Bundesrat **Official Document 96/21 (Decision)**

26.03.21

Decision
of the Bundesrat

Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC

COM (2020) 825 final; Council doc. 14124/20

At its 1002nd session on 26th March 2021, the Bundesrat adopted the following Decision pursuant to §§ 3 and 5, Act on Cooperation between the Federation and the Federal States in European Union Affairs (EUZBLG):

General Comments

1. The Bundesrat welcomes the EU's intensive engagement with the digital platform economy and is pleased to see that it is striving to attain an up-to-date legal framework some 20 years after the entry into force of Directive 2000/31/EC of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce or e-Commerce Directive).

2. The Bundesrat takes note of the draft Regulation, which seeks to regulate the responsibilities and duties of intermediary services in a general and conclusive manner (cf., for example, Article 1(2)(b) and Recital 9 of the draft Regulation). The proposed Digital Services Act aims to address the need to reshape the legal framework for digital services.

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3. The Bundesrat welcomes the general intention in the draft Regulation to address the risks and challenges that have arisen in connection with the use of digital services, both for society as a whole and for individual consumers, since adoption of the e-Commerce Directive.

   It notes that the Commission's objective in the draft Regulation is to further develop the 20-year-old e-Commerce Directive and to strike a new balance between the responsibilities of users, platforms and authorities in line with European values. Creating a framework that is efficient and clear in terms of legal concerns, transparency and accountability for intermediary services such as online platforms (for example, online marketplaces, app stores and social media platforms) also serves to improve consumer protection.

4. The Bundesrat also notes that the regulatory framework for online platforms set out in the draft Regulation is fundamentally positive from the point of view of consumer protection. It welcomes the retention of the liability privilege and, in particular, the consumer-friendly new provision concerning restrictions on the general exemption from liability of online marketplaces, insofar as the impression conveyed to consumers is that the online marketplace itself is the trader.

5. The Bundesrat emphasises that an effective legal framework that strikes a balance between responsibilities is a prerequisite for users' and providers' trust in digital services or content and sustainable digital business models. Above all, this legal framework must ensure that illegal content on the Internet can be combatted effectively, especially if it involves criminal acts.

6. The Bundesrat welcomes in particular the decision to maintain the basic principles of the e-Commerce Directive in the draft Regulation. It also welcomes in principle the continuation of central, tried-and-tested instruments of the digital single market, such as what is known as the liability privilege with incremental liability as a function of the provider's ability to exercise content oversight. A general obligation to monitor the Internet must also be avoided in future.

   The principle that the service provider is not liable for information stored on behalf of a user and the waiver of a general monitoring obligation have contributed significantly to the Internet's achievements and will also foster future progress.

7. In addition, the Bundesrat welcomes the Commission's decision to focus in its draft Regulation primarily on large platforms and to draw a distinction between these and smaller platforms, SMEs and start-ups, as it is primarily very large online platforms that pose risks to consumers through dissemination of illegal content, goods and services and systemic violations of consumer rights.

   The Bundesrat emphasises the importance of the Commission's aim of reinforcing regulatory provisions concerning digital services and thereby ensuring that the rules of the game for these services are not de facto determined by a few very large private companies (platforms). The Bundesrat views this as an important step to counteract information asymmetry between online services and the consumers and authorities who use them.

8. The Bundesrat also commends the Commission's efforts through the draft Regulation to create a safe, predictable and trustworthy online environment in which fundamental rights are protected, which also serves to protect consumers.

   In the Bundesrat's view, the draft Regulation also concerns, in particular, fundamental principles of freedom and democracy and cultural diversity in the Member States. In particular, public discourse is explicitly mentioned in the draft Regulation as meriting protection.

Respect for the Subsidiarity Principle Pursuant to Article 5(1) and (3) TEU

9. a) The Bundesrat points out that with the draft Regulation, the Commission is moving outside the realm of purely competition-related internal market competence by basing this legislation on Article 114 TFEU, which is the fundamental provision for harmonisation of legislation in the internal market, i.e. outside the framework of exclusive competences of the EU pursuant to Article 3 TFEU. In the realm of shared competences pursuant to Article 4 TFEU, the Commission must respect the subsidiarity principle as stipulated in Articles 5(1) and (3) TEU, including in the choice of the legal act.

b) The Bundesrat notes that, in its view, an examination of the criteria laid down in Article 5(3) TEU has not been carried out or has merely been conducted in a formulaic manner, at least with regard to media regulation. The starting point for the subsidiarity check selected by the Commission, "that the Internet is by its nature cross-border", hints at some degree of automatism concerning the need for European legislation to address activities conducted on or via the Internet. Such a broad understanding of the EU's scope for action runs counter to the principle of conferral pursuant to Article 5(1) TEU as well as to the competence-limiting character of the subsidiarity principle and fails to recognise the still primarily national and regional nature of media markets in Europe.

c) In the light of the subsidiarity principle and the proportionality principle, the Bundesrat considers, with regard to the draft Regulation, that the legal form of the regulation is subordinate to the legal form of the directive. In order to design these provisions in conformity with European law and, in particular, to take account of the subsidiarity principle, a corresponding opening clause is required to safeguard Member States' rights in the area of media pluralism.

d) The Bundesrat has considerable doubts as to whether regulation of national administrative structures, as proposed by the draft Regulation, is necessary and appropriate.

