



EUROPEAN COMMISSION

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PERMANENT REPRESENTATION  
OF HUNGARY TO THE  
EUROPEAN UNION  
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### **3. Commission position**

#### ***3.1 Preliminary remarks***

Firstly, the Commission points out, as it was already explained in the Letter of formal notice, that the finding of a violation of EU law by a Member State is an objective concept. Whereas the national legislator's intention as stated in the legislative history may cast some light on certain provisions, the object of the current infringement procedure relates to the legal provisions themselves.

Also, the Commission reiterates that the fact that the protection of minors corresponds to a legitimate public interest shared by the EU and recognised in EU law does not as such mean that in the present case the contested rules are justified on that basis. Indeed, in order to invoke successfully a justification to a restriction to the EU free movement rules or an interference with the EU fundamental rights, Member States must prove, in a concrete manner and by reference to the circumstances of the case, that the measures at issue are justified. In that regard, Member States must substantiate why the public interest invoked is relevant for such measures. So far, the Hungarian authorities have failed to do so in the present case.

In its reply to the Letter of formal notice, Hungary reaffirms that the issue covered by the contested rules is clearly an exclusive national competence, as it concerns the upbringing of Hungarian children and the freedom of Hungarian parents to educate their children, and therefore it cannot be subject to a review of compatibility with EU law.

It also argues that nobody should be able to compel children to receive information of a sexual nature and therefore "the promotion of sexual attitude" and of "the lifestyle of sexual minorities in public upbringing" should be prohibited. Finally, Hungary states that the Law only concerns the education of Hungarian children and the protection of minors and does not interfere with the life of adults.

In this regard, the Commission firstly sees a discrepancy between the stated objective of the contested rules - avoiding that children receive information of a sexual nature - and the rules themselves. The content of merely "promoting or portraying divergence from self-identity corresponding to sex at birth, sex change or homosexuality" is not necessarily of a sexual nature. Similarly, "divergence from self-identify corresponding to sex at birth, sex change or homosexuality" are not "lifestyles of sexual minorities". The Commission also

refers to the arguments provided in its Letter of formal notice, in particular Section 8 “Violation of fundamental rights”.

Secondly, as mentioned in the Letter of formal notice, Member States have some discretion concerning matters related to the protection of minors. However, there are boundaries set by EU law to what can be considered by a Member State as falling under “protection of minors” and what constitutes a threat that minors can legitimately be protected from. The Commission refers to the arguments provided in the Letter of formal notice (Section 1 Preliminary remarks), in particular to the fact that invoking the “protection of minors” does

not provide Member States with a blank cheque, and that the Member States cannot use *ad libitum* public interests such as the protection of minors as a pretext to violate EU internal market rules and breach EU fundamental rights and values.

Therefore, the Commission considers that Hungary has failed to substantiate why the public interest invoked (the protection of minors) is relevant with regard to the contested rules and has failed to identify concretely which threats against minors they aim at preventing.

In the Letter of formal notice, the Commission considered the content targeted by the contested rules (“content that ... promotes or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality”) as extremely broad, and encompassing any information-oriented activity such as press, documentary films, educational books. Also the concepts of “portrayal”, “making available” or “promotion” were considered as unclear and very far-reaching. The Amendment to Act XXXI of 1997 on the protection of children and guardianship administration, Section 6/A, was mentioned as an example of this problematic use of concepts and broad coverage.

In its reply to the Letter of formal notice, Hungary claims that the Commission has misunderstood in particular the impact of Section 6/A of the Children Protection Law as modified by the Law. It argues that the prohibition set out in the above-mentioned Section 6/A only applies to the organisations described in Section 1(1) of the Children Protection Law:

*‘(1) The purpose of this Act is to lay down the basic rules according to which the State, local governments and natural and legal persons as well as other organisations without legal personality responsible for the protection of children shall provide assistance, by means of specified benefits and measures, in the enforcement of the statutory rights and interests of children and in the fulfilment of parental duties, and shall ensure the prevention and elimination of children’s vulnerability, the replacement of missing parental care and the social integration of young adults leaving child protection care.’*

Hungary states that the scope of the Children Protection Law is limited to the Hungarian children protection system and that the legislator’s intention with regard to the above-mentioned Section 6/A is to “provide for the State’s institutional protection obligation also within the child protection system”. Hungary also reiterates that there is no flat or general prohibition and that the amendment related to Section 6/A does not apply to the other contested rules, insisting that all amendments have to be examined separately.

