

Presidency's suggestion on the Proposal for a Regulation on Preventing the dissemination of terrorist content online (TCO), following the fourth trilogue of 24 September 2020

Key Points of the Presidency Package Proposal

- **clear scope limited to unlawful content disseminated to the public, adequately protecting information disseminated for educational, journalistic, artistic or research purposes**
- **a clear definition of terrorist content aligned to the Terrorism Directive**
- **a transparent consultation and cooperation procedure for cross-border removal orders strengthening the fundamental rights' safeguards**
- **clear transparency obligations for hosting service providers and competent authorities**
- **access to an effective remedy for hosting service providers and content providers**
- **competent national authorities exercising their tasks in full respect of fundamental rights and not taking any instructions in exercising their tasks**
- **proportionality when deciding whether to impose a penalty, taking into account factors, such as the intention, the nature, gravity and duration of breaches as well as financial strength, nature and size of the hosting service providers**

The objective of the TCO-Regulation is to provide an effective mechanism to address terrorist content online. The main added value of this draft Regulation is the establishment of harmonised measures based on a clear definition of terrorist content throughout the Union, which ensures the fast removal of terrorist content online made available to the public.

It is important that the TCO-Regulation meets its objectives and protects public security while at the same time safeguards fundamental rights, and maintains a productive business environment. A proportionate implementation of the measures requires a clear scope and a targeted definition of terrorist content. This draft Regulation introduces removal orders with EU-wide applicability to allow fast and effective removal of terrorist content online.

To ensure sustainability, it is essential to establish an institutionalised mechanism for cross-border cooperation between the competent authorities of the member states. Member states shall inform each other and coordinate their measures in a more structured and effective way. To alleviate the burden for start-ups and SMEs, it is important that the measures are proportionate in view of the specific circumstances, including penalties.

The Presidency proposal takes into account the concerns pointed out by the EP Package of February and raised by the EP during the last political trilogue on 24 September 2020.

Article 1: Subject matter and scope

Apart from the paragraphs 2a and 2c, Article 1 is agreed.

Concerning paragraph 2a (line 76): In order to address the concerns of the EP to **strengthen fundamental right safeguards**, the Presidency proposes to build upon the EP proposal (Article 1(2a) (line 76)) and the Commission compromise proposal of 6 March 2020 (line 97) and suggests moving it to Article 2 as a new paragraph 5a. The new paragraph shall clarify that material disseminated for educational, journalistic, artistic or research purposes or awareness rising activities is excluded if based on legitimate purposes.

Concerning paragraph 2c (line 78): Regarding the **reference to the e-Commerce-Directive and Audio Visual Media Services-Directive** the Presidency proposes to use agreed wording and align the wording to standard practice, amending the EP proposal, as follows:

"This Regulation is without prejudice to Directive 2000/31/EC and Directive 2018/1808/EU."

Article 2: Definitions

Regarding the **definition of "hosting service provider"** (line 83), the Presidency supports the Commission compromise proposal from 6 March 2020 and proposes to agree on this compromise. This paragraph should be read in conjunction with the corresponding recitals (10), (10a) and (10b).

(1) 'hosting service provider' means a provider of information society services consisting in the storage of information provided by and at the request of the content provider ~~and in making the information stored available to third parties;~~

There is agreement between the co-legislators that the **definition of "terrorist content"** should be aligned as closely as possible to the Directive on combating terrorism. This aim was emphasized by the EP in its February-package and during the last political trilogue on 24 September. The Presidency recalls the added value of this draft Regulation, which is the establishment of a harmonised tool, the removal order, based on a uniform definition of terrorist content throughout the Union. At the same time, the definition should capture material that is actually used by terrorist groups for recruitment and radicalisation purposes. This is why material soliciting criminal activities of a terrorist group should be included. This is in line with the spirit of the Directive on combating terrorism which criminalises supporting activities as well as the jurisprudence of the European Court of Human Rights. The Presidency proposes to support the Commission compromise proposal from 6 March 2020, which builds upon the EP package of February 2020.

The Presidency proposes to use the definitions suggested by the EP concerning paragraphs 4 and 5. However, in paragraph 5(c) the Presidency suggests building upon the Commission compromise proposal from 6 March, clarifying that only "criminal activities" would fall under the scope.