Respect for Member States' Competence for Cultural Policy and their Regulatory Competence to Ensure Media Pluralism

10. a) The Bundesrat emphasises that, as provided for in the European Treaties, the regulatory competence to safeguard media pluralism lies with the Member States and, as an expression of the federal system in the Federal Republic of Germany, with the German federal states (*Länder*). The EU institutions must respect media pluralism and the diversity of the various national media landscapes in Europe when exercising their competences. These principles are also explicitly reaffirmed in the Council Conclusions on safeguarding a free and pluralistic media system adopted under the German Council Presidency (2020/C 422/08) and are also recognised in other European legislation (cf., for example, Article 1(6) of the e-Commerce Directive; Article 1(3)(b) of the European Electronic Communications Code; Article 21(4) of the EC Merger

Regulation or Article 85 of the General Data Protection Regulation). In the Council Conclusions, the Member States also explicitly emphasise the need for legislation on media pluralism in the Internet context, as previously affirmed in rulings by the Federal Constitutional Court (judgment of 18 July 2018, case number 1 BvR 1675/16, paragraph 79) and the CJEU (judgment of 23rd October 2020, case C719/18 –Vivendi, paragraph 74).

b) The Bundesrat points out that, in the light of the need for media pluralism to be safeguarded by national law, measures are needed for information society services that include more far-reaching or modified obligations than the requirements for intermediary services contained in the draft Regulation. This concerns, for example, how legal content that is distributed via intermediary services is handled (for example, non-discriminatory ranking in search results for journalistic content). In addition, categorising regulated intermediary services as pure transmission, caching and hosting services as well as (very large) online platforms only to a very limited extent reflects the significance of these services for dissemination of journalistic-editorial content.

c) The Bundesrat calls for measures to avoid curtailment of Member States' ability to fulfil their obligation to safeguard diversity of opinion and media. Member States' scope to regulate and enforce provisions, which lies within the ambit of their competence for cultural policy, must therefore be guaranteed by a corresponding opening clause that would allow for additional obligations, exceptions or deviations from the draft Regulation, insofar as these are necessary to safeguard media pluralism. This applies in particular with regard to intermediary services involved in public distribution of journalistic-editorial content within the meaning of Article 2(f) of the draft Regulation.

<u>On Specific Provisions – in particular Articles 1 to 12 of the Draft Regulation</u>

11. One positive aspect is the broad scope of application in terms of the parties to be encompassed by the Digital Services Act pursuant to Article 1(3) of the draft Regulation, which is to apply to all intermediary services within the EU, irrespective of whether these services are based in the European Union. This ensures a uniform regulatory regime for all digital platform companies operating in the internal market.

12. In the Bundesrat's view, including relevant service providers based outside the EU that operate in the internal market is an important instrument to prevent competitive disadvantages for providers based in the EU, while also ensuring effective enforcement of the legal provisions vis-à-vis providers from third countries.

13. The broad definition of "illegal content" in Article 2(g) of the draft Regulation as content that is not in compliance with Union law or the law of a Member State is also to be welcomed, particularly as this provision applies irrespective of the place of establishment. This definition is the basis and prerequisite for the broadest possible enforcement of the applicable legislation.

14. The Bundesrat also proposes that the exemption from liability for online marketplaces (Article 5(3) of the draft Regulation) be made more specific This entails:

    - ensuring that the Regulation itself defines when the trader is acting "under the authority or control" of the marketplace,
    - ensuring that it applies not only to breaches of "consumer protection law" but also, in particular, to breaches of due diligence obligations within the meaning of Article 22 of the draft Regulation,
    - and ensuring that the provision should not rely solely on the knowledge of the "average and reasonably well-informed consumer", but that greater consideration be given to the degree of information asymmetry to the detriment of consumers in specific cases.

15. The Bundesrat points out that the draft Regulation does not differentiate between transaction and interaction platforms. It could be possible, for example, for online marketplaces (transaction platforms) to be subject to different due diligence obligations than social networks (interaction platforms). However, the draft Regulation only differentiates between platforms according to their size in terms of user numbers. Very large platforms with over 45 million users in the EU are therefore subject to much stricter requirements than smaller players encompassed within the general category of "online platforms". Both social networks and marketplaces therefore fall into one of these two categories. Fewer requirements are stipulated for intermediaries and hosting platforms, on the other hand, which only provide the infrastructure for online transactions and online interactions. This solution could be problematic in the case of online marketplaces, for example. Clarification concerning online marketplaces may be required, stipulating that these

marketplaces are liable for illegal content under certain conditions – for example, if counterfeit or unsafe products are offered on the platform. In the Bundesrat's view, the provisions in Article 5(3) of the draft Regulation do not provide sufficient clarification in this respect.

16. The Bundesrat welcomes the draft Regulation's cautious further development of the existing rules of the e-Commerce Directive concerning liability. This includes, in particular, maintaining the existing liability rules of Articles 12 to 14 of the e-Commerce Directive for intermediaries involved in transmission, caching and hosting of information. As has been the case to date, intermediaries are in principle not responsible for third-party content. Any introduction of a general monitoring obligation is precluded (Article 7 of the draft Regulation). Intermediaries are only liable for illegal content if they become aware of such content and do not immediately remove or block it (Article 5 of the draft Regulation). The Commission has correctly acknowledged in this context that liability regimes are one of the cornerstones of the Internet economy and that intermediaries neither have nor should have comprehensive access to and control over third-party content.