First of all, the Commission reiterates, as already stated in the Letter of formal notice, that it has examined all amendments, including Section 6/A, individually.

The Commission takes note of the arguments provided by Hungary concerning the scope of the Children Protection Law and of the amendment introduced by Section 6/A. The Commission does not contest that Section 6/A directly applies to the organisations and persons indicated in Section 1(1) of the Children Protection Law. Nonetheless, Section 6/A is relevant in several regards.

First, in particular the scope of the prohibition remains broad, because it covers not only the State institutions, but also “*local governments and natural and legal persons as well as other organisations without legal personality responsible for the protection of children*” when they act in the “*enforcement of the statutory rights and interests of children and in the fulfilment of parental duties*”. As a result, the prohibition still has a negative impact on the internal market freedoms as well as the EU fundamental rights and values. In particular, 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” prevents such institutions, organisations and other persons from acquiring relevant educational material (such as online material) or using relevant general-purpose material (including audiovisual content) in their activities.

Second, as will be illustrated below, Section 6/A of the Children Protection Law as modified by the Law plays a role in: the application of the Children Protection rules by the service providers, and the assessment that the Roundtable carries out on the basis of the contested rule 2. In that regard, the State institutions and bodies closely associated to the enforcement of legal provisions for the protection of children are bound by the Children Protection Law and its objective. The Roundtable, is defined as a body closely associated to the enforcement of legal provisions for the protection of children,<sup>20</sup> Pursuant to Section 4/D(1) electronic commerce law, the Roundtable issues recommendations or standpoints facilitating the lawful conduct by media content providers: the word “lawful” in this context is very general; furthermore pursuant to Section 4/D(5) of the electronic commerce law, in order to promote lawful conduct by service providers, the Roundtable keeps a register on content endangering the physical, mental and moral development of minors. The content endangering the physical, mental and moral development of minors is precisely the content that the contested rule under 1. prohibits.<sup>21</sup> Thus, even in the absence of explicit reference in the Hungarian law, there is an objective link between, on the one hand, the contested rule under 1. and, on the other hand, the relevant provisions in the Electronic Commerce Law. Therefore, the contested rule under 2. makes an implicit but clear reference to the contested rule under 1. The existence of that objective link is corroborated by the official explanation submitted to the Hungarian Parliament for the adoption of the contested rules: “The amendment (...) defines the range of content in relation to which it must be ensured that children do not come into contact with such content on different surfaces (e.g. media, advertising).” This further corroborates the argument that the Hungarian legislator intended to introduce an extensive and absolute restriction on the content in question, and that there is – at least indirectly through the Roundtable – a link between the Child Protection Law and rules applicable to information society services. As a result, the definition of content that propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality under contested rule under 1. will be used by the Roundtable as a benchmark also when it deals with matters not directly falling into the ambit of application of the Children Protection Law.

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<sup>20</sup> Under Article 4/B. (1) of the Electronic Commerce Law, “The Round-table Conference shall function as the assessment, consultation and recommendation body for the President of Nemzeti Média- és Hírközlési Hatóság (National Media and Infocommunications Authority) (hereinafter referred to as ‘Authority’) intended to facilitate the adoption and enforcement of regulations in the interest of healthy development of minors having regard to media contents and information accessible through commercial electronic services and electronic communications services.”

<sup>21</sup> The fact is confirmed by Hungary itself in its Reply to the Letter of formal notice: “Reading Section 6/A of the Children Protection Act with the Grounds of the Act (their joint reading is required under the Fundamental Law for the dispensation of justice) and the purpose of the Children Protection Act, it is obvious that the legislator’s aim through the provision in question is to lay down the State’s institutional protection obligation also within the child protection system, considering that in the world of children growing up without parents, i.e. in the absence of parents, the State assuming a role in such institutions is of key importance, due in part to the obligation of the State under the Fundamental Law, its so-called ‘institutional protection obligation. In that context, the State’s institutional protection obligation means that, in order to ensure the physical and mental development of the child, it must guarantee the balanced provision of information in accordance with the child’s age. In accordance with the above, while the Act is non-discriminatory and its provisions apply to all forms of sexuality, with regard to social changes, the legislator considered it necessary to classify certain types of behaviour (i.e. divergence from self-identity corresponding to sex at birth, sex change and homosexuality; hereinafter collectively referred to as ‘sensitive content’), which require explanation by the parents (or, in the absence of parents, by an institution) for children.”