The definitions of "terrorist offences" and "terrorist content" would read as follows:

(4) 'terrorist offences' means offences as defined in Article 3(1) of Directive (EU) 2017/541;

(5) 'terrorist content' means one or more of the following *material*:

(a) inciting the commission of one of the offences referred to in points (a) to (i) of Article 3(1) of Directive (EU) 2017/541, where such material, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed;

(b) soliciting a person or a group of persons to commit or contribute to the commission of one of the offences referred to in points (a) to (i) of Article 3(1) of Directive (EU) 2017/541;

(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, or otherwise supporting its *criminal* activities.

(d) providing instruction on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques for the purpose of committing or contributing to the commission of one of the terrorist offences referred to in points (a) to (i) of Article 3(1) of Directive (EU) 2017/541;

(e) constituting a threat to commit one of the offences referred to in points (a) to (i) of Article 3(1) of Directive (EU) 2017/541;

In order to **strengthen fundamental rights' safeguards**, the Presidency suggests inserting a new paragraph 5a (as stated under Article 1) on material disseminated for educational, journalistic, artistic or research purposes, which introduces the Commission compromise proposal and the EP proposal from line 76 as a new paragraph 5a in Article 2. In this way it shall be clarified, that content which is protected by the freedom of expression and information, the freedom of the arts and sciences, the freedom and pluralism of the media protected under Union law shall not be removed. However, a blank exemption might lead to postings of illegal content under the pretext of a protectworthy purpose. It is not the stated purpose that is decisive but whether or not the content is actually protected by the freedom of expression.

The new paragraph 5a is proposed to read as follows:

"Material disseminated for educational, journalistic, artistic or research purposes or for the purposes of preventing or countering terrorism shall not be considered terrorist content in as far as the dissemination of the information is protected as legitimate exercise of the freedom of

expression and information, the freedom of the arts and sciences as well as the freedom and pluralism of the media as protected under Union law."

Additionally, the Presidency suggests splitting the **corresponding recital (9)** into two recitals. The new recital (9a) should start with the sentence "Content disseminated for educational, **journalistic** ..." The new recital shall incorporate the EP-proposal from line 76 (change information into material):

"When determining whether information provided by a content provider constitutes 'terrorist content' within this Regulation account should be taken of in particular the freedom of expression and information, the freedom of the arts and sciences, the freedom and pluralism of the media".

Additionally, in order to strengthen the language regarding the protection of journalistic content, the Presidency proposes to add the following sentence to the new recital (9a):

" in cases where the content provider holds an editorial responsibility, any decision as to the removal of the disseminated material should take into account the journalistic standards established by press or media regulation consistent with the law of the Union and the Charter of Fundamental Rights."

For reasons of legal certainty, it is suggested to add a new recital explaining the new paragraph 5a:

Recital (..):"In line with this Regulation's objective of effectively addressing the risks to internet users and society at large associated with terrorist content, whilst safeguarding fundamental rights as protected under Union law, in particular the Charter of Fundamental Rights of the EU ('the Charter'), such as the freedom of expression and information, the freedom of the arts and sciences and the freedom and pluralism of the media, information should not be considered as terrorist content where its dissemination entails the legitimate exercise of one or more of those rights. In this regard, the objective of the dissemination as stated by the content provider should not, in itself, be decisive. Instead, a case-by-case assessment that takes account of all relevant elements is required to determine whether any of those rights is legitimately being exercised, bearing in mind that activities or acts aimed at the destruction of the rights and freedoms recognised in the Charter, or at their limitation to a greater extent than is provided for therein, are not protected."

Regarding the **definition of "dissemination of the public"** (line 98): The Presidency proposes to agree on the Commission's compromise proposal to define the "dissemination to the public".

Together with Article 1 and the corresponding recitals (10), (10a) and (10b), this definition clarifies that only content disseminated to the public is covered by the Regulation. The definition of "public" as opposed to "private" is based on relevant case law as well as the telecommunications code¹.

¹ Dir. 2018/1972, article 2(5) and recital 17

Paragraph (6) should read as follows:

(6) ‘dissemination *to the public* of terrorist content’ means *the making available of information, at the request of the content provider, available to third parties on the hosting service providers’ services, to a potentially unlimited number of persons.*

Regarding the corresponding recital (10a) (line 25), the Presidency proposes to keep the part, which defines the groups of users covered by the concept of dissemination to the public in the Regulation. It is recalled that the Commission inserted this definition for reasons of legal certainty.

