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MEMBER OF THE EUROPEAN COMMISSION
JUSTICE

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INTERNAL MARKET

Brussels,
Ares S(2021) 4587976

Ms Judit Varga
Minister for Justice

Dear Minister,

On 15 June 2021, the Hungarian National Assembly passed a Bill,¹ which, at its origin is intended to protect children against paedophile offenders, an objective which, without any doubt, is shared and pursued by all institutions and Member States within the Union.

However, what is a legitimate public interest has been used in a way that discriminates against people based on their sex and sexual orientation, departing from the values set out in Article 2 TEU, in particular the respect for human rights, freedom and non-discrimination.

The provisions of this Bill prohibit any content that propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality for persons under 18 years.² Homosexuality, sex change and divergence from self-identity corresponding to sex at birth are put on the same footing as pornography, and are considered as capable of exerting negative influence on the physical or moral development of minors.³ By doing so, when implementing EU law the provisions of this Bill directly violate the prohibition of discrimination based on sex and on sexual orientation enshrined in Article 21 of the Charter, denying people the freedom to express themselves, hold their own opinion, and to enjoy their right to a private and family life.

Some of the provisions of the Bill, if they were to enter into force, would violate several provisions of EU law, in particular Articles 34 and 56 TFEU, the Audio-Visual Media Services Directive (“AVMSD”)⁴ and the e-commerce Directive⁵ as well as the EU Charter of fundamental rights. In this respect, the Commission draws your attention to the provisions listed in the annex to this letter (“the contested provisions”).

¹ Bill of 15 June 2021 on “Taking more severe action against paedophile offenders and amending certain Acts for the protection of children”.

² See for example Amendment to Act XXXI of 1997 on the protection of children and guardianship administration, Section 6A.

³ See for example Amendment to Act CLXXXV of 2010 on media services and mass communication, new Section 9(6).

⁴ Directive 2010/13/EU.

⁵ Directive 2000/31/EC.

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In the ambit of application of EU directives or where a Member State restricts one of the internal market fundamental freedoms, such law must comply with the EU's Charter of Fundamental Rights. The contested provisions directly violate the prohibition of discrimination based on sex and on sexual orientation enshrined in Article 21 of the Charter. In that regard, it follows from well-established case law of both the Court of Justice of the EU and the ECHR Court that discrimination on the basis of gender reassignment would be tantamount to a failure to respect the dignity and freedom to which the individuals concerned are entitled.⁶ In addition the following fundamental rights are violated:

- a) the right to private and family life (Articles 7 and 9 Charter) in particular because they are liable to stigmatise LGBTIQ persons and couples;
- b) the right to freedom of expression and information enshrined in Article 11 of the Charter in particular because they unjustifiably limit the content of media services and other communications;
- c) the freedom to conduct a business enshrined in Article 16 of the Charter, in particular because they oblige service providers to adapt their behaviour and offerings to the Hungarian requirements.

The Audio-Visual Media Services Directive ("AVMSD"), the e-commerce Directive and Article 56 TFEU are applicable to at least some of the scenarios regulated by the contested provisions.

First, the contested measures prima facie violate the freedom of reception of audio-visual media services with a cross-border element enshrined in Article 3 AVMSD, because neither the procedural nor the substantive conditions for a derogation under Article 3(2) in combination with Article 6a AVMSD appear to be fulfilled. Indeed, a Member State may derogate from the home-country jurisdiction for providers of cross-border audio-visual service providers only provisionally and only where a specific service manifestly, seriously and gravely impair the physical, mental or moral development of minors. As regards cross-border audio-visual commercial communications, the contested provisions prima facie do not fulfil these conditions, because they infringe fundamental rights and, in any event, they are disproportionate because they are unrelated to a danger for the minors and go beyond what is necessary to protect the minors. It is true that the Media Council, where problems are identified in connection with the provisions mentioned in the previous point or the Act on Freedom of the Press, must request the Member State that has jurisdiction over the media service provider mentioned in the preceding point to implement effective measures and to take action for the violations specified by the Media Council. However, the host Member State is not allowed under the AVMSD to request the home Member State to take action against a behaviour or conduct that is protected by fundamental rights in a generalised way that is unrelated to a danger for a legitimate public interest.

Second, the contested measures appear to violate the freedom to provide information society services and the home-State competence to regulate and supervise cross-border providers of information society services guaranteed by Article 3 e-commerce Directive because the contested provisions prima facie do not comply (i) with the procedural conditions laid down in the e-commerce Directive (prior notification to the home Member States concerned and the Commission)⁷ and (ii) with any of the substantive conditions laid down therein. In fact, public policy, public health or public security can be invoked by a Member State only where it can prove the existence of a genuine, sufficiently

⁶ Judgment of CJEU of 30 April 1996, Case C-13/94, para. 22. Judgment of the ECHR Court of 12 May 2015, *Identoba and others v. Georgia*, case 73235/12, para 96 and case law cited therein.

⁷ Judgment of CJEU of 19 December 2019, Case C-390/18, para. 96 to 98. See also Directive (EU) 2015/1535 and Judgment of CJEU in Case C-194/94 of 30 April 1996, paras 54-55..

serious threat affecting one of the fundamental interests of society. In the light of fundamental rights, the circumstance that a program or economic advertising propagates or portrays sex change, homosexuality or divergence from self-identity corresponding to sex at birth cannot as such be considered to be a genuine, sufficiently serious threat affecting one of the fundamental interests of society. Moreover, the contested provisions are in any event disproportionate because they provide for a flat prohibition. Furthermore, to the extent that Section 4/D(5) entails the obligation for service providers to refrain from publishing the content listed in the register provided for in Section 4/D(5), it appears to violate the prohibition of general monitoring obligation for providers of information society services (Article 15 e-commerce Directive). In addition, the liability of information society services for publishing content that propagates or portrays homosexuality, sex change or divergence from self-identity corresponding to sex at birth appears to violate Articles 12, 13 or 14 e-commerce Directive, as the case may be.