17. In this context, the Bundesrat also takes a positive view of the provisions in Article 6 of the draft Regulation. It contains a useful supplement to the liability rules by clarifying that voluntary own-initiative investigations by intermediaries to prevent infringements do not call into question their exemptions from liability. In particular, it would act as a deterrent for intermediaries and prevent them from adopting voluntary measures if it were to be assumed that intermediaries automatically obtain information that would constitute a basis for liability as a result of proactive measures, such as the use of automated tools.

18. The Bundesrat proposes that the principles underlying exemption from liability should be reinforced by means of clarification in Article 6 of the draft Regulation. It should be stated explicitly that providers of intermediary services are eligible for the exemptions from liability referred to in Articles 3, 4 and 5 of the draft Regulation even if they carry out voluntary investigations or engage in other activities on their own initiative to identify and remove content that violates their general terms and conditions.

19. In order to further increase legal certainty, the Bundesrat proposes that [in the German-language version of the text] the term “zügig” be used uniformly [“expeditiously” in the English version] as deployed in Article 4(1)(e) and Article 5(1)(b) of the draft Regulation rather than the term “unverzüglich” as used in Recital 22 with reference to the speed of response when becoming aware of illegal content [“expeditiously” in the English version of Recital 22 – the term “unverzüglich” is rendered elsewhere in the draft Regulation as “without undue delay” or “without delay”]. This would also ensure a distinction can be drawn between the requirement for action “without delay” [“unverzüglich”] in the case of reports from trusted flaggers pursuant to Article 19 of the draft Regulation.

20. However, the provisions pertaining to the legal consequences of illegal content on hosting providers’ platforms is insufficient, or at least unclear. Article 8 of the draft Regulation stipulates that courts and authorities in the Member States will be empowered to issue orders in individual cases. However, since illegal content such as criminal hate speech often spreads rapidly on the Internet, individual statutory orders alone will never be as effective as a specifically delimited legal obligation, enforceable by the Member States, to delete this content; a provision to this effect is currently not included in the draft Regulation. A deletion obligation in terms of substantive law does not arise pursuant to Article 5 of the draft Regulation, even if the provider is aware of illegal content. This article only stipulates the conditions under which the provider can be held liable, but does not stipulate the legal consequences that are applicable in case of liability. An obligation to delete does not arise from Article 14 of the draft Regulation either, which, although stipulating that there is an obligation to maintain a reporting mechanism, does not include any provisions concerning how the provider must react if illegal content is reported. If the draft Regulation were to be interpreted as signifying that there is no obligation under EU law to delete illegal content, while at the same time such an obligation could longer be addressed in national law due to full harmonisation, this would constitute a clear and unacceptable retrograde step in the fight against criminal content on the Internet and would reduce the level of protection below that currently in force in Germany. At least in the case of content prohibited under criminal law, a substantive obligation to delete must therefore either be stipulated in the Digital Services Act or it must be made clear in the text of the Regulation that Member States continue to enjoy scope to adopt provisions to this effect.

21. The draft Regulation needs to be amended or supplemented with regard to the enforcement of local prohibitions on the misappropriation of property, both nationally and Europe-wide.

    The Bundesrat therefore requests the Federal Government to advocate in the negotiations on the draft Regulation at European level for specific provisions that open up the option for local and regional authorities to issue effective orders, enforceable throughout Europe, for surrender of data and deletion of illegal content. In particular, efforts should be made to ensure that platforms are obliged to comply with the orders in accordance with Article 8 and Article 9 of the draft Regulation.

    Furthermore, scope should be explicitly maintained for Member States to adopt appropriate rules pursuant to Articles 14 (3) and 15 (2) of the e-Commerce Directive, which remain in force.

    In addition, the draft Regulation should clearly define the instruments and procedures that will be made available to local authorities to prevent or punish violations of bans on misappropriation of property. To this end, the draft Regulation must, inter alia, create the conditions for orders to be served and enforced even if the service provider is based in another European Member State. A law that is not executable and enforceable is a paper tiger.

22. However, the Bundesrat urges implementing differentiated provisions according to platform types, including with regard to the deletion periods for illegal content that is notified. On transaction platforms such as online marketplaces, steps should be taken to ensure that products listed in European rapid alert systems or without a CE label are deleted from the platform within a stipulated timeframe.

23. The Bundesrat further proposes concentrating on digital reporting channels for orders and notifications instead of requiring the URL address, which is an error-prone and bureaucratic method.

24. The Bundesrat underlines Germany's existing solid experience in creating and enforcing an appropriate framework for regulating providers of digital intermediary services. Since the draft Regulation, with its aspiration of full harmonisation, does not foresee national leeway in provisions adopted, the Bundesrat believes there is an urgent need to utilise the experience gleaned in Germany and include tried-and-tested, effective measures in the draft Regulation. This also includes aspects of criminal prosecution, as well as relating, for example, to provisions regarding retention obligations in the notice-and-take-down procedure. The Bundesrat emphasises that enforcement of measures in the Member States must not deteriorate as a result of applying the Regulation, with a view to ensuring that Member States can jointly attain the goal of a secure internal market that protects fundamental rights online.

25. In principle, the Bundesrat commends the inclusion in the draft Regulation, in Articles 12 and 20, of requirements for community standards for platform operators as well as conditions for blocking non-compliant users. However, it is problematic that the provisions are not sufficiently specific as they make excessive use of undefined legal terms. Given the relevance for fundamental rights of dissemination and access to information, the European legislator must take the essential value-related decisions and define clear criteria according to which networks may or must delete content and block users from the flow of information.