(10a) The concept of "dissemination to the public" should entail the making available of information to a potentially unlimited number of persons that is, making the information easily accessible to users in general without further action by the content provider being required, irrespective of whether those persons actually access the information in question. Accordingly, the mere possibility to create groups of users of a given service does not, in itself, mean that this Regulation does not apply. However, the Regulation does not apply to closed groups consisting of a finite number of pre-determined persons. Interpersonal communication services, as defined in [the Telecommunications Code (Dir. 2018/1972)] such as emails or private messaging services, fall outside the scope of this Regulation. Information should be considered stored and disseminated to the public within the meaning of this Regulation only where such activities are performed upon direct request by the content provider. Consequently, providers of services such as cloud infrastructure, which are provided at the request of other parties than the content providers and only indirectly benefit the latter, should not be covered by this Regulation. By way of example, included in the scope of this Regulation are providers of social media, video, image and audio-sharing, as well as file-sharing and other cloud services, in as far as those services are used to make the stored information available to the public at the direct request of the content provider. Where a service provider offers several services, this Regulation should be applied only in respect of the services that fall within its scope.

Regarding the definition of “referrals” (paragraph 8): The Presidency suggests keeping for now the definition on referrals in paragraph 8. Referral is a central and widely used tool which is part of the cooperation between the Member States and Europol as well as between the competent authorities and hosting service providers (see also Article 13). The draft Regulation makes various references to this tool and referrals appear in various articles of the Regulation.

Article 4: Removal orders, Article 4(a): Consultation and cooperation procedure for removal orders and Article 4b: Enforcement of removal orders

In order to effectively address terrorist content online, **Article 4** of the draft Regulation introduces removal orders with EU-wide applicability. The following amendments propose a structured process, which guarantees respect for the EU-Charter of Fundamental rights, strengthens the internal market and protects public security. The Presidency proposal takes into account the

concerns pointed out by the EP package in February and raised by the EP during the last political trilogue.

The Presidency proposes to include a new paragraph 1a in Article 4, which builds upon the EP Proposal about a 12-hour warning, which clarifies that the 12-hour deadline does not apply in exceptional cases (e.g. live transmissions of terrorist offences).

Furthermore, the Presidency proposes to include a new paragraph 8a in Article 4 to strengthen the role of the hosting service provider during the issuing process. This shall give the hosting service provider the right to request the issuing competent authority to review the issued removal order in exceptional circumstances, where the hosting service provider has reasonable grounds to believe that the removal order manifestly and seriously breaches the fundamental rights and freedoms set out in the EU-Charter of Fundamental Rights. The hosting service provider shall bring these concerns also to the attention of the host Member State by informing the competent authority.

The Presidency proposes to further strengthen the role of the host Member State in **Article 4a**: Therefore, it is proposed to introduce a procedural safeguard (new paragraph 3), which builds upon the consultation procedure between the Member States during the issuing process introduced by the Council General Approach. While paragraph 2 gives the host Member State the possibility to raise concerns regarding fundamental interests (e.g. criminal investigations), the new paragraph 3 focusses on fundamental rights. In exceptional circumstances where the host Member State holds the view that the removal order unduly limits the exercise of fundamental rights, the host Member State can raise concerns which must be taken into account by the issuing Member State. Consequently, the latter has to withdraw or adapt the removal order. Considering that all removal orders issued under this draft Regulation need to comply with the definition of terrorist content, that the competent authorities need to assess possible interferences with fundamental rights and that all Member States are subject to the Charter on Fundamental rights, it is important that this procedure is limited to exceptional circumstances.

Additionally, the Presidency suggests including Europol in paragraph 1 to strengthen the institutionalized cooperation mechanism between the Member States and Europol. This allows Europol to prepare annual reports regarding the EU-wide use of this new tool and therefore, facilitates a common understanding of what constitutes terrorist content.