Therefore, in the Commission's view, the above-mentioned Section 6/A violates EU law in several regards, as will be illustrated below.

### **3.2 Compliance with AVMSD**

#### Programme classification

The Law introduced an amendment in Section 9(6) of the Media Law that sets out an obligation to rate the programmes as 'not recommended for audiences under the age of eighteen' and classify them in category 'V' "if their defining features include violence, the promotion or portrayal of deviation from the identity corresponding to one's birth sex, the promotion or portrayal of sex change and homosexuality and the direct, naturalistic or gratuitous portrayal of sexuality".

The new paragraph 4(a) added by the Law to Section 32 of the Media Law excludes from the qualification as public service announcements programmes threatening to "impair the adequate physical, mental and moral development of children, in particular if their defining features include the gratuitous depiction of sexuality, pornography, the promotion or portrayal of a deviation from the identity corresponding to one's birth sex, and the promotion or portrayal of sex change and homosexuality." Therefore, those programmes fall under the classification obligations of Section 9(6) mentioned above.

By virtue of Article 10 of the Media Law (not amended by the Law) programmes classified into Category V may be aired between 10.00 p.m. and 5.00 a.m.

These provisions apply to television broadcasters, as indicated in the new section 9(1) of the Media Law. Moreover, by virtue of section 11(2) of the Media Law, on-demand providers are obliged to apply an "effective technical solution" to ensure that programmes classified in category V are not accessible to minors.

The Commission recalled in the Letter of formal notice that Article 6a(1) AVMSD allows Member States to take appropriate measures to ensure that audiovisual media services provided by media service providers under their jurisdiction which may impair the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see them, and that such measures shall be proportionate to the potential harm of the program. It also recalled that the scope of application of Article 6a(1) AVMSD is limited to the provision of television broadcasts and video-on-demand services by providers established within Hungary (as opposed to cross-border provision by providers established in another Member State). Finally, the Commission also stated that Article 6a(1) AVMSD lays down an obligation of regulation and supervision but, at the same time, procedural and substantive limits for Member States as regards regulation and supervision of audiovisual media service providers as provided for in EU law<sup>22</sup>, from the viewpoint of the protection of minors.

Should the contested rules of the Media Law be considered "more detailed or stricter rules in the fields coordinated by the Directive" under Article 4(1) AVMSD, the Commission stated in the Letter of formal notice that, as this Article specifies, any such rules have to be in compliance with Union law. The fact that the harmonization set out by the Directive is on certain matters not exhaustive does not exclude that the Directive can set out obligations for Member States. In other words, the content of Article 6a AVMSD cannot be disregarded simply on the ground that Article 4(1) AVMSD provides in very general terms that Member States can adopt more detailed or stricter rules.

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<sup>22</sup> Notably the requirements in Article 6a(1) AVMSD that the measures are appropriate for protecting minors and proportionate.

The Commission therefore considered in the Letter of formal notice that the contested rules of the Media Law are in breach of Article 6a AVMSD, because the new rating obligations provided for therein are neither justified nor proportionate to the objective of protecting minors.

Hungary, in its reply to the Letter of formal notice, rejects the Commission's arguments as "based on erroneous foundations and an erroneously specified legislative framework", asserting that the Commission had wrongly based its conclusions on the amendment to the Children Protection Law and not on the amendment to the Media Law. Hungary also reiterates that the AVMSD represents a minimum harmonisation and, in the particular case of protection of minors and programme classification, the precise consideration of what is harmful for them is essentially a cultural issue. For this reason, Hungary considers that the contested rules in this respect constitute a restriction that explicitly complies with the AVMSD.

Additionally, Hungary states that the content and programme items falling under category V are not subject to a general ban and that the new Section 9(6) of the Media Law only aims to prevent minors from accessing such content without certain restrictions.

