

JOINT COMMENTS TO THE DIALOGUE ON NOTICE AND TAKE DOWN OF ILLEGAL CONTENT JULY 2010

Introduction

This document is a response to the ongoing discussions organised by DG Home Affairs of the European Commission with regard to notice and takedown of material alleged to be illegal and hosted on the Internet, and to the proposed “draft Recommendations for public-private cooperation to counter dissemination of illegal content within the European Union”.

As a general consideration, the signatories of this document, representing the Internet Industry and civil society, consider that the draft Recommendations, rather than covering “illegal content” as the title suggests, actually focus on what should be done in cases of allegations from various sources (police, hotlines, citizens and “other bodies duly authorised”) that material is illegal (i.e. in breach of the criminal code) or unlawful (i.e. in breach of civil law).

In the draft Recommendations, ISPs, in the broad sense of the term, are the main addressees, but it is unclear if the Commission is proposing a role for access providers or caching providers. As indicated by all industry and NGO representatives at the last meeting on 21 May, and as recognised by the European Commission at that time, this initiative should only address hosting providers.

It is also unclear what the proposed involvement of public authorities would be in this “cooperation”. For the moment, the involvement appears minimal and exclusively restricted to notifications leading to extra-judicial actions – an administrative process without clear legal authority or judicial oversight – being taken by hosting providers.

Key problems identified in the draft Recommendations

The document seeks to extend the current practices regarding how reports of child abuse websites are dealt with to two very unrelated issues – terrorism and racially motivated hate speech. The proposal to create a “catch all” extra-judicial procedure is neither justified nor practical for several reasons:

- a. The lack of a proper analysis of the functioning of the existing frameworks at national level for takedown of child abuse websites and whether such frameworks exist and are effective – regardless of whether this approach would be appropriate in other areas;
- b. The possible negative impact of extra-judicial approaches on subsequent investigation and prosecution of the criminals participating in such illegal activities;
- c. The absence of a clear assessment of the problem that terrorist or hate speech websites present, (e.g.: remaining online for inordinate amounts of time in the European Union) which the Commission would consider to be a justification of extra-judicial action by ISPs;
- d. Practical problems experienced by courts and law enforcement authorities with regard to the interpretation of the existing definitions – the many misuses of “terrorism” legislation in certain EU Member States is well documented and the Council’s latest move away from “terrorism” towards the even less clear concept of “violent radicalization” (<http://www.statewatch.org/news/2010/apr/eu-council-rad-instrument-7984-add1-10.pdf>) – renders this area of law especially unsuitable for the kinds of extra-judicial procedures suggested by the Commission, because of the difficulties associated with accurately differentiating illegal content from legitimate speech;
- e. The expectation that ISPs, for most types of content, would be qualified and willing to make judgments about whether content is in breach of criminal or civil law, when it is neither appropriate for them to do so nor reasonable to expect businesses to have such specialist legal expertise;
- f. The lack of any analysis of existing processes in the EU or globally, in order to learn from experience, particularly with regard to whether there are examples of such approaches, which have successfully balanced enforcement with fundamental rights;
- g. The absence of a comprehensive analysis of current practices in EU Member States and a justification for the assumption that their court systems are unwilling or unable to prioritise child abuse, terrorism and racism/xenophobia, thereby creating the perceived need for extra-judicial actions.

Respect for fundamental rights obligations

The extra-judicial procedure proposed in the draft Recommendations raises severe concerns with respect of its compliance with fundamental rights. This is particularly important at the moment, since the Lisbon Treaty directly incorporates the Charter of

Fundamental Rights and permits accession to the ECHR. The impact assessment presented by the European Commission with regard to the Directive on Child Exploitation makes the following statement with regard to interferences with the right to communication:

“More problematic may be the compliance with the requirement that the interference in this fundamental right must be “prescribed by law”, which implies that a valid legal basis in domestic law must exist. This may not always be present in a system based exclusively on self-regulation, and therefore this measure risks to amount to a non legitimate interference with fundamental rights”.

Other relevant international obligations, such as the International Covenant for Civil and Political Rights (ICCPR), must also be taken into account:

19.2. “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

19.3. “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:”

Least restrictive alternative?

This whole dialogue is based on the assumption that many or all EU Member States will be unable to prioritise child abuse, terrorism or hate speech to the extent that the provision of sufficiently rapid responses by judicial authorities will be impossible.

Furthermore, there is nothing in the draft Recommendations about redress procedures, nor about processes for putting websites back online that have not subsequently been investigated/prosecuted by public authorities. The draft Recommendations lack provisions for any opportunity for an author or publisher who is subject of an allegation to defend their legal right to publish lawful content, as protected by Article 10 ECHR and other European and international legal standards protecting fundamental rights, and also lack any form of effective redress for a party whose rights have been infringed through a false allegation.

As the draft Recommendations appear incompatible with the fundamental rights guaranteed to European citizens, there is additionally a concomitant lack of legal

certainty for Internet hosting providers, as in following its provisions they would risk be subsequently found to have facilitated unlawful action themselves.

Finally, and surprisingly, in the context of “public private cooperation”, there is no obligation on public authorities to take responsibility for the enforcement process and to then investigate and prosecute the individuals behind the sites that are the subject of take down notices. The draft Recommendations place the legal burden and the onus for the most urgent action on private companies, passing the risk from public authorities to private companies. This omission means that the draft Recommendations risk not only infringing the fundamental rights of the accused, but also could seriously compromise the fight against illegal content through the legitimate, established means of law enforcement. Specifically, there is a real danger that enforcement agencies could exploit providers’ terms of service to act against suspected legal infringements outside formal legal structures, undermining transparency, public accountability and legal certainty.

Conclusion

For the practical, legal and administrative reasons listed above, the signatories believe that the fight against child abuse, racism/xenophobia and terrorism, as well as the protection of fundamental rights in Europe, are not best served by the approach proposed by the European Commission. There appears, nevertheless, to be sufficient basis for continuing the dialogue. We therefore propose that the Commission set aside its draft Recommendations and takes time to assess the current situation more fully. This will provide an opportunity to re-organise the dialogue in a way that better serves the development of real cooperation between the public and private sectors, in complete respect for fundamental rights.

	<p>EuroISPA is the world’s largest association of Internet Services Providers (ISPs) representing the interests of more than 1700 ISPs across the EU and the EFTA countries. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet. www.euroispa.org Contact: Andrea D’Incecco, Head of Policy (+32 2 503.22.65/ andrea@euroispa.org)</p>
	<p>European Digital Rights was founded in June 2002. Currently 27 privacy and civil rights organisations have EDRi membership. They are based or have offices in 17 different countries in Europe. Members of European Digital Rights have joined forces to defend civil rights in the information society. www.edri.org. Contact: Joe McNamee , Advocacy Coordinator (+32 2 550 4112) Brussels@edri.org</p>