The Presidency proposes to include the enforcement of removal orders in a **new Article 4b**. Article 4b clarifies that the host Member State can refuse the enforcement of a removal order in exceptional

cases and thereby strengthening the role of the host Member State. In those exceptional circumstances where the removal order unduly limits the exercise of fundamental rights, the host Member State does not take any measures to enforce the unlawful removal order.

The Articles 4, 4a, 4b are proposed to read as follows:

Art. 4: Removal orders

1. The competent authority shall have the power to issue a **removal order** requiring the hosting service provider to remove terrorist content or disable access to it.

1a. If the relevant competent authority has not previously issued a removal order to a hosting service provider it shall provide the hosting service provider with information on procedures and applicable deadlines at least 12 hours before issuing a removal order except in cases of particular urgency.

2. Hosting service providers shall remove terrorist content or disable access to it ***as soon as possible and in any event*** within one hour from receipt of the removal order.

3. Removal orders shall contain the following elements in accordance with the template set out in Annex I:

(a) identification of the competent authority ***via an electronic signature*** issuing the removal order and authentication of the removal order by the competent authority;

(b) a statement of reasons explaining why the content is considered terrorist content, ~~at least, by~~ ***and*** reference to the ***relevant*** categories of terrorist content listed in Article 2(5);

(c) ~~a~~ ***an exact*** Uniform Resource Locator (URL) and, where necessary, additional information enabling the identification of the content referred;

(d) a reference to this Regulation as the legal basis for the removal order;

(e) date and time stamp of issuing;

(f) ***easily understandable*** information about redress available to the hosting service provider and to the content provider, ***including redress with the competent authority as well as recourse to a court as well as deadlines for appeal,***

(g) where ~~relevant~~ ***necessary and proportionate***, the decision not to disclose information about the removal of terrorist content or the disabling of access to it referred to in Article 11.

4. Upon request by the hosting service provider or by the content provider, the competent authority shall provide a ~~detailed~~ ***supplementary*** statement of reasons, ***explaining why the content is considered terrorist content*** without prejudice to the obligation of the hosting service provider to comply with the removal order within the deadline set out in paragraph 2.

5. The competent authorities shall address removal orders to the main establishment of the hosting service provider or to the legal representative designated by the hosting service provider pursuant to Article 16 and transmit it to the point of contact referred to in Article 14(1). Such orders shall be sent by electronic means capable of producing a written record under conditions allowing to establish the authentication of the sender, including the accuracy of the date and the time of sending and receipt of the order.

6. Hosting service providers shall inform ~~acknowledge receipt and~~, without undue delay, the competent authority about the removal of terrorist content or disabling access to it, indicating, in particular, the time of action, using the template set out in Annex II.

7. If the hosting service provider cannot comply with the removal order because of force majeure or of de facto impossibility not attributable to the hosting service provider, it shall inform, without undue delay, the competent authority, explaining the reasons, using the template set out in Annex III. The deadline set out in paragraph 2 shall apply as soon as the reasons invoked are no longer present.

8. If the hosting service provider cannot comply with the removal order because the removal order contains manifest errors or does not contain sufficient information to execute the order, it shall inform the competent authority without undue delay, asking for the necessary clarification, using the template set out in Annex III. The deadline set out in paragraph 2 shall apply as soon as the clarification is provided.

8a. If the hosting service provider has reasonable grounds to believe that the removal order manifestly and seriously breach the fundamental rights and freedoms set out in the EU Charter of Fundamental Rights, it may request the issuing competent authority to review the issued removal order without undue delay. The hosting service provider shall inform the competent authority of the Member States of main establishment about this request at the same time. The issuing competent authority shall decide on the request without undue delay and inform the hosting service provider and the competent authority of the Member State of main establishment. [The deadline set out in paragraph 2 shall apply as soon as the issuing competent authority has decided on the request.]

9. The competent authority which issued the removal order shall inform the competent authority which oversees the implementation of **proactive specific** measures, referred to in Article 17(1)(c) when the removal order becomes final. A removal order **shall** become final **upon the expiry of** ~~where it has not been appealed within~~ the deadline **for appeal under** according to the applicable national law or **when the removal order** ~~where it has been confirmed following an appeal.~~

Article 4a Consultation and cooperation procedure for removal orders

1. The issuing authority shall submit a copy of the removal order to the competent authority referred to in Article 17(1)(a) of the Member State in which the main establishment of the hosting service provider is located **and to Europol**, at the same time it is transmitted to the hosting service provider in accordance with Article 4(5).

