

EuroISPA's points of critique on the Austrian Federal Act on measures to protect users on communication platforms

EuroISPA is the voice of the European Internet industry, representing over 2,300 Internet Service Providers across Europe, all along the Internet value chain, including providers of all sizes and business models.

EuroISPA has been closely following ongoing discussions on the Austrian Federal Act on measures to protect users on communication platforms (the so-called Kommunikationsplattformen-Gesetz – KoPI-G), in the broader context of the association's work on EU initiatives on intermediary liability and more specifically on the Digital Services Act.

While sharing the important objective of combating hate speech online, we would like to voice our concerns on several elements of the proposal, as we see it posing a risk towards a fragmentation of the European internal market and placing an excessive additional burden on providers offering services in Austria. As the European Commission is expected to publish its Digital Services Act by the end of 2020, which shall also address the challenges of hate content online, we urge Austria to refrain from legislating unilaterally on the matter.

Please find an elaboration of our criticism following.

We support legislative consistency across the Digital Single Market

The present draft aims at promoting the responsible and transparent handling of user reports on hate speech on communication platforms and the expeditious handling of such reports. While such objectives are commendable, EuroISPA notes that these additional obligations risk fragmenting the European internal market, as online platforms are more often than not operating in different European Member States and these would have to put in place specific compliance mechanisms for the Austrian market. In our opinion, it is questionable whether such a restriction on the freedom to provide an information society service from another Member State complies with Art. 3(2) of the E-Commerce Directive¹. We further detail our views in the section below.

Furthermore, as the Internet operates cross-border, we strongly doubt that a national approach could effectively tackle hate speech being spread on global platforms. If we imagine, as a consequence of the Austrian KoPI-G, that all Member States will introduce their own specific laws, the EU would end up with up to 27 incoherent national legislative frameworks. However, with this individualism we would not, in our views, achieve the goal of making users safer online.

Therefore, before legislating on the matter, we encourage the Austrian government to wait for the European Commission to present its proposal for a Digital Services Act, which is about to be published already on the very last day of the KoPI-G's standstill period. The proposal is expected to tackle several provisions dealt with in the KoPI-G, through the formulation of harmonised rules on a notice-and-action system.

¹ [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')

In this context, reference should be made to the European Commission's opinion of 22 November 2019 (C(2019/8585 final)), which deals with the French legislative procedure for combatting hate content on the Internet, which was also notified under Directive (EU) 2015/1535². The European Commission asked France to postpone its legislative initiative since, as mentioned before, the Commission plans to take action itself through the Digital Services Act.

It should also be highlighted that the European Parliament, representing EU citizens, is extremely advanced in its work on reports on the Digital Services Act. Three Committees have already adopted their reports, tackling respectively the functioning of the Single Market³, fundamental rights issues posed⁴, and the need to adapt commercial and civil law rules for commercial entities operating online⁵. These reports are expected to be adopted by the entire European Parliament in October 2020.

The draft law infringes the country of origin principle

Since the measures envisaged in the draft law should also apply to service providers established in other EU Member States, as long as they fall within the scope, the law represents a clear intervention in the Digital Single Market and the country of origin principle set out in the E-Commerce Directive, which should ensure the freedom to provide services cross-border.

According to the E-Commerce Directive, such restrictive measures are only allowed under Art. 3(4)(a)(ii), if they are necessary for the “fight against any incitement to hatred on various grounds”. However, such measures may only apply in respect to “a given information society service”. The interpretation of the Austrian government, according to which “a given information society service” refers to a broader “category of services”, is extremely questionable in the views of EuroISPA. The European Commission has so far explicitly interpreted the term “a given information society service” as referring to specific services – and not categories of services. This was clearly stated, for example, in the “Communication from the Commission on the application of Article 3 Paragraphs 4-6 of the Electronic Commerce Directive to financial services”:

“A ‘given’ service is taken to mean here that the Member State of destination may not, under Article 3(4), take general measures in respect of a category of financial services such as investment funds or loans. To be covered by Article 3(4), the measure must, therefore, be taken on a case-by-case basis against a specific financial service provided by a given operator.”⁶

We oppose overly restrictive timeframes to take down content

The draft law would create an obligation for service providers in the scope to remove or disable access to manifestly illegal content within 24 hours following the receipt of a report. The timeframe would be extended to 7 days for all other kinds of illegal content.

EuroISPA notes with concern the trend of sectorial legislation mandating intermediaries to take down content within strict timeframes. Such requirements push intermediaries to err on the side of caution and to remove doubtful content, rather than running the risk of criminal and civil liability in the event of the content being actually illegal. This leads to a higher risk of over removal of lawful content, which in turn has a chilling effect on European users’ fundamental freedoms.

² [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

³ [2020/2018\(INL\)](#) Digital Services Act: Improving the functioning of the Single Market

⁴ [2020/2022\(INI\)](#) Digital Services Act and fundamental rights issues posed

⁵ [2020/2019\(INL\)](#) Digital Services Act: adapting commercial and civil law rules for commercial entities operating online

⁶ [COM\(2003\) 259](#) Communication from the Commission to the Council, the European Parliament and the European Central Bank: Application to Financial Services of Article 3(4) to (6) of the Electronic Commerce Directive

In this context, EuroISPA would like to draw the attention of the European Commission to the decision of the French Constitutional Council taken on 18 June 2020⁷, which declared the main provisions of the French draft “Avia law”, including the obligation to remove “manifestly illegal hate speech” and other types of content within 24 hours, to be unconstitutional. The Council noted that the lack of involvement of judicial authorities on the decision of whether specific content is illegal or not combined with the incentives to overzealously remove flagged content would “infringe upon the exercise of freedom of expression and communication in a way that is not necessary, suitable, and proportionate”.

⁷ Conseil Constitutionnel, [Décision n° 2020-801 DC du 18 juin 2020](#)