Hungary also puts forward arguments to justify the general interest objective and proportionality of the contested rules and their legal clarity. Among the reasons to introduce Section 9(6) of the Media Law, Hungary indicates that minors are susceptible to models that are different from traditional norms of society, and that the differences from the established social and sexual values may appear to them as an attractive lifestyle.

The Commission is fully aware that Section 9(6) of the Media Law as modified by the Law does not amount to a total ban of the respective content. In the Letter of formal notice (see in particular Section 2), the Commission questioned that provision with regard to programme rating under Category V concerning the "promotion or portrayal of a deviation from the identity corresponding to one's birth sex and the promotion or portrayal of sex change and homosexuality". The Commission reiterates that this categorisation is not justified or proportionate. In particular, firstly, it is not justified because the contested rule makes an unqualified link between, on the one hand, the "promotion or portrayal of a deviation from the identity corresponding to one's birth sex, of sex change and of homosexuality", and, on the other hand, the threat to impair the physical, mental or moral development of minors. That indiscriminate causal link is not based on any objective reason nor on any credible evidence by the Hungarian authorities. Secondly, the contested rule is not proportionate to the objective of protecting minors. It goes beyond what is necessary, because it is clearly over-inclusive and does not leave room for any individual and/or graduated assessment on the basis of the impact of the specific content on the physical, mental or moral development of minors. It goes beyond what is necessary also in that it is exceedingly restrictive; under Article 6a(1) AVMSD, only the most harmful content shall be subject to the strictest measures.

Also, as explained in the Letter of formal notice (Section 2), the Commission considers that the contested rules are in breach of Article 4 AVMSD in combination with Article 6a AVMSD, in what concerns the discretion for Member States to adopt stricter or more details rules, in compliance with EU law. In this respect, the reasons provided by Hungary to justify the general interest objective of the contested rules of the Media Law and their proportionality are in the Commission's view unconvincing. Notably, Hungary has not yet provided any evidence of a causal link between the exposure to "content promoting or portraying a deviation from the identity corresponding to one's birth sex, sex change and homosexuality", and the potential harm to children. In particular, even if Hungary demonstrated (which is not the case) that minors are susceptible to models that are different from "traditional norms of society", and that the differences from the "established social and sexual values" may appear to them as an attractive lifestyle, this does not justify the

fact that “deviation from the identity corresponding to one’s birth sex, the promotion or portrayal of sex change and homosexuality” is singled out and laid down in the contested provision as benchmark for the potential harm to minors. In this regard, the Commission also refers to the arguments provided in the Letter of formal notice (in particular Section 2.1).

In the reply to the Letter of formal notice, Hungary contests the Commission’s assessment that the contested rules on programme classification violate the principle of legal certainty and can be applied arbitrarily. Hungary states that their system of programme rating assesses the entire context and the message, taking into consideration the age-specific intellectual and processing abilities of minors. The result is then that both the topic of the media content and the method of portrayal must correspond to the person’s age. Moreover, Hungary states that the programmes that include the content elements referred to in the modified Section 9(6) of the Media Law as a defining feature also fell under category V prior to the amendment, on the basis of a consistent case-law.

In its reply to the Letter of formal notice, Hungary presents more detailed elements that in its view should be taken into account to determine when a programme whose defining features include the “promotion or portrayal of deviation from the identity corresponding to one’s birth sex, the promotion or portrayal of sex change and homosexuality” falls under category V. According to Hungary, “*Category V obviously does not include the portrayal of general gestures [...] which give expression to affection, provided that their portrayal is not self-centred, does not constitute the central defining feature of the content and does not constitute the main topic of the programme concerned*”. Additionally, Hungary explains that a programme with this type of content falls under category V “*if it portrays or promotes such elements or homosexuality as an exemplary behaviour*”. These elements confirm that, because of the central role or because of the positive message, the “promotion or portrayal of deviation from the identity corresponding to one’s birth sex, the promotion or portrayal of sex change and homosexuality” are considered by virtue of the law as harmful content to be classified under category V. That is also confirmed by Hungary’s general statements about the goals of the Law. According to Hungary, this type of content promotes “sexual attitudes and the lifestyle of sexual minorities in public upbringing”, and “information of a sexual nature” needs to be supervised by parents. These statements contradict the explanations provided by Hungary about a more nuanced application of the restrictions, and effectively neutralise the possibility of limiting the application of Section 9(6) of the Media Law as regards classification of content. The fact that the contested rule applies only in some cases does not make the violation of EU law evaporate.