2. In cases where the competent authority of the Member State in which the main establishment of the hosting service provider **or its legal representative** is located has reasonable grounds to believe that the removal order, may impact fundamental interests of that Member State, it shall inform the issuing competent authority. **The issuing authority shall take these circumstances into account and shall, where necessary, withdraw or adapt the removal order.**

~~3. The issuing authority shall take these circumstances into account and shall, where necessary, withdraw or adapt the removal order.~~

3. In cases where the competent authority of the Member State where the hosting service provider has its main establishment or its legal representative has reasonable grounds to believe that the removal order unduly limits the exercise of fundamental rights set out in the Charter of Fundamental Rights, the issuing authority shall take these circumstances into account and withdraw or adapt the removal order.

Article 4b Enforcement of removal orders

1. If the hosting service provider does not comply with a removal order, the competent authority of the issuing Member State may request the competent authority of the Member State, where the hosting service provider has its main establishment or its legal representative, to take the necessary measures to enforce the removal order.

2. The competent authority of the Member State of main establishment/legal representative shall take the necessary measures to enforce the removal order without undue delay [according to national law], except in those cases, where it holds the view that the removal order manifestly violates one or more fundamental rights set out in the EU-Charter of Fundamental Rights.

3. The competent authority of the Member State, in which the main establishment of the hosting service provider or its legal representative is located, shall consult the competent authority of the issuing Member State before refusing to enforce the removal order.

Article X - Specific Measures (new merged articles 3/6/9)

Member States have provisionally agreed to change "proactive" to "specific" [measures]. As discussed during the last political trilogue the Presidency suggests to deal with the merged Article 3/6/9 at the political trilogue on 29 October 2020. Referring to the trilogue of 24 September, the EP is requested to confirm that the main issue in relation this Article is whether the use of automated tools is made prescriptive.

Article 8: Transparency obligations [for hosting service providers]

The Article on *Transparency obligations for hosting service providers* is agreed apart from its paragraph 1 and paragraph 3c.

Concerning paragraph 1: the Presidency suggests the following wording:

*(1) Hosting service providers shall set out **clearly** in their terms and conditions their policy to prevent the dissemination of terrorist content, including, where appropriate, a meaningful explanation of the functioning of ~~proactive~~ **specific** measures, including **where applicable**, the use of automated tools."*

Concerning paragraph 3c: the Presidency suggests building upon the amendment suggested by the EP and adding the reference to the new paragraph 8a in Art. 4.

(3) (c) number of pieces of terrorist content removed or to which access has been disabled, following removal orders, ~~referrals, or proactive~~, *or specific* measures, respectively, ***and the number of orders where the content has not been removed in accordance with Article 4(7) and (8) [and (8a)] together with reasons for non-compliance.***

Article 8a: Transparency obligations for competent authorities

In the interest of transparency, the Presidency supports the proposal of the EP to introduce transparency obligations for competent authorities as a new Article 8a. It is suggested accepting the text, as it currently appears in the 4-column document.

(1) Competent authorities shall publish annual transparency reports relating to their activities under this Regulation. Those reports shall include at least the following information in relation to the year covered:

(a) the total number of removal orders issued in accordance with Article 4 and the number of instances in which the removal orders led to the removal of or disabling of access to terrorist content and the number of instances in which they did not.

(b) the total number of referrals issued in accordance with Article 5 and number of instances in which the referrals led to the removal of or disabling of access to terrorist content and the number of instances in which they did not.

(c) the total number of decisions imposing specific measures taken in accordance with Article 6 (4) and a description of the measures imposed;

(d) the total number of instances in which removal orders and decisions imposing specific measures were subject to administrative or judicial remedies and information on the outcome of the relevant proceedings.

(e) The total number of decisions imposing penalties, including a description of the type of penalty imposed.

(2) The transparency reports referred to in paragraph 1 shall not contain information that may affect ongoing activities for the prevention, detection, investigation or prosecution of terrorist offences or national security interests.

Art. 9a Effective remedies

As additional safeguards to ensure access to an effective remedy, a substantive article on the possibility to contest a removal order should be introduced into the draft Regulation. The Presidency proposes to build upon the Commission compromise proposal for Article 9a.

