Open Letter to Commissioner Malmström
and Commission Vice-Presidents Reding and Kroes

Dear Commissioners,

European Digital Rights is an association of 27 privacy and digital rights organisations in 17 European countries.

We would like to congratulate you on your nominations and approval as members of the new Commission, led by President Barroso.

Our association warmly welcomes the statements made during your hearings on the need to place the citizen at the centre of decision-making, to ensure a "zero-tolerance policy as regards violations of the Charter" and to ensure that policy-making is "evidence-based". In this context, Commissioner Reding's comments on the Data Retention Directive were particularly welcome.

If the new Commission is able to maintain its independence and deliver citizen-centred and evidence-based policy, this will not alone serve to revitalise civil rights in Europe but it will serve to re-establish the EU as a leader for democracy and civil rights in the world.

Testing the new approach

One of the first decisions that will be taken by the new Commission will be a direct test of whether such an approach will survive political realities. That decision will be the re-launch of the "Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA". EDRi strongly supports the aims of that legislation and hopes that the new instrument will be an effective tool in fighting child exploitation. We do, however, have serious concerns about the draft which which was published last year (prior to being withdrawn due to the entry into force of the Lisbon Treaty).

The original draft of that revised Framework Decision (COM(2009)135) made a proposal for the mandatory blocking of websites deemed to contain illegal images of child abuse ("child pornography"). That measure, which may not be in the best interests of the abused children is, as proven by the remarkably poor accompanying "impact assessment" (SEC(2009)355), an example of legislation proposed without evidence and without due regard for human rights. Unfortunately, as a measure which superficially sounds like a positive move, it is also an attractive option politically, which creates the temptation to legislate based on impulse rather than on evidence, legality and effectiveness.

The proposal is flawed on the basis of law, flawed on the basis of possible effectiveness, flawed on the basis of unintended consequences for the fight against online child abuse and flawed on the basis of inevitable damage for freedom of communication and privacy in the online world.

Elements of an effective and proportionate strategy

In order to deal with the issue of websites portraying child abuse in an effective way, the following issues must be analysed and addressed based on the evidence available:

- The nature of the problem being tackled
- The legality of the measure being proposed
- The scope, scale and nature of possible unintended consequences
- The availability of less intrusive measures

The nature of the problem being tackled

As repeatedly and consistently shown by figures produced by EU hotlines[1], the websites that are targeted by blocking measures are not in some distant "rogue states" that the EU has no influence over – they are hosted on the territories of our major trading partners.

What is needed is comprehensive international law enforcement cooperation – the last thing that is needed is a policy which does nothing to address the actual problem but reduces the political pressure for effective action. Blocking leaves the material online, leaves criminals free and unprosecuted and victims unidentified and unprotected. As a society, we cannot simply accept that the European Union is unable to export its best practice on hotlines, investigation and "notice and takedown" of sites containing material that is universally condemned.

The legality of the measure being proposed

The recent research undertaken on behalf of the Organisation for Security and Cooperation in Europe on Freedom of the Internet in Turkey[2] evaluates the legality of Internet blocking in that country. The report analyses some issues which are particular to that country, but its assessment regarding the core issues of (in)compatibility of Internet blocking with the European Convention on Human Rights would also hold true for every country that is bound that instrument. That analysis leads to the same conclusions as an independent study[3] prepared in 2009 by four leading cybercrime experts on "Internet blocking – balancing cybercrime responses in democratic societies". That research also raised a variety of serious practical and legal questions about the issue of blocking.

Even if one looks narrowly just at the central criteria used by the European Court of Human Rights, one can see the fundamental legal problems of Internet blocking:

- **Suitability**. This criterion is not met as all current blocking technologies are comparatively easy to circumvent.
- **Necessity**. Based on the "impact assessment" accompanying the original proposal, the actual purpose for the blocking measure is unclear. We can guess that its purpose is to address:
  - accidental access, which is an invalid justification as this rarely happens
  - deliberate access, which is an invalid justification as blocking measures are easy to circumvent

1 See http://www.iwf.org.uk/media/news.archive-2007.196.htm for example.
2 http://www.osce.org/documents/rfm/2010/01/42294_en.pdf
3 Executive summary: http://www.aconite.com/sites/default/files/Internet_Blocking_and_Democracy_Exec_Summary.pdf
Full report: http://www.aconite.com/sites/default/files/Internet_blocking_and_Democracy.pdf

- disruption of commercial sites, which is an invalid justification as other solutions are proving more effective (see information on the “financial coalition” below)

– **Proportionality**. This criterion is not met due to overblocking (where innocent sites are blocked) and underblocking (where illegal material is not blocked). Proportionality is also undermined by the inevitability of “mission creep” (the blocking of more and more types of content)

The scope and nature of possible unintended consequences

Currently, all but one EU country that implements blocking does so using “DNS blocking”. This technology is cheap and easy to circumvent. As blocking is a political measure used to create the appearance of action, while no effective measures are really being taken, the ineffectiveness of the technology has never been a particular concern for its political supporters.

