DG GROW
Meeting between Deputy Head of Cabinet Kristian Hedberg and Thomas Myrup Kristensen
(Facebook Managing Director EU Affairs)
Brussels, 8 June 2017

Name of Cabinet Member: HEDBERG Kristian
Name of the Director who has cleared the briefing: Joaquim NUNES DE ALMEIDA; Hubert GAMBS
BASIS request ID: CAB BIENKOWSKA/791
Room, time: 11h
Participants:
Name of main contact person: [redacted]; [redacted]
Telephone number: [redacted]; [redacted]
Directorate/Unit: DG GROW B2; E3

MINI BRIEFING NOTE

Scene setter/Context of the meeting/ Objective of the meeting:

Mr Thomas Myrup Kristensen, Facebook's Managing Director for EU Affairs, requested a meeting to discuss the state of play concerning three legal acts: the draft German Network Enforcement Act, the E-commerce Directive and the Directive on the enforcement of intellectual property rights.

The briefing focuses on the status of the notification procedure of the first legal act, the draft German "*Act improving law enforcement on social networks*", under the Single Market Transparency Directive (EU) No 2015/1535.

The draft Law aims at ensuring that criminal content (such as hate speech, defamation or fake news) published on digital social networks (such as YouTube, Facebook or Twitter) is promptly removed by social network operators. The draft Law was notified on 23 March 2017 and the EC has until 28 June 2017 to express its views on the compatibility or not of the notified draft with EU law, including with the e-Commerce Directive.

This meeting gives us the opportunity to inform Facebook on the status of the notification procedure and to gather information on their position concerning the topics on the agenda.

Overall, Facebook is in favour of the Digital Single Market Strategy: uniform rules mean the company will not have to deal with different laws in each Member State.

KEY messages

- The Commission is aware of the complex balance that has to be stricken between individual rights, effective law enforcement and the need to guarantee the free provision of services when defining measures to avoid the proliferation of criminal offences committed via social networks.

- The Commission is currently assessing the **draft Act** notified by Germany, as the deadline for reaction expires on 28 June 2017.

- **The DSM mid-term review,** adopted on 10 May 2017, stressed where further action is needed, namely on cyber-security, platforms and Big Data.

- **E-Commerce directive**: Boosting cross-border E-Commerce in Europe is one of the main objectives of the DSM Strategy. It has been and continues to be at the heart of our work to achieve a true Digital Single Market.

- Many of the 16 initiatives of the DSM strategy have addressed specific problems related to E-Commerce (e.g. geo-blocking, parcel delivery and contract law). The focus is now on the swift adoption of these initiatives. It has been decided not to reopen the E-Commerce Directive during the mandate of this Commission.

- **Directive on the Enforcement of intellectual property rights – IPRED review:** DG GROW has launched an evaluation of IPRED, assessing the functioning of the Directive and the concrete need for adjustments. In addition, a public consultation has been completed and studies have been launched to provide a deeper evidence base for the review and to assess the functioning of the Directive and the scope of a possible review.

- Depending on the outcome of the evaluation, we will propose measures (by autumn 2017) to modernise the enforcement framework. This work is supported by consultations with stakeholders and an external report.

Questions to the interlocutor?

- How does Facebook see the draft German Network Enforcement Act falling in the scope of the E-commerce and the enforcement of intellectual property rights Directives?

Defensives / Q&A

For each item on the Agenda

Question: Does the EC intend to object to the notified German draft act [redacted]?

Answer: The Commission is still assessing the compatibility of the draft Act notified by Germany with EU law. The deadline for reaction (under the Single Market Transparency Directive (EU) 2015/1535) expires on 28 June 2017.

<u>Background information</u>

Within the framework of the notification procedure laid down by Directive (EU) 2015/1535, the German authorities notified to the Commission on 27 March 2017 a draft "*Act improving law enforcement on social networks*". The draft Law aims at ensuring that criminal content (such as hate speech, defamation or fake news) published on digital social networks is promptly removed by large influential digital social networks operators (such as YouTube, Facebook or Twitter), **within 24h from receiving a complaint**. Social networks shall file quarterly reports on how they dealt with complaints regarding potentially criminal content and may be imposed a fine of up to EUR 5 million in case of non-complying with these obligations. The draft Law thus puts high burden on internet service operators, including on Facebook.

