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**Subject: Notification 2020/544/A**

**Draft Federal Act on measures to protect users on communication platforms (Communication Platforms Act)**

**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 Austrian authorities notified to the Commission on 1 September 2020 the “Draft Federal Act on measures to protect users on communication platforms (Communication Platforms Act)” (‘the notified draft’).

In the notification message, the Austrian authorities explain that the notified draft is aimed at protecting users on communication platforms from content which is illegal according to Austrian law. It does this by imposing certain obligations on communication platforms available to users in Austria for the handling of certain content that is illegal under Austrian law.

The Commission services addressed a request for supplementary information on 29 September 2020 to the Austrian authorities in order to obtain clarifications on certain aspects of the notified draft. The answers provided by the Austrian authorities on 15 October 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

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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.

environment for users, such an objective needs to be pursued in accordance with EU law and in a proportionate way.

In this regard, the Commission further notes that it is finalising a legislative proposal, the Digital Services Act, whose adoption is envisaged in the coming weeks. The aim of this proposal is to ensure a coherent EU approach to effectively address the problem of illegal content and activities on the Internet, as well as to regulate the obligations for online 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 Single Market.

The Commission welcomes the support of the Austrian authorities to the Digital Services Act initiative, as expressly confirmed in the notification message, as well as in the replies to the Commission service's request for supplementary information. The Commission also welcomes the commitment by the Austrian authorities to duly adapt any national rules that will overlap with the Digital Services Act once it enters into force.

In this regard, the Commission further notes that the Digital Services Act takes the form of an EU Regulation, to ensure full harmonisation of the issues it covers. Well-established case law of the Court of Justice of the European Union ("CJEU") make clear that the effect of a Regulation is to prevent the implementation of any legislative measure, even if it is enacted subsequently, which is incompatible with its provisions<sup>2</sup>. The Court also established that Member States are under a duty not to obstruct the direct applicability inherent in regulations and other rules of Union law<sup>3</sup>. For this reason, the Commission reminds the Austrian authorities that, if the notified law is finally adopted, Austria should ensure withdrawal of those provisions, which are incompatible with either the Regulation on Terrorist Content Online<sup>4</sup> or the Digital Services Act once these are adopted at Union level.

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

## **COMMENTS**

### **1. General remarks**

The Commission shares the objective of fighting illegal content online, while adequately safeguarding fundamental rights. In this sense, the Commission welcomes the aim pursued by the notified draft, which would reinforce the obligations of communication platforms to handle potential illegal content intermediated in their services. The Commission takes note of the efforts in the notified draft that aim at introducing a certain degree of proportionality to its obligations.

As the Commission has noted in its formal reactions to recent similar notifications from other Member States, the notified draft is presented in a context where the Commission has already taken a number of initiatives, both in terms of proposals for binding

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<sup>2</sup> Judgment of the Court of 14 December 1971, *Politi s.a.s.*, Case 43-71.

<sup>3</sup> Judgment of the Court of 10 October 1973, *Fratelli Variola S.p.A.*, Case 34/73.

<sup>4</sup> Commission proposal of 12.9.2018, COM(2018) 640 final.

legislation and other regulatory measures, and has announced its intention to propose further legislation on the matter by the end of this year. In particular, the Commission Recommendation on measures to effectively tackle illegal content online<sup>5</sup>, the revised Audiovisual Media Services Directive (“AVMSD”)<sup>6</sup>, and the proposal for a Regulation on preventing the dissemination of terrorist content online have all been adopted. The Commission has also been working intensively on the Digital Services Act legislative proposal, which will be adopted in the coming weeks, and will aim at establishing a harmonised framework of due diligence obligations for online platforms to handle illegal content intermediated on their platforms.

Other Member States have equally adopted or are proposing legislation to regulate online platforms’ responsibilities as regards illegal content online. Increasing fragmentation can represent a risk to the single market for digital services and for Europe’s prosperity.

