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## **EDRi's input to the European Commission's Call for Evidence for the Evaluation of the Terrorist Content Online Regulation**

On February 14th, 2024, following more than eight months of delay, the European Commission (the '**EC**') issued two critical documents regarding the oversight of Regulation (EU) 2021/784, on Addressing the Dissemination of Terrorist Content Online (the '**Regulation**'). The first document is the [Report from the Commission to the European Parliament and the Council on the implementation of Regulation \(EU\) 2021/784 on addressing the dissemination of terrorist content online](#) (the '**Implementation Report**'). The second document is a [Commission Staff Working Document Monitoring programme for Regulation \(EU\) 2021/784 on addressing the dissemination of terrorist content online](#) (the '**Commission Staff Working Document**'), which outlines a comprehensive monitoring program aimed at assessing the outputs, results, and impacts of the Regulation, with the objective of producing an Evaluation Report (the '**Evaluation**'). The EC has invited stakeholders to contribute to the Evaluation report through its Call for Evidence. The EDRi network appreciates the opportunity to offer our input, particularly emphasising the necessity for the Evaluation to address the Regulation's impact on fundamental rights as per Article 23. Having thoroughly examined numerous documents, including the mentioned EC reports, the reports produced by Hosting Service Providers (**HSPs**) and some reports produced by Member States' competent authorities<sup>1</sup>, and having observed the presentation of the report before the LIBE Committee of Olivier Onidi (EC), Deputy Director-General in charge of Schengen & Internal Security (the '**LIBE presentation**'), we hereby present the European Commission with the following feedback.

### **Potential infringements upon fundamental rights**

We have [voiced concerns](#) about potential violations of fundamental rights since the EC published the legislative proposal in 2018. While the Regulation does incorporate safeguards to some extent aimed at enhancing accountability and transparency regarding actions to eliminate alleged terrorist content online, the EC appears unconcerned by the considerable margin for undue removals leading to rights violations. During the LIBE presentation, the message delivered by the EC representative was clear: there is 'no evidence that the legislation has compromised individual rights.' However, the Implementation Report inadequately addresses the

<sup>1</sup> This document heavily relies on Germany's Federal Network Agency's Transparency Report due to both the quantitative data presented in the Implementation report and the fact that Germany is one of the few member states from which such information could be located.



risks of infringing upon fundamental rights. For instance, it briefly acknowledges, that there has been no scrutiny of removal orders to determine potential serious violations of fundamental rights and freedoms by either competent authorities or HSPs because no reasoned requests for scrutiny were submitted. While this appears to be a positive indicator for the EC, we argue that the absence of remedy-seeking action from either users or HSPs is a concerning issue that sheds light on the inadequate understanding and utilisation of the Regulation's safeguards

From the outset, we have been concerned about freedom of expression and access to information online, but now recognise potential infringements on the rights to freedom of peaceful assembly and association at all levels, moreover disproportionately affecting groups already targeted by counter-terrorism measures. There are concerning indications that warrant deeper scrutiny regarding a potential politicised implementation of the Terrorist Content Online Regulation. One such indication is a [leaked document from Statewatch](#), written by Germany, France, and Italy, that suggests, amongst other actions, to 'counter Hamas at EU and global level' notably by pushing 'back against hate speech and anti-Semitic propaganda' on online platforms. There is an inherent risk in such approach of illegal censorship of legitimate expression by [labelling criticism of Israel's actions as anti-Semitic hate speech in line with the International Holocaust Remembrance Alliance definition of antisemitism](#) (adopted by the EU and several Member States) [or as apology of terrorism](#), as they consider 'leveraging [international fora](#)' focused on online terrorist content removal.

Another indication of potential detriment to fundamental rights in the enforcement of the Regulation is the disparity, shown by the Implementation Report, in the number of Removal Orders ('**ROs**') reported. For example, of all 349 removal orders issued in the EU since June 2022, 249 were issued in Germany following the events of October 7th in Israel (Germany's Federal Network Agency's 2023 Transparency Report provides no in-depth examination of these cases, and the Implementation Report specifies that only 27 ROs targeted 'propaganda' of organisations included in the '[EU terrorist list](#)'). In the past months, there has been [credible reports](#) of German authorities [unduly restricting](#) people's exercise of [freedom of expression](#) and of [freedom of assembly and of association](#) regarding the Israel/Palestine context (amongst others, [protest bans](#), [cancellations of events](#), [suppression of student-led initiatives](#), etc.). Consequently, our concern arises from the likelihood that fundamental rights are being infringed upon also in the online realm due to law enforcement's requests to HSPs targeting legitimate freedom of expression, with a subsequently detrimental impact on other rights such as access to information or freedom of assembly.