Hungary also replies to the Commission’s grievance concerning the lack of legal certainty by referring to the definition of the term “promotion” as follows: “*As far as the programme elements referred to at category V are concerned, promotion includes any content portraying homosexuality and the change of sex as a social norm and an exemplary lifestyle; promotion further includes the propaganda activity related to such topics and reflected in the media content, whose purpose is to promote such ideologies and views, emotionally influence minors and persuade them by means of communication*”.

The Commission disagrees with the statement made by Hungary that the amendment has not modified the programme rating system. Hungary refers, without further explanation, to the existence of certain “consistent administrative and judicial practice” which would have resulted in the programmes with content relating to homosexuality, bisexuality or gender identities that differ from cisgender identities to already fall under Category V. Nevertheless, by virtue of the contested rule the criteria on the basis of which the providers are to assess the content of the programmes are not objective. By virtue of the contested rule, as regard the classification under Category V, a bias has been created against the programmes with this content.

Moreover, the amendment to the Media Law has introduced legal uncertainty. As explained by Hungary, “*Category V obviously does not include the portrayal of general gestures [...] which give expression to affection, provided that their portrayal is not self-centred, does not constitute the central defining feature of the content and does not constitute the main topic of the programme concerned*”. Additionally, Hungary explains that a programme with this type of content falls under category V “*if it portrays or promotes such elements or homosexuality as an exemplary behaviour*”. These elements introduce major vagueness and uncertainty in the assessment that providers must carry out in the classification of programmes.

As regards the programmes whose defining features include violence, the “promotion or portrayal of deviation from the identity corresponding to one’s birth sex, the promotion or portrayal of sex change and homosexuality” and the direct, naturalistic or gratuitous portrayal of sexuality, all this content is considered for classification under Category V, that covers children until the age of eighteen, i.e. all minors. The contested rule does not provide for age-specific assessment that can take into account the different levels of intellectual maturity between children age-groups, e.g. age-group of six and age-group of sixteen years old, in relation to the type of content in question. Instead, under the contested rule all the content related to the “promotion or portrayal of deviation from the identity corresponding to one’s birth sex, the promotion or portrayal of sex change and homosexuality” is considered for classification only under Category V. The specific physical, mental or moral potential harm to minors, depending on their age, should be assessed, but this does not seem possible with the current Section 9(6) of the Media Law as regards the “promotion or portrayal of deviation from the identity corresponding to one’s birth sex, the promotion or portrayal of sex change and homosexuality”. Moreover, and opposite to what Hungary claims in its reply to the Letter of formal notice, this classification constitutes a prohibition, as it is not allowed to air such programmes from 5 a.m. to 10 p.m. This also undermines Hungary’s argument that the new Law is only about the education of Hungarian children and the protection of minors and does not interfere with the life of adults: on the contrary, as a result of the provision at issue, the content in question will equally become far less accessible to the adult population.

Also, as specified in the Letter of formal notice, content “promoting or portraying deviation from the identity corresponding to one’s birth sex, promoting or portraying sex change and homosexuality” is put on equal footing as “violence” and “direct, naturalistic or gratuitous portrayal of sexuality”, which, according to Article 6a(1) AVMSD, is the most harmful content and shall be subject to the strictest measures.

In its reply to the Letter of formal notice Hungary puts forward that some new elements in its view should be taken into account for the programme classification. However, the Commission stresses that such elements are not included in the contested rules and therefore cannot be considered in the assessment provided for therein, as their source and legal value are unclear. Even if they would be developed as part of an administrative decision or guidelines (which has not been proved), the Commission highlights that such measures can be easily modified and, moreover, they cannot change the contested rules, which are laid down in a legally binding act.

Even if these new elements as put forward by Hungary were to be considered, they do not solve the problems identified by the Commission. The assessment of whether the “portrayal of deviation from the identity corresponding to one’s birth sex, sex change and homosexuality” is not “*self-centred, does not constitute the central defining feature of the content and does not constitute the main topic*”, confirms in substance that “deviation from the identity corresponding to one’s birth sex, sex change and homosexuality” is set out in the contested rule as benchmark for potential harm to minors. Moreover, if presenting “*such elements or homosexuality*” “*as an exemplary behaviour*” determines that a

programme can be aired only between 10 pm and 5 am, a contrario a programme depicting e.g. homosexuality in a negative way could be shown during other periods. Furthermore, the assessment at issue is subjective and lacks sufficient predictability.

