28-10-2020

How-to: Fundamental rights-compliant removal orders in the Terrorist Content Online Regulation

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European Digital Rights is an association representing 44 human rights organisations from across Europe that defend rights and freedoms in the digital environment.

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This briefing intends to contribute to the current negotiations on the proposal for a Regulation on preventing the dissemination of terrorist content online (TCO) between the European Parliament and the Council of the European Union.

In this brief analysis, we make recommendations that European legislators should consider in order to protect the fundamental rights and freedoms of users when designing the future mechanism of removal order (Article 4, draft legislation) and all related provisions by:

► ensuring that **competent authorities are courts or independent administrative authorities** and

► ensuring that **the TCO introduces a rigorous, rights-based judicial cooperation mechanism for cross-border removal orders.**

1. TCO orders should be made by an independent competent authority

Given the risks of collateral damage for freedom of expression, political censorship and abuse of power in any counter-terrorism legislation, we advocate for the requirement that each competent authority under this Regulation should be an independent judicial or administrative authority.

The European Commission's 2018 proposal left to Member States the discretion to appoint their own national competent authorities to issue orders to remove terrorist content or disable access to it.[1] No criteria were set for the appointment of such competent authorities, meaning any national authority would be allowed to summon internet companies to delete any piece of content that they consider "terrorist". The Council of the EU supported that approach.

The European Parliament's position adopted in April 2019 required the competent authority to be a judicial or functionally independent administrative authority and added the requirement that only one single competent authority could be designated by Member State in order to facilitate and secure the communication with hosting service providers.[2] We also support this requirement.

1 European Commission, COM(2018) 640 final, available at: https://eur-lex.europa.eu/resource.html?uri=cellar:dc0b5b0f-b65f-11e8-99ee-01aa75ed71a1.0001.02/DOC_1&format=PDF

2 European Parliament, P8_TA(2019)0421, available at: https://www.europarl.europa.eu/doceo/document/TA-8-2019-0421_EN.pdf

(1) ***Why it matters***

Content removal orders are a serious interference with the fundamental right to freedom of expression. The definition of terrorist content in the TCO Regulation is overly broad and as such, can readily affect material disseminated for educational, journalistic or research purposes or fail to take proper account of the context of the expression, e.g. irony or parody.[3] Administrative removal orders without independent ex-ante scrutiny creates an inherent risk of disproportionate removal orders that will fail the proportionality test required by Article 52(1) of the Charter. This is consistent with the jurisprudence of the Court of Justice of the European Union in relation to data protection rights (see Digital Rights Ireland and Tele2 Sverige AB):[4] there is no reason in principle why the same standards should not be applied to the protection of freedom of expression.

This was also confirmed in the recent decision of the French Constitutional Council regarding the Avia law on hate speech and terrorist content online. In declaring the provisions dealing with terrorist content unconstitutional, **the French Constitutional Council noted, first, the far-reaching power of the administration to decide the legality of content, and secondly, the insufficient time available (one-hour) for the online service provider to challenge an order from the administration and seeking a prior decision from a judge**. Combined with severe sanctions for failing to comply with removal orders, the Constitutional Council ruled that these provisions were neither necessary nor proportionate and would have too negative an impact on freedom of expression.[5]

The same balancing of fundamental rights would be applied by the constitutional courts of other Member States and by the Court of Justice of the European Union (CJEU), should it be called upon to rule on the validity of the future TCO Regulation. The CJEU would assess its compliance with Article 52(1) of the Charter of Fundamental Rights, according to which any limitation on a fundamental right or freedom recognised by the Charter must be 1) provided by law, 2) respect the essence of the right, 3) and must pass the proportionality test (i.e. it must be necessary and genuinely meet objectives of general interest). In other words, the TCO Regulation will immediately open itself to court challenge if it fails to include sufficient procedural safeguards for the protection of the right to freedom of expression.

We further note that designated 'competent' authorities can vary across Member States (e.g. law enforcement authorities, prosecutors or courts). In our view, the TCO Regulation should signal the EU's strong commitment to due process of law and should under no circumstances be used to lower those standards across the EU by encouraging removal orders to be made by law enforcement authorities.