We are also concerned by the emphasis placed on referrals in the Implementation report, despite their deliberate removal from the Regulation's provisions during the legislative process because they undermine due process, public legitimacy and pose adverse effects on fundamental rights, echoing [civil society concerns](#). [Google's latest Transparency Report](#) reveals that in 2023, although the HSP received zero ROs, some content was removed as a result of 'legal removal notices' citing the Regulation (i.e. what we understand as referrals). In Germany, the normal practice seems to be using referrals before issuing a removal order (according to country's Federal Network Agency's 2023 Transparency Report). First, it shows that the argument of urgency used by the legislator to justify the drastic one-hour removal deadline to prevent the fast dissemination of terrorist content is not confirmed by the practice of law enforcement agencies (German authorities indicate that they wait 48 hours after sending a referral before sending a removal order). Second, the consistent preference for referrals over ROs, [framed as a success of public-private partnerships](#), suggests not only diminished effectiveness of the law but also a limited commitment to transparency, accountability and a lack of compliance with fundamental rights. EDRi, along [other civil society organisations](#), [have repeatedly](#) warned of the dangers for the rule of law and freedom of expression of this form of privatisation of law enforcement missions. The regulatory power to assess whether a piece of content is illegal or not should not be devolved to commercial entities.

Moreover, increased state pressure on and over-enforcement by HSPs are alarming. The [leaked document mentioned earlier](#) suggests closely monitoring and enforcing obligations for digital service providers to protect users'. Furthermore, the strategy would include forcing social media companies to increase their proactive measures 'to combat harmful posts and disinformation' and 'with a particular focus on Hamas' under the Digital Services Act (DSA). This is a dangerous blurring of the lines between what should be assessed as illegal terrorist content under the Regulation and potentially controversial but legitimate content. Furthermore, such measures would disproportionately target certain parts of the EU population and lead to discriminatory bias and chilling effect on the right to freedom of expression and opinion. The proposed actions cannot possibly be in compliance with all the criteria set out in Article 52 of the EU Charter of Fundamental Rights.

Additionally, the Implementation Report states that after October 7th, Germany initially sent referrals and subsequently issued removal orders when referrals were not acted upon, indicating pressure on HSPs. The 2023 Transparency Report produced by Germany's Federal Network Agency is quite alarming in that regard, as it celebrates a 'removal rate of 79.6%' without elaborating on the reasons why some referrals were not accepted or acknowledging the [margin for fundamental rights violations](#) that

systematically ensues in this kind of context. HSPs are required to adopt 'specific measures' to prevent the dissemination of terrorist content, with discretion to choose which measures to implement. Often, as acknowledged by the HSPs' transparency reports, this relies on automation mechanisms, which, as evidenced by [an array of studies](#), are prone to errors leading to the censorship of protected speech.

We are additionally troubled by the 'specific measures' in regard to which HSPs are encouraged to 'voluntarily' assess appeals against both the definitions of terrorist content in the Regulation and their own Terms of Service (Recital 33 of the Regulation). The potential for HSPs to limit online expression based on their terms of service, aligned with the risks posed to the rule of law and freedom of expression due to the privatisation of law enforcement activities highlighted earlier, and [evidenced by instances of undue censorship in the past](#).

The SoundCloud 2023 Transparency Report highlights the fundamental rights risks of automated content moderation. Of the 15,766 content items removed by automated tools (after SoundCloud was subjected to specific measures by German authorities, which is inferred from its Transparency report), only 100 were appealed by users. The false-positive rate of automated tools, which e.g. cannot take context into account, is undoubtedly greater than 0.6%. Moreover, of the 100 appeals, only 9 content items were actually reinstated. This suggests that SoundCloud evaluates appeals not only against the definitions of terrorist content in the Regulation but also against its own Terms of Service, as Recital 33 of the Regulation incentivises service providers to do.