The new article 9a should read as follows:

*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. This shall include a right to contest the removal order before the courts of the issuing Member State. Member States shall put in place effective procedures for exercising this right.*

Art. 12 Capabilities of competent authorities

The Presidency proposes the following changes to Article 12, which integrate concerns raised by the EP regarding Article 17 and builds upon the Commission compromise from March. The new paragraph (2) shall emphasise that the competent authorities of the Member States shall not take any instructions in exercising the tasks assigned by this Regulation. The wording is aligned to the AVMS-Directive (EU) 2018/1808 (Article 30(2), second part, and recital (53)).

Article 12 is proposed as follows:

(1) 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.

(2) Member States shall ensure that their national competent authorities exercise their tasks in a manner that is objective, non-discriminatory and in full respect of fundamental rights. Competent authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them by this regulation. This shall not prevent supervision in accordance with national constitutional law."²

Article 13: Cooperation between hosting service providers, competent authorities and where appropriate competent Union bodies

In order to contribute to the development of a common understanding of what constitutes terrorist content, the Commission suggested annual reports by Europol. This proposal takes into account the concerns by the EP of diverging interpretations of content. The Presidency welcomes this addition as a new paragraph 5.

² See Article 30(2), second part, and recital (53) of Directive (EU) 2018/1808 (AVMSD): "National regulatory authorities or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law."

The new Paragraph 5 is proposed as follows:

(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.

Article 17: Designation of competent authorities

The Presidency welcomes that the EP is prepared to give up the requirement of a single, independent administrative or judicial competent authority per Member State. The Presidency suggests incorporating the concerns of the EP regarding the independence of the competent authorities into Article 12 (2).

Furthermore, referring to EPs amendment 129 (line 221) which moves Article 13(3) to a new paragraph 1a in Article 17, the Presidency suggests taking on board the second sentence of paragraph 2 (set-up of an online register by the Commission) as a new paragraph 2a:

Article 17 is proposed as follows:

- (1) Each Member State shall designate the authority or authorities competent to
 - (a) issue removal orders pursuant to Article 4;
 - (b) detect, identify and refer terrorist content to hosting service providers pursuant to Article 5;
 - (c) oversee the implementation of **proactive specific** measures pursuant to Article 6;
 - (d) impose penalties pursuant to Article 18.

(1a) Member States shall designate a point of contact within the competent authorities to handle requests for clarification and feedback in relation to removal orders issued by them. Information on the contact point shall be made publicly available.

(2) By [~~six~~ **twelve months after the entry into force of this Regulation**] at the latest Member States shall notify the Commission of the competent **authority or** authorities referred to in paragraph 1. The Commission shall publish the notification and any modifications of it in the *Official Journal of the European Union*.

(2a) By [~~six~~ twelve months after the entry into force of this Regulation] at the latest the Commission shall set up an online register listing all those competent authorities and the designated contact point for each competent authority. The Commission shall publish any modifications regularly.

Article 18: Penalties

Paragraph 1 regulates the obligations pursuant to penalties in general. The proportionality of the penalties to be imposed is explicitly regulated in paragraph 3 and the corresponding recital 38. Therefore, the Presidency cannot support to include “systematic and persistent” as suggested by the EP package of February in paragraph 1.

Any decision on sanctions should be proportionate, and minor breaches of first time offenders may not lead to a sanction at all. This is clarified by the addition "when deciding whether..." in paragraph 3, which could alleviate the burden for start-ups and SMEs. The Presidency suggests inserting additional text in recital (38), explaining that penalties can take different forms, including formal warnings for instance in cases of minor breaches or financial penalties in relation to more severe and systematic breaches.

Article 18 is proposed as follows:

(1) Member States shall lay down the rules on penalties applicable to **systematic**³ breaches of the obligations by hosting service providers under this Regulation and shall take all necessary measures to ensure that they are implemented. Such penalties shall be limited to infringement of the obligations pursuant to:

...

(3) 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.

(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.

(4) Member States shall ensure that a systematic failure to comply with obligations pursuant to Article 4(2) is subject to financial penalties of up to 4% of the hosting service provider's global turnover of the last business year."

³ Error in 7037/2020, the word "systematic" should not appear in this paragraph.