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Contribution to the examination of Austria's draft law aimed at combating hate content on the internet (2020/544/A)

European Digital Rights (EDRI) is an association representing 44 human rights organisations from across Europe that defend rights and freedoms in the digital environment. This submission has been developed with the contributions of our members epicenter.works, Access Now and Article 19.

Introduction

On 3 September 2020, the Austrian government released a legislative package to tackle online hate speech. Besides a comprehensive justice reform, the package also contains a bill that creates new obligations for online platforms to remove potentially illegal user-generated content (the so-called Kommunikationsplattformen-Gesetz, or KoPLG for short). On 1. September 2020, Austria notified the draft law to the European Commission in accordance with Directive (EU) 2015/1535.

EDRI strongly advises the European Commission to postpone the Austrian draft KoPLG for the following reasons:

- The draft legislation would seriously hinder the fundamental right to freedom of expression and opinion by creating chilling effects and limit the right to conduct business for SMEs;
- It de facto puts in the hands of platforms within scope the responsibility to enforce the law, although they neither have the necessary knowledge nor the ability to do so;
- Its scope is disproportionate and may affect community-led, non-for-profit as well as small service providers in an unequal and disproportionate manner in contrast to Big Tech companies;
- There is no evidence substantiating the claim that the proposed rules would be an effective and proportionate remedy to deal with the problem of online illegal hate speech in Austria;
- The penalties foreseen in the draft legislation are disproportionate and will certainly lead the platforms to stay on the safe side and thus, to potentially overblock legitimate content in order to escape the threat of disproportionate fines;
- The Commission should prevent the introduction of national measures that would compromise the adoption of the future Digital Services Act package by the European Parliament and the Council in the same field and thus, preventing harmonised legislative landscape across the EU.

The proposal leads to a privatisation of law enforcement

The Austrian NetzDG applies to a catalogue of 15 criminal offences, including hate speech, coercion, stalking and the degradation of religious teachings. Platforms must provide a reporting function for this illegal content and react immediately to notifications. If the content is obviously illegal for legal laypersons, it must be blocked within 24 hours after the notification. If the illegality fails to meet this standard, the platform can take a maximum of 7 days to respond.

To begin with, platforms are ill-equipped to assess the legality of content as they have neither the ability nor the mandate to carry out the tasks of judges in democratic societies. For example, the definition of illegal content contains the offence of "accusation of a judicial criminal act that has already been



dismissed" (§ 113 StGB). The platform would only be able to assess whether a certain content falls under this offence if it had access to court and penal records, which it does not and legally cannot obtain - let alone to obtain this information within a 24-hour or 7-day period. Other offences include coercion (§ 105 Criminal Code) and persistent persecution (§ 107a StGB), which can only be assessed if the platform knew the life situation of the affected person and behavioural changes this posting might have created. The draft bill does not require the person mentioned in a posting to be the one notifying the content as illegal, making the moderation process of the platform even more stochastic and leaning towards over-blocking as a matter of prudence. Legally it is questionable how private prosecution offences like insult (§ 115 StGB) can even be assessed in this context, because if the person the posting is about doesn't complain they wouldn't qualify as illegal in the first place.

Strict time limits create incentives for over-removal

These problems are compounded by the 24-hour deadline, which will lead platforms to remove content merely upon notice, without appropriate analysis and without due process. Legitimate speech will inevitably get caught as a result. This concern has been confirmed by the Constitutional Council of France that held that a 24 hour-time frame for removing online hate speech was unconstitutional due to its negative impact on the right to freedom of expression.

The risk of arbitrary censorship imposed by the draft bill is further increased by the high fines for platforms' non-compliance that can go up to 10 million Euro. Especially for those social networks that are not large online platforms with sufficient resources(eg. Facebook, Google, Youtube, etc.), it will be easier to delete risky content on the basis of terms of service instead of spending hundreds of thousands Euro in training and hiring specialised staff that should then perform a highly complex task of assessing content's legality and balancing users' fundamental rights and freedoms. It is the Member States' positive obligation to prevent non-justifiable limitations of fundamental rights by private actors, especially if such a conduct is a by-product of legislative demands imposed by Member States themselves.

Broad scope with huge repercussions

The scope of the draft bill includes all information service providers if their main purpose is the exchange of messages, videos, pictures or audio files among a large audience, as long as they have at least 100,000 registered users from Austria or an annual turnover of at least 500,000 euros with the service in Austria. There are specific exceptions for not-for-profit online encyclopedias (Wikipedia.de), comment sections of news websites (derStandard.at, Krone.at), and e-commerce platforms that convey services or goods (Amazon.com, Geizhals.at, MyHammer.at).