Regarding the Commission Staff Working Document designed to guide the Evaluation, we are concerned that the outlined indicators are insufficient to prove adequate safeguards of fundamental rights. This is exacerbated by the self-reporting nature of qualitative evidence collection from HSPs, with the largest amongst them [demonstrably performing poorly in respecting and accounting for human rights](#).

The insufficient attention to the centrality of fundamental rights in enforcing the Regulation is highlighted by the reference to the fact that a contractor will assist the EC in the Evaluation; it remains unclear whether this private firm will possess adequate expertise in human rights considerations. We are further troubled by the perceived equal weighting of the 'freedom to conduct business' alongside other fundamental rights.

The points outlined in the next sections significantly overlap with the disregard for fundamental rights and thus reinforce the arguments presented up until now.

### **Challenged Effectiveness of the Regulation**

The Evaluation should adhere to the [EC's Better Regulation Guidelines](#), which include effectiveness as a crucial aspect, assessing whether actions taken under the Regulation have contributed to achieving its declared objectives. However, there are doubts regarding the Regulation's actual effectiveness. While the Implementation Report asserts that the regulation is effectively fulfilling its objectives, this assertion primarily relies on the number of ROs issued—350 since June 2022. Nonetheless, this figure is overshadowed by the much larger number of removals reported by HSPs in their transparency reports.

Additionally, beyond the mere quantity of ROs, the EC should consider other indicators when evaluating the Regulation's impact on curtailing the dissemination of terrorist content online. For instance, the Report lacks qualitative explanations of specific cases wherein competent authorities have taken action, hindering stakeholders' ability to assess the relevance of these cases.

Concretely, SoundCloud's Transparency Report indicates the removal of 15,766 pieces of content following the introduction of specific measures under Article 5. This notably high number, particularly when compared to the number of ROs, sheds specific light on the lack of effectiveness and arbitrariness of the Regulation.

Furthermore, also in alignment with the EC's Better Regulation Guidelines, the Regulation's enforcement falls short of appropriate standards regarding Relevance. It fails to adequately address current and future needs and challenges due to its foundation on flawed reasoning, particularly the lack of clear evidence linking exposure to alleged terrorist content to radicalisation and the uncertain evidence regarding the extent of this exposure. This perpetuates [narrow perspectives on complex societal issues that the EC has applied in other legislative initiatives](#).

### **Inadequate and problematic implementation of the Regulation by Member States**

Returning to the European Commission's Better Regulation Guidelines, the Regulation also falls short of meeting the appropriate standards regarding EU Added Value, which assesses the extent to which the Regulation has provided added value at the EU level compared to what could have been achieved without EU intervention by Member States.

The Implementation Report indicates that 23 Member States have designated competent authorities to issue ROs, and 18 Member States have submitted information to the Commission regarding their actions taken in accordance with the



Regulation. While we appreciate this progress, considering the Regulation came into force in 2022 and the urgency emphasised by the EC on this matter, we are concerned that the Regulation is not being sufficiently utilised by the key actors responsible for its enforcement.

Furthermore, the limited number of cross-border ROs, an element touted as a significant success of this legislation, is alarming. While we do not advocate for Member States to extend their enforcement authority beyond their borders through these mechanisms without prior judicial review or adequate consideration of the rights of individuals in affected jurisdictions, the fact that they are not doing so in this manner raises doubts about the Regulation's limited added value.

In addition to the aforementioned concerns, there are also worrying signs of a lack of knowledge on the part of the designated competent authorities. HSPs transparency reports produced by Meta indicate that certain providers, like Facebook and Instagram, received requests through the dedicated channel for ROs, but a minimal number (none on Instagram) were deemed valid orders. Specifically regarding Facebook, even among the valid orders, only a portion resulted in content removal or access restriction within the EU, raising doubts about the preparedness of those responsible for issuing them.

