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**Subject: Notification 2020/65/D**

**Draft Act combating right-wing extremism and hate crime**

**Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015**

Sir,

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535<sup>1</sup>, the German authorities notified to the Commission on 17 February 2020 the “Draft Act combating right-wing extremism and hate crime” (‘the notified draft’).

In the notification message the German authorities justify the draft measure and the requirements imposed on social networks by the need to facilitate the prosecution of criminal offences under the German law by national law enforcement authorities.

The Commission services addressed to the German authorities a request for supplementary information on 26 March 2020, in order to obtain clarifications as regards certain aspects of the notified draft. The answers provided by the German authorities on 3 April 2020 are taken into account in the following assessment.

The Commission notes that while the objective of the notified draft is in line with the European Union's policy of fighting illegal content online and creating a safe online environment for users, such objective needs to be pursued in a proportionate way.

In this sense, the Commission notes that some of the modifications to be introduced in the Network Enforcement Act (NetzDG) can be seen as an attempt to bring it closer to the Commission Recommendation on measures to effectively tackle illegal content

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<sup>1</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1.

online<sup>2</sup> and the proposal for a Regulation on preventing the dissemination of terrorist content online<sup>3</sup>, in particular as regards the need to ensure that crimes are effectively prosecuted, and as such they should be welcomed. In this regard, the Commission also notes that it has recently announced an EU Digital Services Act, which will aim precisely at ensuring a coherent European approach to effectively address the problem of illegal activities on the Internet, as well as to regulate the obligations for platforms in this regard, whilst supporting the growth of European platforms, crucial actors of pluralism and freedom of expression, which need to capitalise on the scale of our large digital Single Market.

Examination of the relevant provisions of the notified draft has prompted the Commission to issue the following comments.

## COMMENTS

### *General remarks*

The Commission shares the objective of fighting illegal content online and acknowledges that facilitating criminal prosecution of criminal offences involving illegal content online constitutes an important aspect of tackling the online dissemination of such content. Precisely for this reason, the 2018 Commission Recommendation on measures to effectively tackle illegal content online<sup>4</sup> includes some provisions aimed at facilitating closer cooperation of online platforms with national authorities. In particular, building on Article 15(2) of Directive 2000/31/EC (e-Commerce Directive)<sup>5</sup>, Recital (28) of the Recommendation encourages Member States to set up legal procedures for online platforms to promptly inform authorities of serious criminal offences which might come to their attention when carrying out their activities. On this specific aspect, the Commission welcomes the new channel of reporting to be established by the amended NetzDG.

However, the Commission recalls that, as also highlighted in the said Recommendation, when taking measures applicable to providers of online platforms in respect of illegal content online, Member States are to respect the country of origin principle laid down in Article 3 of the e-Commerce Directive.

In the notification message, the German authorities refer to the need to facilitate the prosecution of criminal content online. According to the German authorities, in addition to take down of illegal content under German law, it is necessary to ensure that competent law enforcement authorities become aware of such content. Accordingly, the notified draft provides an amendment to the Network Enforcement Act (NetzDG). This law was notified to the Commission in 2017 (Notification 2017/127/D). However, the

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<sup>2</sup> Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, OJ L 63, 6.3.2018, p. 50–61.

<sup>3</sup> Proposal for a Regulation 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.

<sup>4</sup> Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, OJ L 63, 6.3.2018, p. 50–61.

<sup>5</sup> 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.

present notification is presented in a context where the Commission has already taken a number of initiatives, both in terms of binding legislative proposals and other regulatory measures, and has announced its intention to propose further legislation on the matter by the end of 2020. Furthermore, other Member States have equally issued or are issuing legislation in this field. Increasing fragmentation can represent a risk to the single market for digital services.

The amendments, as set out in the notified draft, consist of two main elements:

In the first place, the amendment would entail the introduction of an obligation for social networks falling under the NetzDG's scope to report content suspected to involve certain criminal offences and certain related user data to the Federal Criminal Police Office (BKA).