For all these reasons, we believe that removal orders should only be authorised by a court or at least an independent administrative authority. **To ensure the TCO complies with EU law and passes the CJEU's test, it is therefore essential for the independence of any authority issuing content removal orders to be guaranteed in the text.**

(2) ***EU legislators should guarantee strong ex ante safeguards as ex post facto oversight is not sufficient to protect freedom of expression***

The European legislators should establish ex ante safeguards for judicial authorisation of removal orders instead of proposing insufficient ex-post oversight mechanisms. **The TCO Regulation should not be based on the principle that "content must be removed first and mistakes rectified later". This is why we urge the negotiating parties to establish binding requirements for national competent authorities: only independent judicial or administrative authorities should be allowed to issue removal orders.**

3 For example, see: https://blog.archive.org/2019/04/10/official-eu-agencies-falsely-report-more-than-550-archive-org-urls-as-terrorist-content/

4 The CJEU affirmed that to be effectively qualified as an issuing authority, national authorities should enjoy a certain level of judicial independence which is interlinked to the objective of ensuring a thorough ex ante scrutiny of the legality, necessity and proportionality of any interference with fundamental rights protected at the EU level.

5 https://www.laquadrature.net/2020/06/18/loi-haine-le-conseil-constitutionnel-refuse-la-censure-sans-juge/

The current proposal presented by the German Presidency seeks to reconcile the Council of the EU's and Parliament's positions and suggests to submit removal orders to "judiciary control" or independent oversight (*ex post facto)*. This independent supervision would review some (not all) of the removal orders in order to ensure that they respect fundamental rights and remain in line with the Regulation's provisions.

This proposal draws inspiration from France's model, whereby the Central Office for Combating Crime linked to Information and Communication Technologies (in French "Office central de lutte contre la criminalité liée aux technologies de l'information et de la communication", OCLCTIC), a law enforcement authority under the control of the Ministry of Interior, can order the blocking, removal and delisting of content and websites to hosting and internet access providers. The National Commission on Information Technology and Freedoms (CNIL) was appointed to supervise the procedure. The OCLCTIC has to send all of its removal orders to the CNIL. The latter can issue a recommendation when it believes an order is unlawful and also has the power to refer orders to the administrative court if it is unhappy with a decision taken by the OCLCTIC.

Why the Terrorist Content Online Regulation should not follow the example set by France:

- The CNIL is a purely administrative – and not judicial – institution. It therefore has no mandate, competence or expertise to review the legality of removal orders and of targeted pieces of content.
- The report[6] issued by the person in charge ("personne qualifiée") in 2018 alerts that this oversight mission cannot be correctly fulfilled because of the lack of resources allocated to the CNIL. In order to guarantee respect for freedom of expression and communication, the review of orders must be exhaustive. However, given the volume of orders received, it is clearly impossible for the authority to review all of them.
- Over five years, the oversight authority used its power to refer cases to an administrative court only four times. In one instance, it took well over a year for the court to annul the removal orders after they were issued in September/October 2017. In the meantime, the French government kept the content censored.[7]
- The Avia law had planned the transfer of competence from the CNIL to the Audiovisual Council ("Conseil Supérieur de l'Audiovisuel", CSA) but this provision was annulled by the Constitutional Council.

In this process which focuses mainly on ex-post safeguards, the potential for wrongful takedowns and political abuses is too great to adequately protect freedom of expression and communication as well as to meet the proportionality test established by European and international human rights law. The French experience shows that this type of oversight is clearly insufficient, presents many flaws and cannot serve as a serious alternative to the need for ex ante judicial authorisation.

2. Respecting the principles of EU judicial cooperation in cross-border removal orders

The European Union has laid down rule of law principles for the effective cooperation between national law enforcement and judicial authorities in the field of criminal justice. It is therefore vital that future measures respect these ground principles which guarantee fundamental procedural rights.

(1) *Why it matters*

Mutual trust should not serve as an excuse to undermine individuals' fundamental right to freedom of expression and the basic principles of criminal justice. We strongly recommend that European legislators ensure that the TCO Regulation will introduce a rigorous, rights-based judicial cooperation

6 Available at: https://www.cnil.fr/sites/default/files/atoms/files/cnil_rapport_blocage_2018_web.pdf
7 Idem

mechanism for cross-border removal orders.

The European Commission and some of the Council Member States insist that removal orders have extra-territorial effect and be applicable on an EU-wide basis. In practice, this would mean that any national authority – designated without fulfilling the independence requirement – could classify certain online publications or content as "terrorism" and to order their removal at European level. The risk of perfectly legal but politically inconvenient speech being targeted by such measures is therefore significant .