Respect for the Principle of Independence of Media Supervision and Requisite Improvements for Law Enforcement by the Administration

26. a) Supervisory structures in the media sector in the Federal Republic of Germany are subject to mandatory constitutional requirements of independence, plurality and relative independence from the state, which are not up for debate at all within the framework of a horizontal regulatory approach such as the present draft Regulation. It is vital to ensure that these requirements are not undermined by the draft Regulation. In particular, encroachment of European administrative structures that do not comply with these principles must be ruled out.

b) The Bundesrat points out that the Member States' competence for cultural policy also includes the design of supervisory structures for the media sector in keeping with national requirements. In this respect, the Bundesrat calls for

measures to ensure that the provisions can be supervised and also effectively enforced by the structures determined and designed by the Member States. For particular constellations, this also includes mechanisms to take action against providers that fall within the scope of the draft Regulation and have their place of establishment in another Member State. In the Bundesrat's view, it appears sensible to use structures that are already established and to reinforce coordination between such structures at the European level.

c) The Bundesrat identifies a particular challenge in enforcement by administrative authorities in the cross-border context. However, the Bundesrat would query whether the structures and procedures envisaged in the draft legislation are well-suited to contribute to effective supervision. Insofar as the regulatory procedures provided for in the draft Regulation apply, they should lead to effective measures directed at service providers, including not only very large online platforms but also other providers. The procedures should therefore be reviewed with regard to the timeframes foreseen in terms of efficient supervision as well as in terms of information requirements, which should not lead to bureaucratic burdens that could be avoided as they are in practice not necessary for implementation.

d) The Bundesrat has considerable doubts as to whether the draft Regulation will have a positive effect compared to the status quo on enforcement procedures for orders issued by national judicial or administrative authorities, in particular concerning the protection of minors from harmful media content. On the contrary, there are concerns that this regulatory approach could even have negative effects. Articles 8 and 9 of the draft Regulation introduce a new instrument which – apparently – aims to make it easier for judicial and administrative authorities to take action against the content of a provider based in another Member State if the content in question is illegal in the state to which the content is transmitted. However, in addition to requirements to standardise the form and content of the requisite orders or requests for information and an obligation for digital service coordinators to inform one another, Articles 8 and 9 of the draft Regulation merely impose an obligation on providers of intermediary services to inform the authority that has issued the order or request for information how this order or request has been fulfilled. The draft Regulation thus largely relies on providers of intermediary services to act responsibly to delete or block illegal content.

e) The Bundesrat calls for clarification of the possibilities for supervisory authorities in cases of non-compliance with orders or requests for information pursuant to Articles 8 and 9 of the draft Regulation. In particular when seeking to protect minors from harmful media content, rapid and efficient removal or blocking of such content is essential in order to prevent serious damage to the physical, mental and moral development of minors. This goal cannot be met solely by imposing more extensive obligations on intermediary services. To attain this objective, there is also a need for improved enforcement of the law by the authorities in cross-border situations on a case-by-case basis, in a manner that – in terms of time as well as content and structure – does not lag behind or contradict procedures established in the media sector.

On Transparency Obligations and Notification and Redress Procedures

27. The Bundesrat shares the Commission's view that there should be greater transparency and accountability with regard to how platform providers moderate content, as well as concerning advertising and algorithmic processes, especially pricing. The Bundesrat welcomes the provision that information concerning these aspects must be "easily comprehensible"; however, it is questionable how this is to be achieved from the consumer's point of view in the case of information that is concealed in the provider's "terms and conditions".

28. In order to counteract the risk of "excessive blocking", the Bundesrat requests that information on average processing times be excluded from the transparency reporting obligations in Article 13 of the draft Regulation, to avoid causing competition to achieve shorter processing times.

29. The Bundesrat has misgivings about the specific design of the notice-and-action mechanisms in Article 14 of the draft Regulation. Pursuant to Article 14(3) of the draft Regulation, a formally correct notification by a user implies that the platforms are presumed to know about or be aware of the particular information concerned. The provision could represent an "obligation to delete on demand" if a user reports content and the platform has not yet been able to examine the specific potential infringement. In this case, there might be such pronounced pressure to delete that excessive blocking could be the result. There is therefore a need to engage in a critical examination of ways to avoid excessive blocking as appropriate. Various approaches that deserve further consideration are discussed in the

academic literature. For example, it could be clarified that deletion – even if temporary – must always be preceded by each platform's own review process. Furthermore, creating a "balance" to Article 14(3) of the draft Regulation in the form of a "pre-flagging mechanism" (the user would need to indicate in advance that a certain posting is legal) is an idea that is sometimes entertained. If an automated summary check (plausibility check) following pre-flagging shows that the flagging is not obviously incorrect – i.e. the content is not manifestly illegal –, the content should not be taken offline until an objection is raised by the party who considers that their rights have been infringed by the content and until the ensuing examination by the platform demonstrates that the content is illegal. Until the review process is completed, the content would thus be kept online and the platform operator would be released from liability for the flagged content. The content would only have to be taken down by the platform subsequently (delayed takedown), after a positive review and determination of illegality. The risk of abuse of the system, which incidentally also exists for flagging of infringing content, is to be limited by the requirement for a summary review, which must be able to take place automatically in order not to place an excessive burden on the platforms' obligations in terms of "Verkehrspflicht" [obligation to ensure the content does not constitute a danger to the public]. In addition, the option of penalties for users that mislabel content is being considered.