In particular, Article 6 of the notified draft, adding §3a to the NetzDG, imposes on providers of social networks under the scope of the latter an obligation to set up an effective procedure to allow transmission to the BKA, without undue delay, the following:

- content which has been subject to a complaint alleging that it is illegal;
- which has been removed or to which access has been disabled following such complaint; and
- which, after an assessment that the notified content is punishable under German law, the social network considers, based on concrete evidence, that there is evidence of one of the criminal offences specified in the notified draft.

In addition to the content, in the above cases the social networks are also required to transmit to the BKA, where available, the IP address and port number of the user having shared such content.

The amendment of the NetzDG in the notified draft also includes a sanction of up to EUR 5 million for failure to set up the reporting system provided for in Article 6.

In the second place, the amendment to the NetzDG under the notified draft would also entail the introduction of a new and broad definition of "complaint" of illegal content. Under the amended Section 1 of the NetzDG, it would cover any complaint submitted by a user seeking to disable access to or remove content for being illegal.

The providers of social networks under the scope of the notified draft constitute providers of information society services as defined in Article 1(b) of Directive (EU) 2015/1535 and therefore also within the meaning of Article 2(a) of the e-Commerce Directive, insofar as they fulfil the conditions mentioned therein ("*any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*").

Having examined the notified draft, and considering the answers provided by the German authorities in response to the request of supplementary information of the Commission services, the Commission has certain concerns about the compliance with EU law on the

protection of personal data and the single market rules on the free provision of (digital) services. The reasoning is set out in what follows.

### **Personal data protection**

The Commission is concerned about possible non-compliance with the provisions of the General Data Protection Regulation (EU) 2016/679<sup>6</sup> (hereinafter “GDPR”).

The notified draft would introduce an obligation for social network providers to report the removed criminal content associated metadata (such as IP addresses, last login and port numbers) to the BKA. The notified draft also provides for the disclosure of users passwords. Without further clarification as regards the actual implementation of this provision, the disclosure of the password on top of the obligation to share content data and metadata raises concerns as regards the compatibility with Article 5(1)(c) and Article 6(4) of the GDPR which require the measures to be necessary and proportionate for the objectives of the notified act.

Further, the German authorities’ reply of 3 April 2020 to the request of supplementary information of the Commission services on §15b of the Telemedia Law is not fully conclusive as to the obligations of the service providers regarding passwords and their encryption. Based on this reply, it seems that data are stored in un-encrypted form. To the extent that the obligation to disclose passwords implies that passwords need to be stored or handed over un-encrypted, it would not be compliant with Article 32(1)(a) GDPR that obliges the data controller to implement appropriate technical and organisational measures to ensure the level of security appropriate to the risk, that including, where appropriate, encryption. Measures would need to be taken to ensure that the implementation in practice of the law is compatible with this provision of the GDPR.

According to §3a(6) of the NetzDG as amended through the notified draft, the data subject would have to be informed of the disclosure to the BKA only four weeks after the disclosure at the earliest, without leaving margin for a case-by-case assessment. Although the GDPR allows for restriction to the right of the data subject to be informed on the processing of his data under article 13(1)(e) GDPR to be set-up by the legislative measure, such restriction has to meet the requirements of Article 23 of the GDPR. That requires in particular that such legislative measure must be necessary and proportionate.

The Commission has not been made aware of the justification for the choice of delay of four weeks. Moreover it is not clear what the maximum delay is in providing the information and who decides whether the information is no longer jeopardising the purpose of the restriction. Therefore the Commission has concerns that §3a(6) of the NetzDG would not meet the requirements of Article 23 GDPR.

Any such legislative measure shall also contain specific provisions, which inter alia, allow for informing the data subject on restrictions, unless that may be prejudicial to the

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<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

purpose of restriction. It is not clear how restricting the providing of information to the data subject in each case fulfils such requirements and what the justification is to delay by four weeks the informing of the data subject without any assessment and balancing of the circumstances of the individual case.