We are also furthermore apprehensive about what the potential invalidation of the Regulation tells about the effectiveness of the text. Despite the Regulation specifying that national competent authorities must act impartially, non-discriminatorily, and with respect for rights, we contended from the outset that only courts or independent administrative bodies, subject to judicial review, should have been granted the authority to issue removal orders. Unfortunately, our arguments went unheeded. As a result, [a coalition of six organisations \(European Digital Rights, La Quadrature du Net, Access Now, ARTICLE 19, European Center for Not-for-Profit Law, and Wikimedia France\) lodged a complaint before the French Supreme Administrative Court against the French decree implementing the Regulation](#). This decree emphasises how the framework empowers law enforcement to determine online speech without prior independent judicial oversight and with little regard for fundamental rights.

Our concerns regarding the effectiveness of the Regulation also encompassed the potentially detrimental role of Europol, portrayed as a crucial actor in its implementation. Unfortunately, we have been unable to access the transparency reports from Europol's Internet Referral Unit for the years 2022 and 2023. Therefore, we must rely solely on the information provided in the EC's Implementation Report, which asserts that 'Coordination works well between MS' competent authorities and Europol'. However, the indicators supporting this argument are again primarily

quantitative, based on the number of processed referrals (at least 14,615) after PERCI 3 went live on 3th July 2023. Notably, the report does not specify the number of processed ROs.

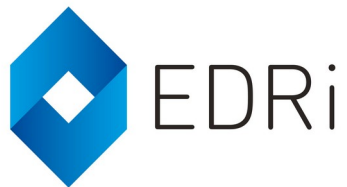
### **Challenges in regulatory compliance among HSPs**

The Implementation Report informs that ROs have been sent to the following HSPs: Telegram, Meta, TikTok, Justpaste.it., DATA ROOM S.R.L., FLOKINET S.R.L., Archive.org, Soundcloud, X, Jumpshare.com, Krakenfiles.com, Top4Top.net and Catbox. We also had the opportunity to assess several HSPs' Transparency Reports that the EC also considered during the drafting of the Implementation Report and will similarly take into account for the Evaluation Report. Upon examining reports from major HSPs such as X, Facebook, Instagram, Microsoft, Google, SoundCloud and TikTok (not existent in other providers like Telegram or LinkedIn), it becomes evident that only a select few are currently capable of meeting the transparency requirements outlined in the Regulation, in contrast with a number of other HSPs that are obliged to do so. This underscores the legitimate concern we previously raised about the potential for further consolidating the dominance of major online platforms. Moreover, the fact that some HSPs received zero ROs during the latest reporting periods suggests that competent authorities are primarily focusing on some HSPs rather than others. This reality also highlights the risk of harmful actors migrating to alternative platforms or those, like Telegram, which don't comply with ROs.

### **Delays and Lack of Transparency**

We also find it necessary to express our disappointment with the deviation from the originally planned timeline, as evidenced by the delay in the publication of both the Implementation Report (initially scheduled for June 7th, 2023) and the Evaluation Report (initially scheduled for June 7th, 2024). These delays become even more perplexing when considering the haste with which the Regulation was negotiated and published shortly after the September 2018 deadline to implement the Directive on Combating Terrorism (2015/0625). This rush to enact the regulation appeared even more illogical when we consider that the preceding directive had not garnered much attention and had not been properly evaluated.

The absence of available data is compounded by the lack of transparency mentioned throughout this document. This is exemplified by the fact that we have encountered considerable difficulty, to the extent of impossibility in many cases, in locating transparency reports mandated to be prepared and published by national competent authorities regarding their activities under the Regulation, as stipulated in Article 8 of the text. Civil society organisations have repeatedly emphasised the critical role of transparency in ensuring a fair enforcement of the Regulation.. This lack of



transparency and willingness to engage with stakeholders was already [apparent during the negotiation process](#), highlighted by the absence of a final vote and exacerbated by the secrecy surrounding the trilogues.

### **Conclusion**

Considering the arguments presented above, we reiterate our serious concerns regarding both the Regulation's impact on fundamental rights and its effectiveness in achieving the stated objectives, we strongly recommend its withdrawal. Following the EC's Better Regulation Guidelines regarding Coherence, we believe there is alternative legislation capable of achieving the Regulation's stated objectives while [ensuring a more comprehensive defence of fundamental rights through stronger safeguards, increased transparency and accountability, and broader participation of civil society](#). That legislation is the Digital Services Act.

Sincerely,