In their notification message and in the replies provided to the Commission service’s request for supplementary information, the Austrian authorities justified the need for the notified draft to address urgently the dissemination of illegal content online. The Commission shares the view of the Austrian authorities on the need to react urgently to this increasing concern. Precisely for this reason, the Commission is finalising its Digital Services Act legislative proposal. The Commission would welcome the active support of Member States, including Austria, and the focusing of national efforts on a rapid discussion of this legislative proposal, achievement of a fast compromise between the European co-legislators and subsequent entry into force of the new rules, instead of dedicating additional efforts on parallel national initiatives.

While pursuing a legitimate policy objective, national measures in this field are likely to add to the existing legal fragmentation in the Single Market and would, in any case, need to be duly adapted to the Digital Services Act once it enters into force. The regulatory fragmentation of the single market resulting from these measures would create further obstacles, especially for emergent or smaller services to scale up across the EU, while the larger established platforms would be the only ones able to effectively comply with different regulatory regimes at national level. In addition, national measures, on their own, are also likely to be ineffective in addressing the spread of illegal content, which is a horizontal concern across the EU and affecting European users.

The relevant provisions set out in the notified draft consist of the following main elements:

- Obligation for communication platforms under the scope of the notified draft to set up and operate a reporting mechanism allowing users to report potentially illegal content to the platform. National offences constituting illegal content for

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<sup>5</sup> Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online (C(2018) 1177 final).

<sup>6</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

the purposes of the notified draft are listed in section 1 §2(6) of the notified draft law.<sup>7</sup>

- According to the notified draft (section 2 §3) such mechanisms should also allow communication platforms to provide certain information to the notifying users on how their report will be dealt with, the decision taken and the reasons for that decision.
- Communication platforms are also required to assess and take appropriate action on the reported content: take down or block access to manifestly illegal content within 24 hours from receiving the notification; and complete a detailed examination and take appropriate action for all other content within 7 days from receiving the notification.
- Communication platforms shall also inform the notifying users and the users providing the allegedly illegal content on the possible ways to appeal the decision taken by the platform.
- Communication platforms will also need to operate back up systems to retain the content blocked or removed, including certain data for evidence purposes and prosecution, and store it for up to 10 weeks.
- Communication platforms shall also set up and operate an internal procedure to review their decisions regarding notified content at the request of the users having uploaded or notified the content. Such a review process must be completed within 2 weeks of the application.
- Communication platforms shall prepare and submit to the supervisory authority a report on the handling of reports of allegedly illegal content, which they are required to make available on their websites. Section 2 §4 of the notified draft provides further details on the granular information to be provided in those reports.
- Communication platforms shall appoint a legal representative with sufficient powers to ensure compliance with the notified draft and with sufficient knowledge of German language.
- The national competent administrative authority will be entrusted the function of complaints office for out of court settlement of disputes between concerned users and communication platforms.
- Communication platforms are also required to contribute with a fee to finance the expenses of the national administrative authority incurred in the application of the notified draft.
- The Austrian competent authority shall supervise the measures taken by service providers in implementing the notified draft and is empowered to impose fines of up to EUR 10 million in case of systemic non compliance.

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<sup>7</sup> Section 1 §2(6) of the notified draft defines illegal content as content that objectively constitutes one of the following offences and is not justified: Coercion (§ 105 Criminal Code [Strafgesetzbuch – StGB], Federal Law Gazette No 60/1974), dangerous threat (§ 107 StGB), persistent persecution (§ 107a StGB), continual harassment by means of telecommunications (§ 107c StGB), accusation of a judicial criminal act that has already been dismissed (§ 113 StGB), insult (§ 115 StGB), unauthorised image recordings (§ 120a StGB), blackmail (§ 144 StGB), disparagement of religious teachings (§ 188 StGB), pornographic representations of minors (§ 207a StGB), initiation of sexual contact with minors (§ 208a StGB), terrorists organisation (§ 278b StGB), instructions for committing a terrorist offence (§ 278f StGB), encouragement to commit terrorist offences and approval of terrorist offences (§ 282a StGB), incitement to hatred (§ 283 StGB), § 3d, § 3g, § 3h of the Prohibition Act, State Law Gazette No 13/1945.

As explained by the Austrian authorities in their notification message and replies to the request for further information, the providers of communications platforms 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 Austrian authorities in response to the request of supplementary information of the Commission services, the Commission has certain concerns about the compliance of that draft with EU law on the single market rules on the free provision of (digital) services. The reasons for those concerns are set in the following sections.