In this context, the Commission would also like to note that the proposed Regulation on preventing the dissemination of terrorist content online establishes more specific conditions to determine the prohibition for the service provider to inform the content provider about the removal of the content. In particular, this applies where the competent authority decides that there should be no disclosure for reasons of public security, such as the prevention, investigation, detection and prosecution of terrorist offences, and this for as long as necessary, but not exceeding [four] weeks from that decision.

### **E-Commerce Directive**

Article 3(1) and (2) of the e-Commerce Directive lay down in secondary EU law, and in the context of information society services, provisions that seek to ensure the freedom to provide services across borders set out in Article 56 of the Treaty on the Functioning of the European Union (“TFEU”). Those provisions are based on the principle that information society services must be supervised at the source of the activity and are, as a rule, subject to the law of the Member State in which the service provider is established (see recital 22). This internal market principle is also known as the country of origin principle, or the principle of home state control.

Under paragraph 1, Member States are required to ensure that information society services provided by providers established in their territory comply with the applicable provisions of their respective national law which fall within the coordinated field. Paragraph 2 adds that Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide such services from another Member State.

The amendments to the NetzDG, set out in the notified draft, fall within the coordinated fields of the e-Commerce Directive as defined in its Article 2(h), as they concern the obligations for providers of social networks as regards suspected illegal content provided by third parties. The obligations under the notified draft are, in addition, not covered by any of the fields listed in the Annex to the e-Commerce Directive, which are exempted from the scope of the country of origin principle pursuant to its Article 3(3).

As regards the territorial scope, in the notification message, the German authorities clarify that the intended amendments to the NetzDG shall apply to the same providers of social networks as the current text of the NetzDG. Consequently, the new obligations under the notified draft (§1(4) and §3a of the NetzDG) would apply to any provider of social networks with at least two million registered users in Germany, regardless of their place of establishment. This means that providers of social network services established in other Member States than Germany are covered as well by the new provisions of the notified draft, in as far as they fulfil such threshold.

### **New §3a of the NetzDG (reporting obligation)**

The notified draft imposes on the relevant cross-border service providers some likely burdensome obligations, namely the need to report to the German law enforcement authorities certain content where it is deemed to be concrete evidence of certain criminal offences specified in German law. In combination with the current rules under the NetzDG, this amendment implies that social networks are required to carry out two separate assessments: 1), in accordance with §3 of the NetzDG, social networks need to assess the legal merits of the complaint; and 2) if as a result of such assessment the content is removed or blocked, according to the notified amendment, social networks then need to assess whether the content constitutes sufficient evidence of a serious crime.

In practice, these obligations entail potential burden for cross-border service providers, as it requires the following:

- Providers of social networks need to carry out an additional assessment of the content to which access has been disabled or which has been removed in order to determine whether there is concrete evidence of the listed criminal offences.
- The assessment as to whether there is such evidence is often highly contextual and therefore complex. Moreover, the assessment is not guided by a legal standard that would help the providers determine whether or not there is sufficient evidence to justify reporting the content in question.
- Providers of social networks must then assess whether such concrete evidence would point to a certain specific criminal offence under German national law, according to the list provided in Article 6 of the notified draft<sup>7</sup>. According to the detailed explanation provided by the German authorities, these offences may have a particular dangerous effect on the democratic system and public order. The assessment requires a deep knowledge and understanding of the relevant provisions of German criminal law and case law, which may not be obvious especially for providers from other Member States, which will face the need to enrol staff in Germany or outsource this assessment.
- Providers of social networks would, if appropriate, need to report the content as well as, where available, IP and user port to the BKA, without undue delay.

In light of the above, the Commission is of the view that the measures contained in the notified draft could entail a restriction of the freedom to provide information society services from other Member States than Germany, enshrined in Article 3(2) of the e-Commerce Directive.

