21 February 2013

cc: Vice-President Viviane Reding
Commissioner Michel Barnier
Mr Werner Stengg (Markt E4)

Dear President Barroso,

European Digital Rights (EDRi) is an association of 32 digital civil rights organisations from 20 European countries.

We greatly appreciate your efforts to support the European Charter of Fundamental Rights, in particular your speech and press release to mark the historic event on 3 May 2010, where the current College of Commissioners became the first in history to swear an oath to uphold the Charter. Your statement on that day made it clear that the Charter is not just a legal text, but a document whose “principles and values” should be upheld.

In this context, we are increasingly concerned about the approach that the European Commission has been taking with regard to “voluntary” measures implemented by Internet companies to address allegedly illegal or simply unwanted material, thereby threatening citizens' fundamental rights.

Under the current legal framework (Directive 2000/31/EC), Internet companies become liable if they fail to act expeditiously once they have “actual knowledge” of the illegality of material hosted on their services. However, the concept of “actual knowledge” is treated very differently in different EU Member States, creating uncertainty for Internet companies and citizens. There is growing evidence that this uncertainty leads to legal content being deleted by companies that feel the need to “play safe” to avoid liability. In brief, it is clear that the shortcomings of the current legal framework lead to restrictions of citizens’ fundamental right to freedom of communication.

This situation is exacerbated by “self-regulatory” projects funded by and/or led by the Commission, apparently without any overarching strategy on the issue, demanding “quicker” take-down of allegedly illegal content, without any empirical evidence of the problems they are aiming to solve.[1] These generally aim to use Internet companies' terms of service to delete content without waiting for, or in lieu of, a court order. This creates a situation where the relative predictability of the rule of law is replaced with ad hoc implementation of the over-broad terms of service of participating

1 The Commission's response to Parliamentary Question E-8898/2011 is an example of this lack of evidence.

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companies.

Over the past 12 months, we have seen three projects being run by three different Directorates General on the subject of “notice and takedown” and “notice and action”, with no clear common theme and no visible cooperation. Two of these were based on “self-regulation” and started without a clear evidence base and one is an internal European Commission project to gather evidence on which to base future policy.

The two “self-regulatory” schemes were the “Clean IT” project and the “CEO Coalition to make the Internet a better place for kids”. The CleanIT project, funded by the European Commission's DG HOME, had a work stream on voluntary “notice and takedown” of allegedly terrorist material. The incoherence of this project led, unfortunately, to a huge amount of negative publicity directed at the Commission. The “CEO Coalition on making the Internet a better place for kids,” is financed by DG CONNECT, has been running in parallel to CleanIT, involves many of the same companies, is also working on “notice and takedown,” but there is no perceptible policy coordination at Commission level between the two projects.

This situation is quite clearly unacceptable – an inadequate legal framework that restricts citizens' fundamental right to freedom of communication is being exacerbated by ad hoc, uncoordinated projects funded by the European Commission before its own work on notice and take-down is completed. Furthermore, any voluntary restrictions that would be agreed in such forums would, by definition, not be foreseen by law and would therefore constitute a breach of the principles and values of the European Charter, Article 52.1 in particular. Additionally, the whole approach of these ad hoc projects appears also to be in breach of Article 17 of the 2003 Interinstitutional Agreement.

The third project that we are aware of is the DG MARKT project on “notice and action”. Whereas the “CleanIT” and “CEO Coalition” projects had no evidence base, DG MARKT diligently undertook long-term research on the issues, including numerous bilateral meetings, expert group meetings and an open consultation which, we believe, generated a record number of responses from individual European citizens. While we cannot pre-judge the outcome of DG MARKT's work, we strongly support the inclusive, diligent and thorough approach that was followed and hope that this will be the model for future policy development. We, therefore, urge you to move the Commission towards a rule-of-law based approach to this issue.

We believe that this problem has been left unresolved for too long. We ask you to help ensure that the evidence collected by DG MARKT over the last year can be used to provide European citizens with an approach which is predictable, effectively addressing illegal online activity while ensuring protection of citizens’ fundamental rights and respecting the rule of law.

Yours sincerely,

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Executive Director

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