## **2. E-Commerce Directive**

Articles 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 Article 3(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. Article 3(2) adds that Member States may not restrict, for reasons falling within the coordinated field, the freedom to provide such services from another Member State.

The provisions 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 information society services qualifying as communication platforms 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, as confirmed by the Austrian authorities in their reply to the questions posed by the Commission services, the obligations under the notified draft would apply to any provider of communication platforms fulfilling the thresholds set out in section 1 §1(2) of the draft, regardless of the provider's place of establishment. However, the sub-category of information society services that would constitute video-sharing platforms under the definitions of the AVMSD, and for the provisions coordinated by such Directive, would be excluded from the scope of the notified draft.

In practice, this means that providers of communication platforms, other than those constituting video-sharing platforms for the fields coordinated by the AVMSD,

established in other Member States than Austria are covered as well by the new provisions of the notified draft, in as far as they fulfil such thresholds.

The Digital Services Act will confirm these provisions and make their implementation stronger. It is therefore all the more important to ensure compliance, as the existing rules will not change.

### **Notified obligations on communication platforms** (Section 2 of the notified draft)

The Commission generally welcomes the objective pursued by the notified draft to address illegal content on online platforms.

However, in practice, the obligations imposed by the notified draft appear to entail a burden for cross-border service providers, as it requires the following:

- Set up or align the design of the reporting mechanism when providing services to users in Austria to the new requirements under the notified draft, as well as its operation. Such mechanisms shall also cater to the specific content that would be illegal under national Austrian law. This is likely to create an additional burden on communication platforms, which are now required to retain the content for up to 10 weeks and set up new information flows when their services are acceded from users in Austria.
- Set up a system or align the existing ones to take appropriate action, in particular deciding whether to block or take down the notified content, within the deadlines set out in the notified draft. In particular, service providers would be required to perform a legal assessment of the notified content against national criminal law to determine whether the content is to be considered “manifestly illegal” within 24 hours from receipt of the notification.

Note should be taken of the fact that some of the criminal offences listed in the notified draft would require a contextual assessment of the notified content, for instance in the case of coercion and insult. In addition, the service provider is likely to also be required to perform a more comprehensive assessment, which may include other evidence than the notified content, to determine whether the content constitutes ongoing harassment or accusation of a criminal act that has been dismissed. The notified draft does not provide any explanation on how platforms are to conduct this assessment which is likely to require additional administrative resources.

- Set up and operate an internal appeal mechanism allowing users accessing their services from Austria to address requests for review of their content moderation decisions. Such reviews need to be completed within 2 weeks of application. This is likely to create additional administrative and resources requirements on communication platforms which offer their services in Austria.
- Appoint a legal representative for the specific purposes of ensuring compliance with the notified draft, which presupposes certain knowledge of the Austrian legal system, and with sufficient knowledge of German language.
- Comply with the very granular and specific reporting obligations as regards their services in Austria, as required under the notified draft and likely in German

language. In addition, they shall abide by the future guidance of the national competent authority in this regard.

- Communication platforms and concerned users in Austria would have the possibility to seek an out of resolution to disputes on the content moderation decisions through the Austrian RTR-GmbH, which is to act as the complaints office according to the notified draft. For cross border providers, due to distance and linguistic reasons, being subject to such an out of court dispute resolution body is likely to entail additional burden to be able to effectively participate in such procedures.

In light of the above, the Commission is of the view that the measures contained in the notified draft appear to contravene Article 3(2) of the e-Commerce Directive as they could be seen as entailing a restriction of the freedom to provide information society services from other Member States than Austria.

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

The reasons allowing a derogation from the principles set out in the first two paragraphs of Article 3 are clearly and exhaustively set out in Article 3(4)(a)(i). The Commission agrees that reasons of public policy, including tackling illegal content online potentially involving criminal offences, could, 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 Art. 3(4)(a)(i).