However, as “mission creep” moves blocking into other areas, such as gambling (as currently either in force or planned in Italy, Belgium, Denmark, Poland and France), effectiveness will become more significant – national gambling monopolies will demand blocking that actually works rather than blocking that can be used for public relations purposes. As a result, it is easy to envisage more invasive technologies, such as BT's Cleanfeed, (currently deployed in the UK) and, ultimately, “deep packet inspection” being demanded and mandated.

With blocking already creeping into other policy areas, from the protection of national gambling monopolies in the above-mentioned countries to IPR infringements (based on the initial ruling in the Scarlet/Sabam case in Belgium and envisioned by the French HADOPI law), the EU's credibility in condemning restrictions to communication freedom in Iran, China and elsewhere will be eroded to the point of simple farce. Worse still, the work done to develop ever more effective blocking measures will serve to support imposition of these restrictions in such countries. In February 2010, the European Parliament adopted a resolution criticising companies for “providing the Iranian authorities with the necessary censorship and surveillance technologies”. In this context, it would be very unfortunate if the Commission were now to make a proposal in favour of Internet blocking which would have the unintended consequence of increasing the market for such technologies.

Indeed, the European Commission's credibility with regard to human rights is already being put under pressure by Internet blocking. While the EU will shortly accede to the European Convention on Human Rights, which provides that freedom of communication “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law”, the European Commission currently funds the CIRCAMP project, which supports extra-judicial Internet blocking via industry “self-regulation” in several EU Member States. To quote the Commission's own impact assessment “such measures must indeed be subject to law, or they are illegal”.

The availability of less intrusive measures

A bad policy should not be implemented simply because nobody can think of anything better to do. However, there are some obvious steps that could be taken. We have had an unending list of International Treaties from the International Labour Organisation, the United Nations, the Council of Europe and others over the last twenty years on the issue of child abuse images. What is needed is focussed, evidence-based actions that deal with the crime as a crime and not as a nuisance that can be somehow “switched off”. The following points should be considered in this regard:

- The EU's system of hotlines and “notice and takedown”, based on the safe harbour protections for Internet access and hosting providers (Directive 2000/31/EC) is an effective measure that has been in place for most of the history of the world wide web. The country identified as hosting most of the illegal websites is the United States – it seems incomprehensible that the USA proposed “notice and takedown” for websites infringing intellectual property within the context of the ACTA negotiations, yet the EU is unable to persuade the USA to implement such a policy as regards child abuse websites that are, in effect, crime scenes.
- Secondly, the time has come to fully implement the UN Convention on the Rights of the Child. This calls for “*all* appropriate national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials.” Commissioner Frattini's call on Russia to take action against sites hosted in that country is a rare, laudable and, above all, successful example of the UN Convention's obligations being respected. Other examples are very hard, if not impossible, to find.
- The delays in setting up of an effective “EU Financial Coalition against Child Pornography” are entirely unacceptable. The US model already exists, is already effective, does not use public funds and is already successfully leading to prosecutions. Why has it taken over two years of discussions and one year of funding by EU taxpayers to produce fewer results, less focus and more costs in the EU – despite the fact that many of the same companies are involved? We ask Commissioner Malmström to become personally involved to ensure that this initiative narrow its focus to that of the US coalition and start operations without any further needless delay. The tools are available to ensure that no EU citizen can feel secure when paying for child abuse images online – it is time to put them in place. Finally, we wish to stress that industry “self-regulation” should never be used in a way which circumvents legal protections, democratic decision-making or places private business priorities ahead of those established by democratically-elected governments.[4]

Conclusion

We remain hopeful that the undertakings made during the hearings in the European Parliament will be effectively implemented and that new Commission will make an evidence-based proposal on this issue. The first test is a politically difficult one – we hope that it will be passed with success.

EDRi remains at your disposal for any support that we can give you in achieving your goals.

Thank you for your consideration of our views.

Yours sincerely,
Andreas Krisch

EDRi President

4 http://www.guardian.co.uk/business/2008/nov/09/child-porn-money-trials