30. The Bundesrat proposes that the wording of Article 14(2) sentence 2(a) of the draft Regulation should be aligned with that of Article 14(2) sentence 1 of the draft Regulation. Accordingly, the substantiation provided when submitting notification concerning particular content should be sufficiently precise and appropriate. Setting the bar too low for this substantiation could lead the platform operator to delete the content if there is any doubt, such as in situations in which it is unclear why a user has reported content as illegal, in an attempt to avoid a costly investigation and possible liability.

31. The Bundesrat supports the establishment of accessible and user-friendly reporting and redress procedures as well as complaint management systems in the sense of the draft Regulation.

    However, it believes that small and micro enterprises should be exempted from the obligation to maintain a notification and redress procedure.

32. The Bundesrat requests a review of whether harmonised standards can be developed for comparable procedures in further regulatory proposals of the Commission such as the European Data Strategy or when legislating on artificial intelligence in order to limit procedural complexity for consumers and to simplify recourse to these mechanisms for those affected.

33. The Bundesrat also considers it to be problematic that the draft Regulation does not create any substantive user rights. For example, thought could be given to introducing provisions on the right to information when seeking to determine the identity of a user, the enforcement of this right as well as further subjective, i.e. actionable, user rights. Such rights could, for example, grant users a secondary claim for damages against the platform operator, which would mirror claims asserted by the rightsholder against the platform operator in the case of publication of illegal content. This could also create incentive structures that would counteract excessive blocking.

Taking Account of Requirements in Media Law in Measures to Mitigate Systemic Risks

34. The Bundesrat notes that the draft Regulation provides for measures by very large online platforms to mitigate systemic risks based on self-initiated risk assessments. The risks addressed in this context also concern diversity of opinion and media diversity as well as protection of minors in the media. It must therefore be ensured that measures at the national level that serve to safeguard these goals are neither precluded nor counteracted by this mechanism. Within the framework of supervision of self-regulatory measures in this area, the principles applicable to media supervision must be upheld. Reviews of risk assessments should be carried out by appropriate bodies certified by independent supervisory authorities. The results of these reviews should be made comprehensively available to Member States, in particular with a view to fully understanding and assessing the risks identified for social debate and electoral processes.

On the Dispute Resolution Mechanism

35. The Bundesrat welcomes in particular the approach in Article 18(1) of the draft Regulation, which is intended to oblige online platforms to cooperate in good faith with an out-of-court dispute resolution body authorised pursuant to Article 18(2) of the draft Regulation in the event of disputes arising between users and the online platforms involved in connection with decisions pursuant to Article 17(1) of the draft Regulation. However, pursuant to the current conception of Article 18(3) of the draft Regulation, users must make payments up-front in order to use the services of such a dispute resolution body. In the Bundesrat's view, this appears problematic, as a fee requirement could create obstacles that would make it more difficult for users to enforce their rights against online platforms. Therefore, in the Bundesrat's view, participation in cases addressed in dispute resolution mechanisms in particular should be free of charge for consumers or only subject to a nominal fee. This should apply in particular if consumers pay a fee for using a particular online platform and thus have a right to consumer dispute resolution offered free of charge or at most for a nominal fee pursuant to Article 8(c) of Directive 2013/11/EU on alternative dispute resolution for consumer disputes. The Bundesrat therefore requests the Federal Government to advocate at the European level that consumer access to out-of-court dispute resolution in Article 18 of the draft Regulation be structured without prohibitive obstacles and in compliance with Directive 2013/11/EU.

36. The Bundesrat considers that further concerns exist concerning the provisions in Article 18 of the draft Regulation on out-of-court dispute resolution. These do not appear to be sufficiently balanced. There could be one-sided restriction of the right to justice to the detriment of online platforms. That is because the second sentence of Article 18(1) of the draft Regulation standardises an obligation for online platforms to cooperate with the dispute resolution body as well as (cumulatively) the binding effect of decisions taken by this body. As a consequence, the platform cannot decide voluntarily to participate in an out-of-court dispute resolution procedure initiated by the user nor take a voluntary decision to accept a dispute resolution ruling or request judicial review thereof. This provision could give rise to a considerable restriction of the constitutionally enshrined right to legal protection by independent courts. With a view to safeguarding the right to judicial protection, consideration could therefore be given to creating an option

for online platforms, that would also allow them– as is already envisaged for users – to request that the decision of the dispute resolution body be reviewed by an independent court.

37. However, in connection with the use of out-of-court dispute resolution bodies, the Bundesrat proposes that users who repeatedly and arbitrarily cause disputes to the detriment of online platforms should be required to bear the costs.

On the Mechanism for Suspected Offences

38. The Bundesrat welcomes the decision to limit the number of notifiable offences as a general rule. It is vital to find a means of reconciling the professional freedom of hosting providers and the right to informational self-determination of users on the one hand, and on the other hand the state's interest in not allowing the Internet to become a realm beyond the reach of the law, while also ensuring that users can exercise their freedom of expression without fear of defamation charges. In order to strike a balance between these conflicting interests, there is therefore a need to limit the obligation to notify certain offences. In this regard, however, it should be noted that the draft Regulation must be able to satisfy requirements concerning the principle of certainty in respect of designation of the criminal offences in question. The draft Regulation has not dealt in an adequate fashion with this point with reference to serious offences that pose a danger to the life or safety of persons. In particular, it would not be possible to clearly define offences that endanger personal safety. An additional requirement concerning the gravity of the deeds could not provide a further reliable means of limitation. Moreover, it is possible that offences that pose a threat to the democratic rule of law or public order might not be included on this list. That means that it may prove necessary, in order to protect democracy in Europe, to stipulate that such acts, which can reach a broad audience and flourish on the Internet, shall not be exempted from the notification obligation.