Critically, the draft lacks any safeguard for Small and Medium Enterprises (SMEs) and will also apply to non-commercial platforms. In essence, there is one set of obligations that applies directly to Facebook and Google and all other smaller platforms. If a European company becomes popular in Austria and exceeds the threshold of 100.000 registered users in this country, the law becomes applicable, nevertheless if there has ever been any profit. In the national consultation affected services have estimated the cost of complying with the obligations of KoPLG at 50,000 to 120,000 Euros per year. Additionally, penalties of up to 10 million Euros for the company and 10.000 to 50.000 Euros for the named



representative will apply. This creates a real and tangible restriction for the cross-border provision of services in the single market. European SMEs would be foolish to grow in the Austrian market with these types of restrictions.

Furthermore, the Austrian draft bill goes beyond the German Network Enforcement Act (NetzDG) in so far as the scope is not limited to for-profit social networks. The national consultation already identified affected crowdfunding platforms, projects adjacent to Wikipedia for sharing pictures (WikiCommons) and structured data (WikiData), educational startups and code sharing platforms (Github). They all have in common that there is neither evidence to substantiate a claim of illegal hate speech on those platforms, nor evidence that the proposed rules would be an effective or proportionate remedy for their situations. In light of the diversity of online services and the definition proposed this draft bill risks to seriously undermine the innovative capacity of the digital market. The legislator has not put forward any type of justification why the scope is not limited to social networks.

Additionally, there are online platforms explicitly exempted from the draft bill that are seriously confronted with the spread of illegal hate speech. Online newspapers in Austria are prone to illegal comments. DerStandard.at alone had in 2016 already 9 million comments and a moderation department of 12 staff that also deals with illegal hate speech in the newspapers online comment section. The bill justifies the exemption of media companies because they are already subjected to the liability regime under Austrian media law, which however does not apply to their comment sections. Earlier drafts of the bill included newspapers in the scope. Amazon is excluded from the scope, although their content moderation policies include rules that cover the types of content the bill defines as illegal hate speech and the company has over a million users in Austria.

The scope of the law does not exclusively apply to those services which have a substantiated problem with illegal hate speech. Several platforms fall within the scope of the draft bill, even though a sufficient evidence of strong presence of online hate speech on their platforms is not only missing, but their whole nature makes these types of problems unlikely (e.g. Crowdfunding platforms). On the other hand, services which are outside its scope have demonstrated a need for intensive moderation of illegal content. Hence, we dispute the argument given in recitals that the restrictions on the cross-border provisioning of services imposed by this national legislation are in line with the requirements of Article 3(4)(a)(ii) of the eCommerce Directive.

Lack of oversight and disproportionate obligations

As the Austrian association of judges pointed out in their response to the national consultation, the dispute settlement of the media regulatory authority is only tasked with resolving procedural questions about content notification and takedowns. It does not have a competence to resolve the content dispute itself. Together with the lack of judicial oversight, the legality assessment as well as the moderation decision on illegal content are shifted away from the legal system to private companies.

The national legislator plans to extend the competence and to increase the budget of the Austrian media regulator KommAustria that is tasked with enforcement of the draft bill. Yet, the regulator issued a



crushing 10-page response in the national consultation arguing that the law would lead to “increased legal uncertainty” and qualified the requirements for the platforms’ responsible representatives according to § 5 as “unrealistic”. Together with the huge penalties and the broad scope, we believe the draft to be disproportionate and therefore in breach of Article 3(4)(a)(ii) of the eCommerce directive.

Pulling the rug from under the European Commission and the harmonisation of rules under the future Digital Services Act

Proposing such a law at national level just before the European Commission's own Digital Services Act package can only be considered a direct attempt to undermine the EU's ability to reach harmonised standards. The standstill period of this notification ends on the exact day the Commission has announced the release of the Digital Services Act (DSA). Therefore, this notification cannot be assessed equally with the German NetzDG from 2017 or the French Avia Law from 2019.

Based on Article 4(3) of the Treaty on European Union, Member States shall facilitate the achievement of the Union's task and refrain from any measure which could jeopardize the attainment of the Union's objectives. Based on the fidelity principle, Member States should at least closely cooperate with the EU institutions in order to facilitate the achievement of common objectives and to ensure consistency and coherence of their actions. Should the draft bill be adopted, this national legislation would, in our view, pre-empt the necessary public debate that should take place at European level about systemic regulation of online gatekeepers and processes that will apply to both transnational and national platforms. Therefore, this unilateral attempt risks jeopardising Europe's ability to adopt a harmonised approach to this important area in the foreseeable future. Other countries like Denmark have already announced similar proposals.

The Austrian bill contains no safeguards for SMEs, very broad definitions of affected platforms that go beyond classical social networks and the draft rules place particularly burdensome and costly obligations on the affected online platforms. Hence, we urge the Commission to seriously take into consideration the negative effect of this legislation on the Digital single market. If this legislation were to be adopted in 2020 nothing could stop another Member State issuing legislation in 2021 laying down another incompatible set of requirements for a notice-and-action procedure and requiring to name a Responsible representative of the platform in that country. The cost of complying with all of these national obligations further deteriorates European Union's ability to complete a digital single market and ever reach harmonised European rules.

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