



2 November, 2012

Dear Commissioner Malmström,

We would like to draw your attention to a legal contradiction in relation to website blocking that needs to be resolved in order to bring Member States into line with the Charter of Fundamental Rights of the European Union.

As you know, Member States may decide to "block" access to illegal child abuse websites according to the Directive on combating the sexual abuse and sexual exploitation of children and child pornography.¹ While we obviously support the fight against these crimes, the European Union's legal system is clear that criminal activity must be addressed in a framework that respects the rule of law and fundamental rights. This principle is reflected clearly in Article 52 of the Charter of Fundamental Rights of the European Union, which states in this regard:

"1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. [...]"

This principle is also clear in the European Convention on Human Rights, to which the Union is currently negotiating accession. Article 10(2), for example, requires restrictions to be "prescribed by law".

During the drafting of the Directive, the Commission evaluated the impact of different policy options and came to the following conclusion:

"[...] encouragement of self regulation by ISPs to block access to Internet pages containing child pornography *would involve interference in the right to freedom of expression* in Article 10 ECHR (Article 11 of the EU Charter). In accordance with the ECHR, again, as interpreted by the European Court of Human Rights in Strasbourg, to respect fundamental rights *such interference needs to be prescribed by law* and be necessary in a democratic society for important interests, such as the prevention of crime."² (emphasis added)

In that analysis, your services clearly and correctly acknowledge that such blocking would interfere with a fundamental right and would therefore require a basis in law. We agree completely with this assessment.

However, this understanding was lost during the legislative procedure, leading to the adoption of recital 47 of the Directive, which contains the following comment about such blocking mechanisms:

"In that context, this Directive is without prejudice to voluntary action taken by the

1 Directive 2011/92/EU, Official Journal L 335 , 17/12/2011 P. 0001 - 0014

2 SEC(2009)355, 25/03/2009, p. 30

Internet industry to prevent the misuse of its services or to any support for such action by Member States."

The adoption of the new Directive clearly places the issue of blocking of such material within the scope of implementation of the Charter while, although not legally binding, the Commission's impact assessment of the same Directive makes it clear that both recital 47 and the related activities of individual Member States (Denmark, Sweden and the UK, for example) are contrary to the Charter.

We would therefore request that the Commission take action to bring current activities (such as "voluntary" blocking in Sweden, Denmark and elsewhere) in Europe into line with the Charter. Our government structure is based on the premise that transparent democratic decision-making leads to the most efficient, effective and proportionate measures to deal with serious crime – child protection is too important to be left to ad hoc, intransparent and unpredictable arrangements for which no evidence of usefulness has ever been produced.

We remain at your disposal to work constructively with you on this and other issues of mutual concern.

Yours sincerely,

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Executive Director