39. With regard to criminal law measures to combat illegal content, the Digital Services Act must not diminish investigative possibilities and powers. It is therefore, necessary, on the one hand, to clarify that Article 21 of the draft Regulation does not affect national regulations that also provide for a reporting obligation for acts below the threshold of serious criminal offences. Provisions should also be requested stipulating which content must be secured by the provider for a certain

period of time for the purposes of evidence in the event of content take-down. Article 9(4) of the draft Regulation explicitly provides for recourse to national regulations concerning obligations for intermediaries to provide information. The Bundesrat commends this.

On Traceability of Traders

40. The Bundesrat requests the Federal Government, with regard to the "know-your-business-customer principle" stipulated in Article 22 of the draft Regulation, to advocate that the Commission develop a digital, forgery-proof and uniform European or international means of identification. The envisaged system for verification of companies' details causes considerable effort for the platforms. The Bundesrat proposes specifying that the evidence and the self-declaration of the company to be verified must be submitted in the official language of the Member State in which the online platform has its registered office.

41. The Bundesrat also urges that a proposal be put forward stating that online marketplaces – in order to avoid fake shops, for example – may only publish offers if third-party providers provide the information stipulated in Article 22 of the draft Regulation, in particular with regard to identity and contact details, and if the reliability of this information has been verified by the marketplace operators using publicly accessible databases, as envisaged in Article 22 of the draft Regulation.

42. In the Bundesrat's view, the obligation to identify commercial users should apply not only to online trading platforms, but to all service providers who enable users to conclude consumer contracts in return for payment. Commercial users should be obliged to identify themselves when concluding consumer contracts. In this respect, parallelism with conventional (bricks-and-mortar) retailers should be established.

On Risk Management

43. The Bundesrat expressly welcomes the Commission's intention to oblige very large platforms to prevent abuse of their systems by requiring them to adopt risk-based measures and have their risk management system independently audited.

44. However, with regard to Article 28(1) of the draft Regulation, the Bundesrat proposes that very large online platforms should not be obliged to undergo an audit according to a rigid time-frame of at least once a year, but that instead a schedule should be established for audits to be held reasonably frequently. Due to the additional bureaucratic burden involved, excessively frequent audits could counteract proactive efforts by these platforms to ensure a transparent and secure online environment.

On Recommender Systems

45. The Bundesrat notes that the draft Regulation lays down transparency provisions (such as Articles 29 and 30 of the draft Regulation). Corresponding provisions have been adopted in the Federal Republic of Germany, inter alia, in §§ 22, 84, 85, 93 and 94 of the State Media Treaty (*Medienstaatsvertrag*, MStV). These provisions contain specific stipulations on transparency with regard to advertising messages as well as on transparency in content selection and presentation, and, building on this, concerning freedom from discrimination for digital services that are particularly relevant in shaping public opinion, also including protagonists other than the "very large online platforms" as defined in the draft Regulation. In the Bundesrat's view, it is vital to ensure continued scope for such provisions to be adopted by the Member States within the ambit of their competence to determine cultural policy. These provisions inter alia make it possible to ensure that diversity protection measures address the influence that search engines and social networks have on views concerning diversity in the national digital context. There must continue to be scope for these and future provisions to ensure a well-functioning national public discourse, also in the digital realm. The draft Regulation on a single market for digital services must not impede progress here, meaning that it should enable the Member States to secure media pluralism through requirements for transparency and ease of information retrieval.

46. The Bundesrat points out that to ensure acceptance of algorithm-based decisions it is important that consumers are able to understand which criteria underpin the decisions taken. The Bundesrat therefore requests a review of the extent to which regulating recommender systems for very large platforms, as provided for in the draft Regulation, should be supplemented by graduated, basic information and transparency measures for all platforms, in particular readily comprehensible labelling of the use of algorithmic systems.

Codes of Conduct

47. In the Bundesrat's view, it is important to ensure that identification of systemic risks for several very large online platforms does not lead to the introduction of obligations for other online platforms and other intermediary service providers to take specific risk mitigation measures as well as regular reporting (Article 35(2) of the draft Regulation).

Ensuring Autonomous Oversight Independent of the State For Appraisal of Measures Adopted by Mediation Services in Crisis Situations (Crisis Protocols)

48. The Bundesrat welcomes the procedure for drawing up crisis protocols provided for in Article 37 of the draft Regulation.

    The Bundesrat acknowledges that availability and visibility of reliable information, especially in crisis and disaster situations, must also be ensured on the Internet. In addition to official information (warnings, etc.), reporting in and by media working on the basis of journalistic standards is of particular importance in the fight against disinformation. Particularly in times of crisis, oversight and criticism of government decisions through visible media coverage are essential. One-sided highlighting of official information sources could run counter to this. Due to these risks to the process of free public communication, obligations to display certain information prominently, in particular information from government sources, must be restricted to strictly defined exceptional cases and adequate safeguards must apply to avoid abuse of this system.