*New §1, paragraph 4, of the NetzDG (definition of “complaint”)*

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<sup>7</sup> The following criminal offences need to be reported: dissemination of propaganda material of unconstitutional organisations; using symbols of unconstitutional organisations; preparation of a serious violent offence endangering the state; encouraging the commission of a serious violent offence endangering the state; breach of the public peace by threatening to commit offences; forming terrorist organisations; criminal and terrorist organisations abroad; extended confiscation and deprivation; incitement to hatred; dissemination of depictions of violence; rewarding and approving of criminal offences; distribution, acquisition and possession of child pornography; threatening the commission of a felony against life, sexual identity, physical integrity or personal freedom.

Article 6 of the notified draft introduces a definition of what constitutes a “complaint” of illegal content under Section 1 of the current text of the NetzDG – as the current text does not include a definition. The amendment would establish a very broad definition, according to which *”a complaint about illegal content shall mean any complaint about content seeking to remove it or disable access to it, unless the complaint clearly does not allege the existence of an unlawful content.”* It follows from this definition that complaints need not be precise or substantiated, in particular as regards the reasons why the content in question is considered contrary to any particular provision of German law.

In practice, this would mean that providers of a social network, including those providing such services from other Member States than Germany, would need to assess each complaint received from users regarding allegedly illegal content against the provisions of German law listed in the NetzDG. According to the detailed explanation accompanying the notified draft, social networks providing a dedicated channel for NetzDG-related notifications should also assess any content notified outside of the dedicated channels against those provisions.

It is the Commission’s understanding that failure to act upon an individual complaint does not lead to the liability of the provider concerned for the content in question as such. However, providers that fail to provide or correctly apply the procedure to remove or disable access to relevant content upon the reception of complaints can be made subject to serious administrative fines under the NetzDG<sup>8</sup>.

Moreover, the other obligations under the current text of the NetzDG would then need to be complied with, including those regarding transparency obligations on content moderation activities (section 2 of the current NetzDG), as well as the new reporting obligations under the notified draft discussed above.

In practice, in view of the above, this broad definition of “complaint” means that the providers’ burdens under the amended NetzDG would be considerable, including for cross-border service providers operating from other Member States. In the Commission’s view, the obligations resulting from this amendment set out in the notified draft could therefore constitute an additional, and significant, restriction of the freedom to the cross-border provision of information society services, contrary to Article 3(2) of the e-Commerce Directive.

#### Application of Article 3(4) of the e-Commerce Directive

In their notification message, the German authorities briefly mention Article 3(4) of the e-Commerce Directive as permitting derogations from the first two paragraphs of Article 3 for reasons of protecting public policy and, more specifically, the objective of prosecuting criminal offences pursued by the notified draft.

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<sup>8</sup> Following § 3(2)(2) of the notified draft, the procedure shall ensure that the provider of the social network (1) “removes or blocks access to content that is manifestly unlawful within 24 hours of receiving the complaint” or (2) “removes or blocks access to all unlawful content immediately, this generally being within 7 days of receiving the complaint”. However, there is no corresponding fine derived from the lack of compliance with this particular obligation, but only if it “fails to supply a procedure mentioned therein or to do so correctly” (Section 4 (1)(3)) of the NetzDG.

The Commission agrees that reasons of public policy, including the prosecution of criminal offences, can, in principle, justify deviating from the home state control principle and restricting the freedom to provide cross-border information society services. That follows from the first indent of Article 3(4)(a)(i).

However, Article 3(4)(a) requires that any derogation has to be targeted (“taken against a given information society service”), in view of the prejudice – or the serious and grave risk of prejudice – of the service to the objective invoked to justify the restrictive measures. In addition, the measures must be proportionate to those objectives. This follows from points (ii) and (iii) of that provision.

The proportionality of the restriction and, in particular, whether less restrictive measures could lead to the same policy result have not been justified in the present case, in the view of the Commission.

To begin with, faced with the possibility of being imposed serious fines, it is likely that providers of social networks will err on the side of caution and report vast amounts of content and user data to the BKA. Incentives to over-reporting would not meet the objective of identifying upstream the relevant offences.