In a context where two Member States are subjected to Article 7 proceedings[8] because of endangered independence of their judicial systems and potential breaches of the rule of law, the principle of mutual trust among EU Member States is clearly insufficient to protect people's free speech. The example of the Dutch judicial authorities refusing to execute requests issued by Poland under the European Arrest Warrant system speaks volumes about the current state of mutual trust among EU countries.[9]

In a report adopted on 7 October 2020[10], MEPs called for the reinforcement of the rule of law across Europe through a new mechanism on democracy, the rule of law and fundamental rights as well as effective sanctions on EU countries found to be in violation of these founding principles. Giving national authorities a blank cheque to censor online content without judicial authorisation and respect for due process standards in the context of the TCO proposal seems therefore at odds with the recent calls to enforce Article 7 procedure and to ensure the respect of all founding principles enshrined in Article 2 TEU.[11]

We already witnessed in the past how several Member States manipulated the definition of terrorism-related offences to stigmatise and silence certain political critics. In 2019 French authorities requested the deletion of hundreds of Internet sites that did not relate to terrorism at all, including cartoons, scientific publications, government publications and information on veganism.[12] In 2017, the Spanish authorities sought to block websites that encourage participation in the referendum on Catalonian independence.[13]

(2) *EU legislators should introduce a rigorous judicial cooperation mechanism for cross-border removal orders*

European legislator should introduce a proper judicial cooperation mechanism for cross-border removal orders. This judicial cooperation mechanism should abide by the following steps:

1. **The competent authority of the issuing Member State (which is a court or an independent administrative authority as per paragraph 1 of this paper) sends a removal order to the competent authority of the Member State in which the hosting service provider is established (i.e. the Member State of establishment);**
2. **The competent authority of the Member State of establishment (which is a court or an independent administrative authority as per paragraph 1 of this paper) reviews the legality of the order;**
3. **In case the competent authority of the Member State of establishment finds that the order runs**

8 Article 7 proceedings could lead to the suspension of some of their rights as Member States
9 https://www.politico.eu/article/dutch-netherlands-courts-to-stop-extraditing-poland-suspects/
10 https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20201001STO88311/rule-of-law-meps-demand-protection-of-eu-budget-and-values
11 https://www.europarl.europa.eu/news/en/press-room/20200910IPR86860/poland-council-has-to-finally-act-to-protect-minorities-and-the-rule-of-law
12 More information available at: https://blog.archive.org/2019/04/10/official-eu-agencies-falsely-report-more-than-550-archive-org-urls-as-terrorist-content/
and at: https://edri.org/our-work/context-in-terrorist-content-online/
13 Read more at: https://www.article19.org/resources/spain-now-more-than-ever-authorities-in-spain-must-guarantee-free-expression-and-the-right-to-protest-in-catalonia/

counter to fundamental rights or rule of law safeguards provided under EU law, it is its responsibility to reject the removal order;

4. **In case the competent authority of the Member State of establishment validates the order, it can enforce the order and the hosting service provider may remove the content.**

This would ensure that:

- Effective judicial cooperation between authorities is fostered in the EU;
- The competent authority of the Member State of establishment is required to respond by validating or rejecting the order of the issuing Member State and give reasons for its decision;
- Constitutional traditions are respected, especially special protections related to the freedom of the press, artistic and academic freedoms;
- Cross-border removal orders do not constitute politically motivated censorship (against whistle-blowers for example);
- Affected individuals have better possibilities to seek remedies and access redress mechanisms as they can decide to challenge the legality of the order in the issuing Member State or the Member State of establishment;
- Online service providers benefit from legal certainty when executing an order coming from a foreign authority;
- The process is effective thanks to strict and proportionate deadlines.

The German Presidency proposal suggests that, in case of reasonable doubts, the online service provider would address the competent authority in its country of establishment in order to review the legality of an order received by a foreign authority. This practically turns private companies into human rights defenders. People should not have to rely on private entities to assess and prevent potential violations of their fundamental rights. Online service providers' primary goal is to avoid sanctions and further troubles with Member States authorities if they do not comply with the proposed Regulation. They have neither the incentive nor the capacity to deal with a fundamental rights assessment that any piece of potentially illegal content requires.

Finally, requiring removal orders to have extra-territorial direct effect is contrary to EU judicial cooperation principles, the principle of territoriality and the right to access to justice.[14] We recall that 51% of EU citizens want only public authorities or courts of their own country to decide on the legality of Internet publications in that country.[15]

The EU cannot simply rush to adopt content removal orders that would prevent local circumstances from being taken into account. We therefore urge you to consider our proposal detailed above that ensures stronger protection to fundamental rights.

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14 In this scenario, the affected person would have to challenge the order in the issuing Member State, even if her/his place of residence is located in another one. This would represent an overly burdensome process to access justice considering the potential linguistic barriers and the differences in national criminal justice systems.

15 See: https://edri.org/our-work/59-of-polled-eu-citizens-decry-anti-terror-upload-filters-you-should-too/