



Council of the European Union  
General Secretariat

**Brussels, 06 March 2020**

**WK 2669/2020 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 - drafting proposals from EC following technical meeting with EP on 3 March 2020

# 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.”*

## 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.~~**

## 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.*

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

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:

(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:

# TCO - Drafting Proposals

- (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.
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.

### *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.***