Furthermore, the German authorities have not provided any evidence that they assessed possible less restrictive measures than the amendments to the NetzDG included in the notified draft. In respect of the reporting obligation, the notification message briefly refers to maintaining the current legal situation as the only alternative, which is considered insufficient, without providing any additional explanation. In particular, the German authorities fail to assess whether obligations to give prominence to existing reporting or complaint mechanisms regarding allegedly illegal content could constitute a less restrictive alternative. As regards the new definition of “complaint”, there is no assessment as to whether a more specific definition – especially one requiring at least some degree of precision and substantiation – would not be possible.

In addition, pursuant to Article 3(4)(b) of the Directive, certain procedural requirements must be met for a Member State to be entitled to derogate from the home state control principle. Specifically, before taking the restrictive measures in question, the “home” Member State of the service provider(s) concerned is to be asked to take measures to address the identified public policy problem. If that Member State fails to take (adequate) measures, it must, together with the Commission, subsequently be notified of the measure that the “host” Member State (in this case Germany) intends to take.

To date, the German authorities have not provided any information showing that those procedural requirements have been met in the case at hand.

From the above considerations it appears that the notified draft is likely to restrict the freedom to provide cross border information society services, without the substantive and procedural requirements for enacting such restrictive measures, set out in Article 3(4) of the e-Commerce Directive, having been met.



Compatibility with Article 15, read in conjunction with Article 14 and Recital 48, of the e-Commerce Directive

Under the current NetzDG, the reception of users' such complaints triggers several obligations for providers of social networks. Those obligations include the obligation to establish a channel for the submission of complaints on certain criminal offences by users, and to report periodically on the number of complaints received; furthermore, they need to remove or disable access to manifestly illegal content within 24 hours, and other illegal content within 7 days. Failure to provide for and apply the necessary procedure to this effect can lead to the imposition of serious fines on the providers concerned under the NetzDG.

As stated above, one of the two amendments to the current NetzDG contained in the notified draft would involve the introduction of a new – and broad – definition of “complaint” about illegal content.

As highlighted above, the breadth of this definition adopted raises certain issues in and of itself. Moreover, following the notified draft, the obligations put on social networks as a result of such a broadly defined “complaint” (*“any complaint about content seeking to remove it or disable access to it, unless the complaint clearly does not allege the existence of an unlawful content”*) also raise concerns as to their compatibility with the rules related to the exemption of liability for hosting service providers.

In the view of the Commission, this amendment raises concerns from the viewpoint of Article 15(1) of the e-Commerce Directive, read in conjunction with Article 14 and Recital 48 of that directive. In this regard, it notes the following.

Pursuant to Article 15(1), Member States are prohibited from imposing on providers of “hosting” services (within the meaning of Article 14) general obligations to actively seek facts or circumstances indicating illegal activity.

The providers of social networks covered by the amendment to the NetzDG under the notified draft (as confirmed in the message accompanying the notification) are telemedia services under German law and involve, as a general rule, “hosting” services within the meaning of Article 14 of the e-Commerce Directive (as transposed into German law by Article 10 of the Telemedia Law). The prohibition set out in Article 15(1) of the directive therefore applies in relation to those providers.

The Commission is concerned that the envisaged amendment would lead to a violation of Article 15(1), given the broad manner in which the concept of a “complaint” would be defined in the amended NetzDG. In particular, as noted above, the envisaged amendment contains no requirement whatsoever that complaints be precise and substantiated, at least to some extent, for them to be actionable under the NetzDG. Because there is no such requirement, providers of social networks can be expected to receive considerable

numbers of complaints that are either not at all, or insufficiently precise and substantiated<sup>9</sup>.

At the same time, under the new rules, providers of social networks are expected to check any complaints - received through any channel and on any basis - that could entail violations of certain provisions of German criminal law. In order to determine whether those provisions may have been violated, one normally needs to have at least a reasonable understanding of the relevant facts and circumstances. Given that the complaints received are not guaranteed to contain even a minimum of precision and substantiation, the only manner for the providers concerned to meet their obligations under the new rules would be for them to actively seek facts or circumstances indicating illegal activity. A general obligation to that effect would, however, be incompatible with Article 15(1) of the e-Commerce Directive.