The concept of promotion as defined by Hungary raises again the same concerns already mentioned by the Commission in the Letter of formal notice concerning discrimination, lack of justification, proportionality and violation of the EU Charter of Fundamental rights. In particular, this concept restricts the ability of persons that are not heterosexual and cisgender of being promoted (including depicting the risks ensuing from their stigmatisation) or merely being displayed. We refer to the arguments provided in this respect in the Letter of formal notice, in particular in Section B.8 (Violation of fundamental rights), which stress that the Law stigmatises persons that are not heterosexual and cisgender, and to the Section 3.8 Compliance with the EU Charter on Fundamental rights of this Reasoned opinion, below

In view of the above, the Commission has reached the conclusion that the amended Section 9(6) of the Media Law (contested rule under 4.) is in breach of Article 4 and Article 6a(1) AVMSD.

### Cross-border services

The Commission considered in its Letter of formal notice that, as regards audiovisual media services with a cross-border element, the contested rules described under 1., 2., 4., 5. and 6. also violate the freedom of reception and the freedom of retransmission of audiovisual media services enshrined in Article 3(1) AVMSD and the home-country rule set out in Article 2 AVMSD.

Hungary, in its reply, states that the contested rules, in particular those affecting media service providers, apply only to those providers that are established in Hungary and, therefore, there is no breach of Articles 2 and 3(1) AVMSD. It also argues that the provisions of the Media Law transposing Article 3 of the AVMSD, concerning the procedure vis-à-vis media content providers established in another Member State (Section 176) have not been amended and are in conformity with the procedural conditions set out in Article 3(2) AVMSD.

The Commission observes that the new Section 179(2) of the Media Law obliges the Media Council to act - issue a request to the Member State of jurisdiction - "if problems are identified in relation to the provisions set out in paragraph (1), and if this Act or the relevant provisions of the Freedom of the Press Act are violated". The Media Law, therefore, puts in place, for triggering the derogation mechanism from the country of origin rule, a threshold that is lower than the one provided for by Article 3 of the AVMSD - "where an audiovisual media service provided by a media service provider under the jurisdiction of another Member State manifestly, seriously and gravely infringes point (a) of Article 6(1) or Article 6a(1) or prejudices or presents a serious and grave risk of prejudice to public health". This lower threshold constitutes a violation of Article 3 AVMSD, as it expands the derogation from the country of origin principle, which is only allowed by the Directive in exceptionally serious circumstances.

Additionally, it exacerbates legal risks for media service providers that offer their services in Hungary but are not under its jurisdiction. Given the lower threshold established by Hungary for triggering the derogation mechanism from the country of origin rule, compared to that provided for by the AVMSD, there is the risk that the Hungarian authorities may try to enforce the contested rules under 4. and 6. through that mechanism also with regard to service providers established in other Member States and providing their services in Hungary from the State of establishment. That risk, even if it did not translate into concrete sanctions in practice, is likely to produce a chilling effect on such

providers. They may by virtue of those contested rules be induced to minimize regulatory compliance risks and thus to avoid providing in Hungary the content targeted by the contested rules. The chilling effect described here is also reinforced by the systemic nature of the contested rules (in terms of their generalized and pervasive nature).

In view of the arguments above, the Commission reiterates that, as regards audiovisual media services with a cross-border element, the contested rules described under 4., 5. and 6. violate Articles 2 and 3(1) AVMSD.

### The Advertising Law

Section 3 of the Law adds a new paragraph (1a) in Section 8 of the Advertising Law (the contested rule described under 3. above). This new paragraph forbids “to make available advertisements to persons under the age of eighteen which depict sexuality in a gratuitous manner, promote or portray deviation from the identity corresponding to one’s birth sex, and promote or portray sex change and homosexuality.”