However, in this case, and in as much as they could constitute a restriction to cross border service providers, the necessity of the some new measures to effectively tackle illegal content on communication platforms has not been sufficiently justified. In the notification message, the Austrian authorities briefly refer to the explanations provided in recent notifications of similar measures by other Member States. In its formal reaction to such notifications the Commission has raised doubts on the compatibility of similar measures with Article 3(4) of the e-Commerce Directive which would be similarly applicable here.

Article 3(4)(a) also 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 Commission welcomes the explanation provided by the Austrian authorities in their notification message as well as in their replies on the proportionality of the notified draft. The Austrian authorities point at the fact that the obligations foreseen in the notified draft would only apply to service providers fulfilling the thresholds set out in the notified draft, which are expected to be large platforms in terms of resources. Although the Austrian authorities have not provided any estimation on the expected compliance costs, the fact that the obligations would only apply to service providers above those thresholds would justify, in their view, the proportionality of the administrative and economic

burden resulting from compliance with the obligations to the financial capabilities of such platforms.<sup>8</sup>

However, the proportionality of the restriction vis a vis the objective pursued and, in particular, whether less restrictive measures could lead to the same policy result have not been justified. In their notification message, the Austrian authorities fail to assess possible less restrictive measures than the notified draft.

In addition, pursuant to Article 3(4)(b), 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 Austria) intends to take.

The fact that, in their replies to the Commission service’s request for supplementary information, the Austrian authorities invoked the urgency procedure of Article 3(5) of the e-Commerce Directive cannot alter that conclusion, considering that the conditions set out therein have not been met. The Austrian authorities have not indicated sufficient reasons substantiating their position that there is urgency in adopting national measures in this field. The Commission is well aware of the specific examples invoked by the Austrian authorities and has reacted to the related concerns in the form of recent legislative and non-legislative initiatives. In the Commission’s view, those concerns can only be effectively addressed with an EU harmonized framework, which is in fact envisaged in the upcoming Digital Services Act.

In addition, the Austrian authorities have failed to inform the “home” Member State in the shortest possible time. Moreover, the Commission sees no objective reasons to consider the use of the urgency procedure justified in the case at hand; while certain recent events make effective action necessary, urgency justifying ignoring the coordination provisions across the whole range of illegal content has not been established. The fact that the draft measures have been notified under Directive (EU) 2015/1535 without invoking urgency seems to confirm that view. Consequently, there seem no reasons to derogate from the conditions stipulated in Article 3(4)(b).

From the information available to it, the Commission must therefore conclude that the Austrian authorities failed to meet the requirements set out in Article 3(4) of the e-Commerce Directive which would justify a derogation from Article 3(2).

Finally, in their reply to one of the questions of the Commission services, the Austrian authorities clarify that the notified draft would not be of application to the communication platforms constituting video-sharing platform providers under the AVMSD. According to the Austrian authorities, a separate national measure transposing the AVMSD would cover video-sharing platform providers established in the Austrian

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<sup>8</sup> In particular, when asked about this specific point in the Commission’s request of additional information, the Austrian authorities limit their explanations to point out that the resulting compliance costs will not be significant in relation to the turnover achieved and will therefore be reasonable (and therefore proportionate) to the financial strength of the undertakings concerned.



territory, while video-sharing platform providers established in another Member States would be under the jurisdiction of such Member State of establishment. The Commission would like to recall that the country of origin principle of the e-Commerce Directive, mirrored in Article 28a of the AVMSD, and its related derogations apply in a horizontal manner to all information society services established in a Member State and regardless of the level of harmonization achieved, as long as the measure at stake falls within the coordinated field and are not excluded pursuant to paragraph 3.

#### **4. Interplay with the Audiovisual Media Services Directive**

According to the information provided by the Austrian authorities, the Commission understands that the notified draft will not apply to video sharing platforms within the meaning of Article 1 of Directive 2010/13, as recently revised by Directive (EU) 2018/1808 (the “AVMSD”). The Austrian authorities stated that the requirements addressed by the Commission resulting from Article 28b of the revised AVMSD are implemented in the Audiovisual Media Services Act independently of the notified draft for the group of video-sharing platform services established in Austria.

