



Brussels, 29 November 2016

Complaint ref. 292/2016/PMC – EDRi's comments on the reply by the EU Commission

Dear Ms O'Reilly,

Thank you for your letter of 27 October 2016. Please find below my observations concerning EDRi's complaint ref. 292/2016/PMC.

1. Internal notes vs. overriding public interest

The Commission recalls that the two documents - (i) the note of 10 June 2015 and (ii) the concept note - constitute the Commission's internal reflections in order to prepare a meeting of the "EU Internet Forum" with IT companies. However, some elements of the preparatory documents will have logically been shared with external stakeholders, namely said IT companies.

As EDRi argued in its confirmatory request of 14 August 2015, citizens' communications are affected by the measures discussed in the EU Internet Forum which means that the initiatives have a broader impact on human rights and on the fundamental right to freedom of expression in particular. EDRi is of the view that there is an overriding public interest and thus sufficient grounds to request the full disclosure of the two documents.

2. Alleged circumvention of counter-terrorism measures

Secondly, the Commission claims that revealing the documents of the EU Internet Forum would undermine the effectiveness of tackling terrorism. Making documents and details of the initiatives public "would allow them [terrorist groups] to circumvent counter-terrorism measures"¹.

The fact that the Commission uses the term "circumvention" in the context of reducing online accessibility of undefined "terrorist material", demonstrates that the restriction of communications was the object of discussions with industry representatives.

¹ EU Commission comments on complaint ref. 292/2016/PMC of 7 October 2016

The blocking or filtering of online communications was considered highly problematic by former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue:

“States’ use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression [...]. Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively”.²

Indeed, one outcome of the EU Internet Forum was a non-binding Code of Conduct for industry, “taking the lead” in deleting with unproven “hate speech”, which is not assessed on the basis of law but on the basis of industry “rules and community guidelines and *where necessary* national laws” (emphasis added)³. The measures are not established in – or even primarily governed by – law, despite the fact that Article 52 of the EU Charter of Fundamental Rights requires a legal basis for any restriction on rights and freedoms.

In short, as the Commission identified the circumvention as a risk to the restriction on the freedom of communication of the initiative, there is a restriction on the freedom of expression requiring a legal basis. EDRi is thus of the opinion that the EU Commission is obliged to make at least the underlying legal basis or reasoning public. The notion that a predictable legal or procedural basis makes content restrictions impossible is quite obviously absurd.

3. Use of the public security exception – real vs. hypothetical

Lastly, the EU Commission claims that wider public release of the two documents would undermine public security in a foreseeable and not purely hypothetical manner. To prove the real nature of the threat, the Commission quotes two press articles which report on threats to CEOs of US-based IT companies. In the absence of a confirmation by law enforcement, EDRi is of the view that press reports and claims by industry representatives in the media are insufficient proof of the reality of the threat.

The picture of Commissioner Jourová with four individuals representing the four companies on the Google’s website⁴ on the day the adoption of the Code of Conduct also suggests that there was no perception of a security threat.

² UN Special Rapporteur report A/HRC/17/27 of 16 May 2011, p.9

http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

³ EU Code of Conduct on countering illegal hate speech online http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf

⁴ Google press release https://blog.google/topics/google-europe/our-commitment-to-fighting-illegal-hate_39/



EDRi also wishes to point out that the EU Commission already published information about the participants of the EU Internet Forum on 16 March 2015⁵, on 30 September 2015⁶ and in its press release of 3 December 2016⁷. The IT companies participating in the counter-terrorism discussions were thus publicly known before the Commission's refusal to grant access to the two documents in its response to a confirmatory application⁸.

Regardless of how broadly the security exception can be interpreted, it is clearly implausible to argue that revealing additional details regarding the scope of the initiative would lead to new threat for the industry representatives.

For all of the above reasons, EDRi considers that the EU Commission is demonstrably misusing the wide discretion it has as regards the exception for public security as per Article 4.1 (a) of Regulation 1049/2001 which should not become a *carte blanche* for restrictions on fundamental rights and for the systematic non-disclosure of documents.

Please note that we remain at your disposal for any further questions you might have.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "K. Fiedler", is positioned above the typed name.

Kirsten Fiedler
Managing Director

5 Response to GESTDEM 2014/5135

https://www.asktheeu.org/en/request/ministerial_dinner_with_it_compa#incoming-6427

6 Response to GESTDEM 2015/4066

https://www.asktheeu.org/en/request/forum_with_the_internet_service#incoming-8009

7 Press release IP/15/6243 http://europa.eu/rapid/press-release_IP-15-6243_en.htm

8 EU Commission response to EDRi's confirmatory application GESTDEM 2015/3658

<https://www.asktheeu.org/en/request/1929/response/8255/attach/4/FIEDLER%202015%203658%20EN%20signed.pdf>