49. The Bundesrat points out that existing legislation already contains provisions on instruments to provide information immediately in acute crisis situations and, over and above this, to increase the visibility of reliable information generally. For official information, this includes in particular national provisions stipulated in legislation concerning announcements (cf., for example, § 10 ZDF-StV or § 9 paragraph 1 SWR-StV). Article 7a of the AVMS Directive provides for appropriate emphasis to be given to audiovisual media services of general interest (for example, public broadcasting). The federal states have made use of this option in § 84 MStV.

50. Article 37 of the draft Regulation does not, in the Bundesrat's view, fulfil the necessary requirements to ensure a free process of public communication.

    a) The scope of application and terminology of the draft Regulation are not defined sufficiently clearly and are potentially too extensive, particularly as there is the option of intervening in the public communication process over a longer period of time.

    b) Responsibility for establishing and implementing the protocols lies essentially with the platforms. A review is carried out solely by the Commission. Particularly in this area, which is highly sensitive in terms of media diversity and diversity of opinions, oversight by bodies independent of the state must be ensured. The Commission does not fulfil these requirements.

    c) In most cases, the crises addressed are local incidents (especially natural disasters or terrorist attacks). Centralised supervision by the Commission across the EU therefore does not seem expedient or necessary.

51. The Bundesrat calls for the provisions concerning crisis protocols within the meaning of Article 37 of the draft Regulation to be restricted to disaster situations and other comparable tangible, significant threats to public safety. In any case, the content that is displayed prominently must be limited to factual, neutral information.

52. The Bundesrat further calls for mandatory review of the crisis protocols and their implementation by bodies that have the necessary degree of independence from the state as well as the requisite expertise and sensitivity in the area of fundamental rights related to communication. In particular in the field of media regulation, it would be possible to draw upon the appropriate and suitable structures that already exist, also at European level.

53. The Bundesrat requests the Federal Government to continue advocating the inclusion of provisions on correction of misinformation concerning health issues. In the Bundesrat's view, the procedure envisaged should be limited to absolutely necessary measures, in terms of both content and time. In addition, any procedure for correction of such information must be consistent with the draft Regulation.

Content Moderation concerning Journalistic-editorial Content

54. a) The Bundesrat notes that the draft Regulation has so far not prevented the intermediary services addressed in the draft Regulation from deleting journalistic-editorial content in accordance with procedures applicable to other content on the grounds of alleged illegality or because this content is judged to contradict the intermediaries' terms and conditions. The Bundesrat views this with concern as distribution of journalistic-editorial content undeniably also takes place via digital intermediary services due to changing user habits. Consequently, the services' self-defined standards concerning which journalistic-editorial content users may or may not see might become entrenched as a basis for oversight. Given the power of the largest of these services, this strikes at the very foundations of media and information freedom.

b) The Bundesrat emphasises that treating journalistic-editorial content as if it were equivalent to other content is neither appropriate nor necessary for several reasons. Journalistic-editorial content – also on the Internet – is already subject to the journalistic obligation to exercise due care in reporting, compliance with which is monitored by competent bodies that are independent of the state. In this respect, complaint procedures already exist as does the option of legal recourse, which can be enforced much more easily vis-à-vis providers of journalistic-editorial content than against other private users, due to existing imprint obligations and even licensing obligations in the broadcasting sector.

Other Specific Provisions - in particular Articles 38 to 42 of the Draft Regulation

55. The Bundesrat proposes that Article 38 of the draft Regulation should call for even closer exchanges between the Digital Services Coordinators in the Member States. In the interest of a harmonised approach, there should be an obligation for the Digital Services Coordinators to exchange information regularly and develop common principles.

56. A critical view should be taken concerning the idea put forward in the Commission's proposal that in future, pursuant to Article 40 of the draft Regulation, the country of the main establishment [of the provider of intermediary services] should be almost exclusively responsible for enforcing measures and penalising infringements. Fast, effective enforcement of these legal provisions is crucial, especially when dealing with large platform operators, in particular in cases involving deletion of illegal content. Enforcement should therefore remain largely in the hands of the Member States in the future. In particularly in cases involving orders adopted by the Member State pursuant to Articles 8 and 9 of the draft Regulation, the large number of cases that can already be anticipated would make it impracticable for jurisdiction to be located in the country of the main establishment [of the provider of intermediary services].

57. The Bundesrat requests clarification that the penalties and fines stipulated in Articles 42 and 59 of the draft Regulation are to be imposed only in the case of systematic infringements.

Better Coordination with Sector-specific Media Regulation at European and National Level, especially concerning Protection of Minors from Harmful Media Content.

58. a) Irrespective of the need for a more open approach within the ambit of Member States' competence to determine cultural policy, the Bundesrat considers it necessary to define the area covered by the draft Regulation more clearly with regard to its scope of application, substantive provisions and procedural requirements, also with regard to the way in which it relates to existing service categorisations, obligations and procedures, and in particular to other European legal acts. This applies especially with regard to the material scope of application, which should be clarified and thus meaningfully delimited, particularly with regard to content-aggregation services. In addition, duplicate structures should be avoided, which may arise when the horizontal approach of the draft Regulation is combined with existing sector-specific provisions (for example in areas such as prevention of dissemination of terrorist content on the Internet, online advertising or measures designed to protect minors, especially on video-sharing platforms). In particular, requirements, opening clauses and – in the light of the competence for cultural policy of the Member States, media supervision by bodies independent of the state and effective law enforcement – established procedural regulations contained in

the AVMSD must not be thwarted or undermined.