The Commission considered, in the Letter of formal notice, that the contested rule violates Article 9(1)(c)(ii) AVMSD, whereby Member States shall ensure that audiovisual commercial communications shall not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. The Commission also explained the reasons why Hungary cannot rely on Article 4 AVMSD to make the contested rule compatible with the AVMSD (Section 2.2 of the Letter). The Commission also considered that, as regards audiovisual commercial communications provided by media service providers under the jurisdiction of other Member States, the contested rule violates the country-of-origin principle (Article 2 AVMSD) and the freedoms of reception and retransmission of audiovisual media services (Article 3(1) AVMSD). These reasons have not been successfully rebutted and are thus maintained by the Commission in the present Reasoned opinion.

According to the reply from the Hungarian authorities, the Commission’s objection that the Section 6/A of the Children Protection Law and Section 8(1a) of the Advertising Law are in breach of the AVMS Directive is based on erroneous provisions, since Section 6/A of the Children Protection Law does not apply to media services in the first place; the Hungarian authorities add that the provisions of the Advertising Law must be interpreted in conjunction with those of the Media Law on the basis of which, in linear media services, advertisements should also be classified into the age restriction categories specified by the Media Law. Consequently, according to the Hungarian authorities, the Media Law does not provide for a total ban of advertisements promoting or portraying deviation from the identity corresponding to one’s birth sex, sex change and homosexuality.

The Commission reiterates that Section 8(1a) of the Advertising Law provides for a clear and broad prohibition to make accessible to persons under the age of eighteen advertisement that “propagates or portrays divergence from self-identity corresponding to sex at birth, sex change or homosexuality”. In so far as linear media services are concerned, as indicated in the previous Section, the classification under category V implies that such programmes and commercial communications can be aired only between 10 p.m. and 5 a.m. (and therefore there is a prohibition within the time frame between 5 a.m. and 10 p.m.). In the same vein, the Commission reiterates its position that the prohibition at issue cannot be justified on the basis of Article 9(1)(g) AVMSD and is not proportionate to the objective of protecting minors. While the Commission recognises that, in line with the provision of Article 9(1)(g) AVMSD, minors must be protected from commercial messages that may cause physical, mental or moral detriment to them, there is no objective

reason why content such as referred to in Section 8(1a) of the Advertising Act could per se represent a potential threat to minors, and the Hungarian authorities did not provide any credible evidence in this regard. In that provision Hungary has, without any objective justification, singled out (next to the depiction of sexuality in a gratuitous manner) the content regarding “promotion or portrayal of deviation from the identity corresponding to one’s birth sex, and promotion or portrayal of sex change and homosexuality”.

The Hungarian authorities also reject the Commission’s conclusion that the contested rule is in conflict with the principle of non-discrimination set out in Article 9(1)(c)(ii) of the AVMSD, since the cited provision “concerns the commercial communications published rather than the legislation in the first place”.

Article 9(1)(c)(ii) AVMSD states that commercial communications shall not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation. This rule is a clear expression of the principle of non-discrimination, which is one of the fundamental principles of Union law. Any form of discrimination that is based on one of the grounds listed in Article 9(1)(c)(ii) AVMSD is prohibited, unless it is based on an objectively justified criterion and is proportionate (which is not the case here). Moreover, the prohibition of commercial messages which promote or portray such content, and their inclusion in a category together with harmful and erotic content constitutes an attempt to define the representation of diverse gender identities as per se ‘harmful’, and, therefore, to promote de facto discrimination based on sex and sexual orientation and to stigmatise individuals on the basis of their sexual orientation. This is in direct contradiction with the obligation of Member States, under Article 9(1)(c)(ii) AVMSD, to ensure that audiovisual commercial communications provided by media service providers under their jurisdiction do not include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.

Furthermore, according to the Hungarian authorities, the contested provision cannot be considered discriminatory because “where any form of sexuality appears in the advertisement, the protection of minors becomes justified”. The justification to protect minors from ‘any form of sexuality’ seems therefore to refer to erotic content. Nevertheless, the contested rule refers to the “promotion or portrayal of homosexuality, deviation from one’s birth sex and sex change” without any link to sexual or erotic content. This content is defined as harmful ‘per se’. This argument by Hungary is therefore not able to disprove or call into question the discriminatory nature of the provision at issue.