In view of the above, the Commission considers that for the sake of legal clarity it could be beneficial to better clarify in the notified draft that it does not apply to video sharing platforms and that its provisions are without prejudice to the specific regime concerning these services.

#### **5. Interplay with the proposed TCO Regulation**

The notified draft regulates a number of aspects that are also covered by the Commission’s proposal for a Regulation on preventing the dissemination of terrorist content online (‘TCO Regulation’)<sup>9</sup>.

It includes an obligation for online platforms to take down notified illegal content defined in section 1 §2(6) of the notified draft, which includes: terrorists organisation (§ 278b StGB), instructions for committing a terrorist offence (§ 278f StGB), encouragement to commit terrorist offences and approval of terrorist offences (§ 282a StGB)

Furthermore, the notified draft also includes the following obligations that are also covered under the proposed TCO Regulation:

- transparency obligations under Section 2 §4 of the notified draft
- requirements for complaint procedures and handling complaints about illegal content under (Section 2 of the notified draft),

The European Parliament, Council and Commission are currently holding political trilogue meetings on the proposed TCO Regulation. The Commission recalls that, when the TCO Regulation is adopted, the Austrian authorities would no longer have the possibility to regulate the matters falling within the scope of that Regulation.

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<sup>9</sup> 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. 7 Commission Communication of 19.2.2020: “Shaping Europe's digital future”, COM(2020) 67 final.

## **6. 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 could overlap with the EU Digital Services Act proposal announced by Commission President von der Leyen in her political guidelines and in the Commission Communication “Shaping Europe’s digital future”.

The Digital Services Act, for which adoption is planned by the end of the year, will aim at completing the single market for online service providers by clarifying and harmonizing their responsibilities, including those covered by the notified draft. The initiative at EU level aims at addressing the need for a clear and harmonised set of rules on the responsibility of digital platforms, while avoiding the regulatory fragmentation of the Internal market that national initiatives can entail.

The Digital Services Act will aim at creating a clear system of responsibilities for online service providers for tackling potentially illegal content and activities in their services, which should be carefully balanced against the need to adequately preserve Fundamental Rights as protected by the Charter of Fundamental Rights of the Union, such as freedom of expression and information. As the Commission intends to propose it, the new system would aim at preventing incentives for online platforms to remove legal content when in doubt of its legality, which creates clear risks for freedom of expression online.

These incentives are likely to arise from obligations to assess the illegality of wide categories of content (especially those requiring a contextual assessment) within very strict time deadlines, as set out in §3(3) of the notified draft. Especially when coupled with step sanctions for individual instances of lack of compliance, it could lead to unacceptable outcomes, in particular disproportionate burdens for the online platforms and, in certain circumstances, a risk of over-removal and hence negative effects on freedom of expression. This risk is particularly high in particular for online platforms that have limited resources.

The Digital Services Act will also aim to underpin the notice and action requirements for online platforms with clear requirements on due process and transparency, in order to ensure that the concerned users are able to assert their rights by means of redress, including judicial redress, throughout the process. The objective would be to reinforce the accountability of online platforms when moderating the content available on their services.

As already stressed above, the Commission shares with the Austrian authorities the policy objective of fighting illegal content online and welcomes their support of the Digital Services Act. In particular, the Commission welcomes their views supporting the need for EU legislative action<sup>10</sup>.

However, in view of the Commission’s intention to adopt the Digital Services Act legislative proposal in the coming weeks, it is suggested that Member States exercise restraint when considering the adoption of national initiatives on this same matter, such

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<sup>10</sup> <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=544> “As this is a cross-border challenge, effective regulation at the European level is the best solution. In its Resolution of the Council of Ministers of 9 July 2020, the Federal Government therefore welcomed the submission of a Digital Services Act announced by the European Commission for the end of the year.”

as the notified draft. The Commission is committed to work closely with Member States throughout the preparation and negotiation of its proposal and invites the Austrian authorities to actively participate in the process.

Finally, the Commission reminds the Austrian authorities that these comments do not preempt any enforcement of Union rules by the Commission or by national courts if an infringement against the abovementioned provisions is established.

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

Yours faithfully,

For the Commission

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Director-General

Directorate-General for Internal  
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and SMEs