[redacted]

CNECT has informed the German authorities of CNECT's intention to regulate the same matter with a different approach than the one presented in the notified draft, as also other EU Member States intend to regulate the matter.

[redacted] However, VP Ansip is highly interested in initiating a dialogue with Germany (he sent to the LS a draft letter to the German authorities for visa, where he questions the German draft law).

The German State Secretary Mr Billen presented the Draft German law in the *High Level group on Combating Racism, Xenophobia and other forms of intolerance* (chaired by DG JUST) on 31 May 2017. This High Level Group brings together Member States' authorities, civil society organisations and community representatives, relevant EU agencies (the Fundamental Rights Agency), as well as international organisations active in this area (Council of Europe/ECRI, OSCE/ODHIR, UN/OCHCR), as a means to step up cooperation and coordination between relevant actors, maximizing concrete impact on preventing and combating hate crime and hate speech as well as informing on national initiatives. The presentation was merely informative and the Commission did not comment on that.

Evaluation and review of Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED)

Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) is a legislative instrument whose overall aim is the better functioning of the internal market. What it does is to approximate the laws of the Member States in the area of civil enforcement of Intellectual Property Rights (IPR). It contains minimum harmonisation rules on measures and remedies available to right holders in order to enforce their IPRs, meaning that Member States can provide for greater protection if they so choose.

The Digital Single Market Strategy announced that "the Commission will make legislative proposals modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the 'follow the money' approach) as well as its cross-border applicability". DG GROW has launched an evaluation of Directive 2004/48/EC, assessing the functioning of the Directive and the concrete need for adjustments. Main issues for the evaluation seem to be the identification of infringers, cross-border execution of injunctions, the role of intermediaries and the calculation of damages.

E-Commerce Directive

Boosting cross-border e-commerce in Europe is one of the main objectives of the DSM Strategy. Many of the initiatives have aimed at reducing red tape and barriers to traders.

So far, the Commission has adopted positions and legislative instruments on areas related to ecommerce including Geo-blocking, Harmonised contract rules for digital content, Enhanced cooperation between national consumer protection authorities, Secured affordable cross-border delivery services and Simplified VAT declaration procedures.

The fully harmonised set of rules on 'digital contracts' will reduce the differences between national consumer contract laws. Business take-up of e-commerce opportunities also depends on affordable cross-border parcel delivery services and simpler VAT declaration procedures.

CNBC newspaper Article (18 May 2017): Facebook fined $122 million by EU for giving 'misleading information' about its takeover of WhatsApp.

The Commission said that Facebook provided "misleading information" about the acquisition and its decision to approve the takeover in 2014 will not be affected by the fine.

"Today's decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information. And it imposes a proportionate and deterrent fine on Facebook," EU Commissioner Margrethe Vestager said in a statement.

What is the issue?

Facebook bought WhatsApp in 2014 for $19 billion. The Commission's issue centers around the U.S. social networking giant linking Facebook accounts to WhatsApp user identities. In 2014, the Commission said that Facebook told it that there was no possibility to establish "reliable automated matching between Facebook users' accounts and WhatsApp users' accounts."

But in 2016, Facebook released an update to its terms of service that raised the possibility of linking accounts from both platforms.

"By coordinating more with Facebook, we'll be able to do things like track basic metrics about how often people use our services and better fight spam on WhatsApp," the messaging firm said in a blog post at the time.

"And by connecting your phone number with Facebook's systems, Facebook can offer better friend suggestions and show you more relevant ads if you have an account with them."

But the Commission said that contrary to Facebook's statements in 2014 saying it wasn't able to link accounts, the U.S. firm was aware that such a possibility existed.

However, the fine will not impact the EU body's previous decision to approve the acquisition.

Facebook said that to the best of its knowledge, the information it provided was correct. The errors we made in our 2014 filings were not intentional and the Commission has confirmed that they did not impact the outcome of the merger review," a Facebook spokesperson told CNBC by email.

"Today's announcement brings this matter to a close."

How was the fine calculated?

Under European Union rules, a company can be fined up to 1 percent of its aggregated turnover if it intentionally or negligently provides incorrect or misleading information about a merger or acquisition.

The fine is small when taken in the context of Facebook's overall revenue which was $27.6 billion in 2016, and just over $8 billion in the first quarter of 2017 alone.