That holds true even more so considering that, under the notified amendment of the NetzDG, complaints may even be submitted to providers of social networks through dedicated channels intended for complaints about other types of alleged infringements (such as, for instance, copyright), or may solely be based on the provider's terms and conditions.

This needs to be read in combination with the new obligation (subject to serious penalties of up to 5 million EUR) to assess all (broadly defined) complaints in order to identify clear evidence that such content violates certain provisions of criminal law.

Consequently, the broad definition of "complaints", coupled with the new obligations imposed on providers of social networks in relation to such complaints would mean that those providers are made subject to more excessive obligations than in the context of the present rules, where social networks can have a margin of discretion as to what should be considered a "complaint". EU rules limiting the liability that Member States can impose on hosting service providers, and in particular Article 15(1), however, precisely aims to preclude the imposition of such obligations.

The Commission recalls in this regard that, in as far as the requirements imposed by the NetzDG are to be considered as "duties of care" specified in national law, within the meaning of Recital 48 of the e-Commerce Directive, any such duties must still be compatible with EU law, including Article 15(1) of that directive. Moreover, Recital 48 makes clear that any such duties should remain limited to what can be "*reasonably expected*" from the service providers concerned.

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<sup>9</sup> Furthermore, the Commission Recommendation on measures to effectively tackle illegal content online recommends that the mechanisms to submit notices allow for and encourage the submission of notices which are sufficiently precise and adequately substantiated to enable the hosting provider concerned to take an informed and diligent decision in respect of the content to which the notice relates, in particular whether or not that content is to be considered illegal content and is to be removed or access thereto is to be disabled. Those mechanisms should be such as to facilitate the provision of notices that contain an explanation of the reasons why the notice provider considers that content to be illegal content and a clear indication of the location of that content.

### ***Overlap with the announced EU Digital Services Act***

For the sake of completeness, and in line with what has been noted above, the Commission notes that the notified draft is likely to overlap with the EU Digital Services Act initiative announced by Commission President von der Leyen in her political guidelines and in the Commission Communication “Shaping Europe’s digital future”.<sup>10</sup>

The Digital Services Act will complete the Digital single market for online service providers by clarifying and harmonizing their responsibilities. The initiative at EU level aims at addressing the need for a clear and harmonized set of rules on the responsibility of digital platforms, while avoiding the regulatory fragmentation of the Internal market that national initiatives can entail.

As already stressed above, the Commission shares with the German authorities the policy objective of fighting illegal content online. However, in view of the Commission’s intention and on-going work towards adopting EU legislation on the matter in the near future, it is suggested that Member States exercise restraint when considering the adoption of national initiatives on this same matter, such as the notified draft. The Commission is committed to work closely with Member States throughout the preparation and negotiation of this file and invites the German authorities to actively participate in the process.

### ***Interplay with the proposed Regulation on preventing the dissemination of terrorist content online***

Article 6 of the notified draft, adding §3a of the NetzDG, imposes on social networks an obligation to communicate to law enforcement authorities evidence of criminal activities.

In its Article 13(4), the proposed Regulation on terrorist content online provides for a similar obligation focusing on a subset of illegal content, namely terrorist content. Accordingly, upon the adoption of the Regulation, hosting service providers (including social networks) would have the obligation to promptly inform the competent authorities in the Member State concerned or where they are established or have a legal representative of any evidence of terrorist offences that they become aware of.

The European Parliament, the Council and the Commission are currently holding political trilogue meetings on the proposed Regulation.

The Commission recalls that, when this Regulation is adopted, it will constitute the EU regulatory framework on these matters, thus precluding Member States from adopting national measures on matters falling within its scope.

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<sup>10</sup> Commission Communication of 19.2.2020: “Shaping Europe's digital future”, COM(2020) 67 final.

For the reasons stated above, the Commission invites the German authorities to take the above comments into account.

Yours faithfully,

For the Commission

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