size of the provider be a consideration when setting a penalty.

Five Member States expressed strong support to the proposals. One Member State did not support the wording which made it explicit that it is in the discretion of the Member State if to impose a penalty.