Dear Vice-President Kroes,

European Digital Rights (EDRi) welcomes your efforts to develop a strong framework for protecting children in the digital environment. Most particularly, we feel that you have not received credit for the efforts to create a strong evidence base for the development of child protection policy. As a result of these efforts, the EUKidsOnline project has set a new global benchmark for thorough research in this policy area.

Having produced the comprehensive research that is necessary for the development of evidence-based policy, we are, however, somewhat puzzled by the fact that this extremely relevant and valuable research is not being extensively referenced in the European Commission's policy documents. Indeed, even though the research was presented to the “CEO Coalition,” scarcely any of the work of that group (which represents one of the main streams of work facilitated by the Commission in this policy area) targets specific problems identified by EUKidsOnline.

Similarly, it is disappointing that, while the EUKidsOnline project looked out into society to learn of the experiences of European children on the Internet, there is very little internal analysis within the Commission as to the impact of the its own Internet initiatives. As just one example, the methodology for statistical reporting by hotlines funded by the Commission not only varies widely between countries, it even varies on a year-to-year basis within those hotlines. We welcome the focus on this issue in the Safer Internet Work Programme 2011 but are concerned that there is too much policy being created now before the necessary information has been collected.

This leads us to have a variety of serious concerns regarding the CEO Coalition. On the most basic level, we have been unable to get a clear response from your services as to the likely relationship of the Commission with any outcomes/agreements that the industry group could produce. Does the Commission envisage verifying or confirming the legality of any outcomes? Does it envisage publicly endorsing any outcomes?

A clear position from the European Commission is crucial – it needs to take a position as to whether or not any of the envisaged measures represent restrictions on fundamental rights (based on European Court of Justice (ECJ) and European Court of Human Rights (ECHR) case law). The Commission needs to be clear as to if and why any such restrictions would be in compliance with the letter and spirit of the Charter. The current College was the first to take personal oaths to...
defend the Charter and the wording of that oath was well drafted – the oath is not just to respect the Treaties and the Charter but to uphold its "principles and values". We trust that this will be reflected in clarity regarding the relationship of the Commission with the outcome of the CEO Coalition and clarity regarding the Commission’s legal analysis of any ensuing voluntary measures implemented by industry.

The broad methodology of the CEO Coalition is similar to the one that gave us the Safer Social Networking Principles. The recent press furore in the United Kingdom related to “Habbo Hotel” shows not only the limits of such industry-led approaches but also how delicate the position of the Commission is, as facilitator of such initiatives. The scandal surrounding “Habbo Hotel” shows how important it is to be clear about the relationship of the Commission to industry-led measures.

Particularly bearing in mind this recent experience, we were surprised and very disappointed that our repeated questions to the Commission about its planned/possible relationship with any outcomes of the project not only failed to be answered at the recent CEO Coalition meeting, but they were also not even mentioned in the public report of the meeting. This was all the more disappointing because we contacted the Commission on the day after the meeting asking for our unanswered questions to be included in the meeting summary.

We are also somewhat surprised at the lack of attention given to ensuring the credibility of the CEO Coalition. For such an industry-led project to be successful, as well as for the Commission’s own credibility, the outcome must be above suspicion of anti-competitive machinations or vested interests. However, the way in which the working groups have been put together raises serious questions in this regard. In particular, there is a clear risk that commercial interests of certain leading companies may have, or may be perceived to have, undue influence on certain working groups.

Without wishing to impute any ill intent to the company, the position of Facebook as the leader of the working group on age-appropriate privacy settings will seem questionable at best to the general public, who are unlikely to perceive Facebook as being in the vanguard of those who seek to protect and enhance people's privacy online. Similarly, Microsoft is responsible for the working group on "effective takedown of illegal material" (which has now expanded to cover prevention as well as removal of illegal material). Microsoft recently hit the headlines as the company which sent more takedown notices for copyright infringements than any other company on the planet.

A key part of Microsoft’s work as leader in the takedown working group is the promotion of widespread upload filtering using the PhotoDNA software that it makes available free of charge for this purpose. Despite the fact that there is no agreed Commission policy on upload filtering in general (oblique references to “prevention” in certain documents notwithstanding), it is being actively supported by your services in this dialogue. We have serious legal and practical concerns about the support being offered by the Commission for this policy.

Regardless of proportionality and necessity, which have not been addressed in the Coalition discussions, the Scarlet/Sabam and Scarlet/Netlog cases in the European Court of Justice clearly indicate that such upload filtering would restrict fundamental rights. It is far from obvious to us how the implementation of such measures with no legal basis, but with strong support from the Commission, would be in line with either the letter or the spirit of the Charter - Article 52 in particular.
From a practical perspective, there has been no attempt at all to produce comprehensive analysis of the experience of the use of PhotoDNA in the United States, where it has been used for over two years, nor by Facebook in Europe, which has been using the software for one year. This is completely incomprehensible to us – there are limited resources available, both in the public and private sectors, for child protection measures, so diligence is essential in directing the resources that do exist in the right way.

Remarkably,

– we have no independent testing of reliability of the software when it is used for the comparatively low number of images filtered in the United States;
– there are no plans for independent testing for the expected use of the software to search for large numbers of known images, as envisaged by some in the Coalition.

This means that we have no independent verification that the software is effective both at avoiding false negatives (letting material slip through, a particular issue when there are few samples to hand) and false positives – a concern that it will incorrectly flag irrelevant material, in particular when it is trying to detect a great many images in parallel.

Additionally,

– we have no assessment of the potential for abuse of the software (for example, it appears possible to abuse services that use photoDNA in order to check if a particular image is known to the police or not);
– we have no assessment or guidance regarding the retention of log files related to suspected upload of illegal material;
– we have no data regarding the number of investigations that are launched following the blocking of images in the United States (we believe that investigations happen in fewer than one in five cases) or in Europe and;
– since there is no clear understanding of the usefulness of the information about uploads of illegal material to the authorities, the potential impact in Europe cannot even be guessed at.

The Commission’s internal processes for agreeing policy and the Union's legislative procedures have a specific value. They are the checks and balances that help to ensure that ideas are refined and improved and that policies are as effective as possible in the interests of European citizens. There are few policy areas which are more deserving of such thorough analysis than the protection of children, yet this is one of the few areas where policy frequently does not receive such scrutiny.

We are very worried that this and other policies being generated by the CEO Coalition are not subject to rigorous analysis and risk implementing policies which restrict fundamental rights in a way which is in breach of both the Charter and the Convention. Even before this is implemented in a widespread way, even before any thorough assessment has been done, the Commission is already offering funding to develop similar upload filter software for video content.

You have done some groundbreaking work on the “no disconnect” strategy which, again, you...
deserve far more credit for than you have so far received. The legacy of this valuable work could easily be undone by pushing the rollout – outside the rule of law – of upload filters whose effectiveness, legality and proportionality have not been tested.

The web blocking by mobile operators, negotiated by the Commission in a similar context, has led to blocking of civil society websites\(^6\), privacy-enhancing technologies\(^7\) and various random innocent websites\(^8\) and was ultimately rejected by the EU as a mandatory measure when finally subjected to a democratic decision-making process. Your political legacy deserves to be the protection of children and the defence of open and democratic networks. It should not be a series of untested measures which ultimately fail to protect children. Your legacy deserves not to be measures used to cloak or justify restrictions on the open and democratic Internet.

We would welcome your reassurances that such policies will not be accepted by the European Commission within the context of the CEO Coalition without a full analysis of both legality and respect for fundamental rights of European citizens.

We remain a constructive partner for your work in this important policy area.

Yours sincerely,

Joe McNamee
Executive Director