Finally, the arguments made in relation to Article 4 AVMSD and the contested rules under 4. (the Media Law) also apply to the contested rule under 3. (the Advertising Law). As in the case of the Media Law, should the rules under the Advertising Law be considered “more detailed stricter rules in the fields coordinated by the Directive”, under Article 4(1) AVMSD, the limits for regulation and supervision provided for in EU law would still apply. The content of Article 9(1)(c) AVMSD cannot be disregarded on the ground that Article 4(1) AVMSD provides in very general terms that Member States can adopt more detailed or stricter rules. The arguments in this regard are summarized in the previous Section, and the Commission refers as well to the detailed arguments provided in the Letter of formal notice, Section 2.2.

In view of the above, the Commission considers that the contested rule in the Advertising Law (contested rule under 3.) violates Article 4 and Article 9(1)(c)(ii) AVMSD.

*Video-sharing platforms*

The Commission considered in the Letter of formal notice that the contested rule described above under 1. (Section 6/A of the Children Protection Law as modified by the Law) applied erga omnes, including to video-sharing platforms (VSPs). Therefore the Commission concluded that as regards video-sharing platform providers, the contested rule violates Article 28b AVMSD.

Hungary has rejected this claim, observing that “the rules for the provision of VSPs and the rules concerning liability for the content published are not even indirectly affected and are not amended by the Children Protection Legislative Package” and that “the sector-specific provisions concerning video sharing platform services are thus laid down in Sections 15/C to W of the e-Commerce Act rather than in the Children Protection Law”.

The Commission takes note of the arguments provided by Hungary about the more limited scope of the contested rule. The Commission accepts that formally the contested rule under 1. does not directly apply to VSPs; however, as explained above, contested rule under 1. still plays a role in this context as well (see above text accompanying footnote 21).

Furthermore, the Commission points out that Act XXIV of 2020 amending Act CVIII of 2001 on certain issues concerning e-commerce services and services related to the information society applies to VSPs. Its Section 15/D(1) specifies that VSPs shall implement the measures and technological solutions to protect minors from content that could impair their physical, mental, spiritual or moral development. Section 15/F provides that VSPs should put in place age verification and parental control systems.

Hungary has made clear in its reply to the Letter of formal notice that it considers to be harmful to minors the content “portraying or promoting divergence from self-identity corresponding to sex at birth, sex change and homosexuality”. Hungary has stated the need to protect children from this type of content and adopted several amendments to different Laws pursuing this horizontal objective. In light thereof, where VSPs implement the above-mentioned obligations to protect children for the purposes of application of Sections 15/D(1) and 15/F of the Electronic Commerce Law, the VSPs will follow, or at least take into account, the criteria set out in the contested rules, which single out and prohibit content “portraying or promoting divergence from self-identity corresponding to sex at birth, sex change and homosexuality”. Through that behaviour, VSPs would indeed minimize their regulatory compliance risk. That behaviour by the VSPs, even if not expressly required by the Hungarian law, result from the material and logical link between, on the one hand, the contested provisions and, on the other hand, Section 15/D (general obligation on VSPs to protect children from content that could impair their development) and Section 15/F (specific obligation on VSPs to put in place age verification and parental control systems).

Moreover, the new rules in Section 4/D concerning the Roundtable under the Hungarian Electronic Commerce Law also apply to VSPs. This means that the Roundtable may take actions vis-à-vis the service providers on the basis of the contested rule under 2.: for the reasons explained in the Letter of formal notice (pages 29-30), all the powers granted to the Roundtable by the contested rule under 2 are restrictive (see also the considerations set out below in the subsection “*Hungarian Electronic Commerce Law,*” in the section regarding the ECD). According to Article 28b AVSMD, VSPs must protect minors from harmful content in accordance with Article 6(a) AVMSD. Although the contested rule 1 (Section 6/A of the Children Protection Law as modified by the Law) does not directly apply to VSPs, the Roundtable, as a body closely associated to the enforcement of legal provisions for the protection of children, is bound by the Children Protection Act and its objective. It follows that the Roundtable, in its assessment of whether the content would be harmful to minors, will be guided by the Children Protection Law, including its Section

6/A. The link between the powers granted to the Roundtable by the contested rule under 2. and the prohibition laid down in the contested rule under 1. has been illustrated in detail above (see above text accompanying footnote 21). Therefore, the power of the Roundtable to issue such requests contravenes Article 28b AVMSD in that regard.

In light of the foregoing considerations, the contested rule under 2. violates Article 28b AVMSD.