b) The Bundesrat emphasises that effective protection of young people from harmful media content is of paramount importance in all electronic information and communication media. The Federation and the federal states are continuously working to adjust the regulatory framework for the protection of minors from harmful media content to take account of the behavioural shifts in media use among children and young people, as well as seeking to devise adequate means of counteracting newly emerging dangers. This also applies in particular to intermediary services. The principal goal is to ensure that children and young people can use the Internet in a protected age-appropriate environment. That is the only way to ensure they can make use of the opportunities and possibilities this medium offers without any concerns arising.

c) The Bundesrat considers it imperative that the draft Regulation does not in any way reduce the level of existing protection of children and young people from harmful media content. As a prerequisite to attaining this, the Member States must continue to be able to determine which content should be accessible to minors only on a restricted basis due to its harmful effect on their physical, mental or moral development and to determine how access restrictions should be designed in this respect.

d) The Bundesrat calls for attention to be paid to ensuring that the draft Regulation does not thwart use of existing and future obligations for intermediary services intended to improve the protection of minors from harmful media content. In this context, the Bundesrat would also welcome clarification on a number of points concerning the scope of the draft Regulation.

   aa) At present, it is still unclear whether and to what extent the term “illegal content” (Article 2(g) of the draft Regulation) also includes content that would be harmful to minors and detrimental to their development, in particular to the extent that it is not already covered by prohibitions under criminal law in the Federal Republic of Germany (for example, “soft” pornography). Consequently, it is also unclear whether the provisions referring to this term would apply. Furthermore, it is unclear in this context how an order within the meaning of Article 8 of the draft Regulation can be enforced.

bb) From the Bundesrat's point of view, it is still not clear how reporting systems under the AVMS Directive (Article 28b(3)(d)) will interact with the reporting systems of the draft Regulation pursuant to Article 14. In particular, insofar as illegal content within the meaning of Article 2(g) of the draft Regulation is relevant to the protection of minors, it appears likely that in this context a problematic duplication of regulations may emerge and would not be resolved by Article 1(5)(b) of the draft Regulation.

cc) The Bundesrat requests clarification of the relationship between Article 28b AVMS Directive in particular and provisions on (exclusion from) liability and prohibitions concerning general monitoring obligations as currently stipulated in Articles 3 to 7 of the draft Regulation.

dd) Furthermore, it is also unclear what impact the draft Regulation will have on infringement of specific requirements concerning dissemination of certain content by intermediary services (for example, age verification systems or closed user groups in the case of pornographic content). Within the framework of the AVMS Directive (cf. Article 28b(3), third subparagraph, point (f)), such obligations exist at the EU level only for video-sharing platforms as a special type of intermediary service and thus only for a sub-set of the services to be addressed in terms of effective protection of minors from harmful media content.

ee) Against this backdrop, the Bundesrat would particularly welcome a clear statement that an obligation to install technical measures for the protection of minors in all types of intermediary services is consistent with the draft Regulation.

Further Comments

59. The Bundesrat takes a critical view of the increasingly unfair competition that European traders face on large online trading platforms due to marketplace traders from third countries who do not comply with European regulations or do so only inadequately and thus enjoy major competitive advantages. This is also associated with an inflow of illegal goods that often fail to respect manufacturers' trademark and patent rights. The Bundesrat requests examination of the question of whether further specific provisions may be needed for large online trading platforms concerning counterfeit products, illegal goods or non-compliance with

European or Member State regulations in order to put a stop to this tendency. In contrast to content that is very sensitive in terms of fundamental rights, such as statements on social networks, which must be thoroughly scrutinised before removal, an extended catalogue of obligations may be appropriate when taking action against illegal goods or criminal traders on marketplaces. It would be conceivable to introduce an obligation for online trading platforms to exercise due diligence when admitting marketplace traders and to require them to engage in active monitoring, because only the online trading platforms have an overview of the entire market and the distribution channels on their platform. If illegal products are detected, in addition to promptly removing offers for such goods and contacting the authorities, it should also be mandatory to inform rightsholders. At the same time, consumers who have purchased products detected as illegal should also be informed. The Bundesrat requests the Federal Government to take these aspects into account in further deliberations on the draft Regulation at EU level.

60. The Bundesrat requests that consideration be given to the question of whether an exemption from the regulatory provisions can be created for B2B platforms in the industrial sector, irrespective of size. This could offer a means of reducing obstacles in order to promote the emergence of new data-driven services or products for companies and use of such on a wider scale, affording scope to make better use of the data economy's potential for European companies. The Bundesrat believes that different standards should be applied to B2B platforms than to B2C platforms. In the case of B2B platforms, no particular risks of disinformation or potential threats to privacy arise. The risk of rendering market entry more difficult also appears low in this context.

61. Furthermore, the Bundesrat proposes that the Commission be requested to carry out an evaluation after entry into force of the Digital Services Act, in particular with regard to the extent to which the effects intended by the Regulation have been achieved and whether existing information asymmetries between companies and consumers have changed.

Procedural Issues

62. The Bundesrat requests the Federal Government to raise the questions and comments mentioned in this opinion in the relevant Council fora, also if appropriate insofar as the relevant thematic areas have already been addressed.

Direct Transmission of the Opinion

63. The Bundesrat shall transmit this Opinion directly to the Commission.