Re: A coherent and rights-based approach to dealing with illegal content

Dear Commissioner Gabriel,

European Digital Rights (EDRi)[1] is an association of 35 digital civil rights organisations working nationally and internationally to defend fundamental rights in the digital environment.

We are writing in response to the recent European Commission Communication on "Tackling Illegal Content Online"[2]. While we welcome certain positive elements in the Communication, we feel strongly that, as you pointed out in your Nomination Hearing[3], the European Union currently lacks a more structured approach to dealing with illegal content online that would achieve your aim "to promote a holistic approach – with Europe's citizens at its very heart". EDRi firmly believes a broader perspective is necessary to overcome decades of structural failures in this area, both to protect the fundamental rights of citizens and to better achieve wider public policy goals.

As the Communication acknowledges, a "harmonised and coherent approach to removing illegal content does not exist at present in the EU". Twenty years after the internet started becoming part of the fabric of our society, this is an unacceptable failure not just in the EU but globally. To overcome this, we need to build a clear and agreed understanding of the legal and practical framework within which policies can be developed. This will not alone serve to produce better outcomes in the European Union, but will also serve as a beacon for other parts of the world struggling with similar challenges.

We propose that there should be at least three workstreams for such a focused effort to create a harmonised and coherent approach to illegal content online. These workstreams would develop an understanding of the fundamental rights framework in this complex policy area, establish a structure for learning from the wealth of experience of the past twenty years and would establish a clear methodology for developing fundamental rights-friendly and effective approaches in the future. As was done in DG CONNECT's exemplary consultation in 2012-2014, this work could be undertaken in consultation between the Commission and small groups of representative stakeholders, including civil society organisations.

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1   https://edri.org
2   https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms
3   https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_ep_hearings/2017-ep-hearings-reply-gabriel_en.pdf

1. Fundamental rights framework

We strongly welcome your undertaking "to defend freedom of expression, freedom of information and media pluralism".[4] This policy area presents a particular set of challenges in this regard that need careful assessment. Any regime for tackling illegal content on the internet has to be carefully calibrated to ensure respect for the fundamental rights on which our society and our democracy are based. This means, in particular, robust protection for due process and safeguards against removal of legal content.

Initiatives in this area straddle the dividing line between public and private law. As a result, rights and obligations of individuals, businesses and governments become less clear, leading to real risks that fundamental rights safeguards will be undermined. It is not acceptable for governments to encourage or coerce internet intermediaries to take measures "voluntarily" that would not be permitted by international law or national constitutions, if they were provided for by law.

We need to ensure that measures against illegal activities do not undermine the fundamental rights on which our society is built. Any government or EU action fighting illegal content online – even if the outcomes are nominally voluntary – should respect Article 52.1 of the Charter of Fundamental Rights of the European Union. This workstream could valuably build on the work of the Institute for Information Law of the University of Amsterdam on the role of internet intermediaries.[5]

> The first deliverable would be clear guidelines on government and European Commission compliance with the requirements of Article 52.1 of the Charter when they design, promote or participate in "voluntary" or mandatory measures that may restrict fundamental rights.

2. Learning from experience

The European Union and Member States have a vast wealth of experience of various voluntary and non-voluntary measures to deal with illegal content online. This ranges from criminal content, such as child abuse material, to copyright infringements, where the content is not illegal *per se*.

- What was successful?
- How is or was success defined?

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4   https://ec.europa.eu/commission/commissioners/sites/cwt/files/commissioner_ep_hearings/2017-ep-hearings-reply-gabriel_en.pdf
5   https://www.ivir.nl/publicaties/download/1796

- What are the common characteristics of projects that were successful?
- What are the common characteristics of projects that failed?

The lack of analysis of this experience means that the entire framework for dealing with different types of illegal content is invented each time that a Member State or the Commission takes the initiative to address a particular problem. This wastes the experience, both good and bad, and is one of the main contributors to the fact that neither the EU nor its Member States have a harmonised and coherent approach to dealing with illegal content online.

> The second deliverable would be a neutral assessment of the experience of the EU and Member States, with regard to initiatives taken in relation to a wide range of illegal online content, covering the full range of impacts including both the fundamental rights and public policy results of the measures that have been attempted. This could build on methodologies developed under the first deliverable.

3. Establishing effective and predictable frameworks for addressing illegal content

On the basis of the first two deliverables, it should be possible to develop a sophisticated methodology for addressing different types of illegal content.

We note that the Commission's approach so far has been overwhelmingly aimed at "removing" as much content as possible without, in our view, sufficient regard for the fact that that content might be lawful. Little attention has been given to addressing the root causes underlying the illegal behaviour at issue, nor flanking measures that citizens would expect from national authorities. This is particularly telling in relation to terrorist content, where the European Commission has acknowledged that Europol's Internet Referral Unit "does not keep any statistics of how many of the referrals to Member States led to the opening of an investigation".[6] In our view, this is symptomatic of the structural issues that need to be addressed by the Commission in its efforts to address illegal behaviour.

A diligent, results- and rights-based approach to tackling illegal content online will establish a methodology[6] that could include issues such as:

- How are the necessity, proportionality and predictability of the measures being guaranteed?

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6 Answer to Parliamentary question 1772/2017: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-001772&language=EN

- What specific actions are expected from each stakeholder?
- What are the risks for citizens, providers and governments and how are they being mitigated, including risks for respect for international law standards such as proportionality, including whether the measures adopted are the least restrictive alternative?
- What, in detail, are the key performance indicators (going beyond simple response times and content removal rates)?
- What are the review, redress and oversight mechanisms and in what languages are they available?
- What are the transparency mechanisms for internet services?
- What are the transparency mechanisms for states to show that they are playing their part?
- What contingencies are in place to allow the project to be adapted or abandoned?

> The third deliverable would be an effective, flexible methodology for tackling different types and areas of illegal content that would ensure a diligent approach to fundamental rights, problem identification, review processes and contingencies.

EDRi remains fully committed to helping the European Commission move beyond the problem it identified with the lack of a harmonised and coherent approach to dealing with illegal content online. We hope that the excellent work of the European Commission from 2012 to 2014 can be restarted, in order to produce policy that will protect fundamental rights and comprehensively achieve important public policy objectives.

Kind regards,

Joe McNamee
Executive Director
European Digital Rights

cc
First Vice-President Commissioner Frans Timmermans
High Representative Federica Mogherini
Vice-President Andrus Ansip
Commissioner Dimitris Avramopoulos
Commissioner Věra Jourová
Commissioner Julian King