Third, some of the scenarios regulated by the contested provisions may fall into the ambit of application of the freedom to provide services cross border enshrined in Article 56 TFEU, which constitutes one of the fundamental principles of the EU internal market and the EU legal order. That would be the case if a service is provided to a recipient established in Hungary by a provider established in another Member State. Besides, Article 56 TFEU may also be applicable in the scenario where a content or service is provided domestically, but the provider offers the same service in several Member States or is part of a multinational EU-group. A further scenario where the freedom to provide services may be relevant is that the IP rights of services offered in Hungary are owned by a physical or legal person established in another Member State. It should be noted that the freedom to provide services in the internal market protects not only the provision but also the reception of services with a cross-border element. The contested provisions are prima facie liable to hinder, deter or make the provision of services cross-border more difficult, thus constituting restrictions to the freedom to provide services in the EU internal market. For the reasons explained in the preceding paragraph, prima facie such restrictions cannot be justified and are in any event disproportionate.

Finally, if the measure affects physical publications (like books or magazines), the rules on the free movement of goods laid down in Articles 34 to 36 TFEU may also be applicable and possibly be infringed by the contested provisions. The Hungarian authorities are therefore invited to clarify the effect of the contested provisions, among others, on the marketing, the sale and the use of publications “propagating” or “portraying” homosexuality, sex change and divergence from self-identity corresponding to sex at birth. Those contested provisions that are laid down in Section 4/D also raise an issue of legal certainty because the exact content of the obligations imposed on service providers remains partly undetermined.

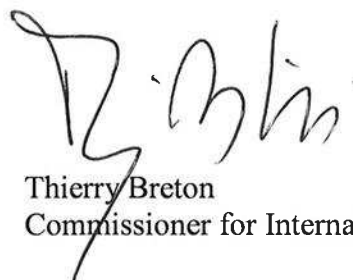
Under these circumstances, the Commission should be grateful if you could provide any clarifications, explanation and information regarding the points illustrated above. A constructive and loyal dialogue between the Commission and the Hungarian authorities would in our view be necessary at this stage, before the final adoption of the Bill. Should the Bill enter into force, the European Commission will not hesitate to take action in line with its powers under the Treaty.

We would be most grateful for a reply to this letter before 30 June 2021.

Yours sincerely,



Didier Reynders
Commissioner for Justice



Thierry Breton
Commissioner for Internal Market

Annex

1. The prohibition to make accessible to minors content that propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality.⁸
2. The empowerment of and obligation for the Roundtable to take the following measures with regard to electronic commerce services and information society services:⁹
 - to issue recommendations or standpoints facilitating the lawful conduct by media content providers (Section 4/D(1))
 - to investigate individual cases and to issue recommendations or standpoints (Section 4/D(2))
 - to call upon the service provider to act in compliance with the recommendation or standpoint (Section 4/D(3)(a))
 - to publish service provider's name in its annual report if the call was ineffective (Section 4/D(3)(b))
 - to call the service provider to remove the violating content (Section 4/D(3)(c)), whereby the service provider shall comply with it ("The service provider shall be obliged to comply with a call", Section 4/D(3)(4))
 - to initiate a proceeding by the Authority where the service provider does not comply with the abovementioned call (Section 4/D(4))
 - in order to promote lawful conduct by service providers, to keep i) a register on detected content endangering the physical, mental and moral development of minors on the basis of the reports received and ii) a register on content endangering the physical, mental and moral development of minors (Section 4/D(5)).
3. The prohibition to make accessible to minors economic advertisements that propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality.¹⁰
4. The obligation of classification (Section 9(1) of the Media Law as modified by the Bill)
5. The obligation for media service providers offering linear media services to classify all programmes broadcasted into category V where the program is capable of exerting negative influence on the appropriate physical, mental or moral development of minors, in particular as a result of having its central element the propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality.¹¹
6. The obligation for the Media Council, where problems are identified in connection with the provisions mentioned in the previous point or the Act on Freedom of the Press, to request the

⁸ Amendment to Act XXXI of 1997 on the protection of children and guardianship administration, Section 6/A.

⁹ Amendment to Act CVIII of 2001 on certain issues of electronic commerce services and information society services, Section 4/D

¹⁰ Amendment to Act XLVIII of 2008 on the basic conditions of and certain restrictions on economic advertising activities, new Section 8(1a).

¹¹ Amendment to Act CLXXXV of 2010 on media services and mass communication, new Section 9(6) in combination with Section 9(1).

Member State that has jurisdiction over the media service provider mentioned in the preceding point to implement effective measures and to take action for the violations specified by the Media Council.¹²

7. The exclusion of the qualification as public service announcements and community facility advertisements where the advertisement is capable of exerting negative influence on the appropriate physical, mental or moral development of minors, in particular as a result of having its central element the propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality.¹³

¹² Amendment Act CLXXXV of 2010 on media services and mass communication, new Section 179(2).

¹³ Amendment to Act CLXXXV of 2010 on media services and mass communication, Section 32(4a).