

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law

CM1904 Comments on the proposal for a Regulation on preventing the dissemination of terrorist content online (COM(2018) 640 final)

1. General observations

The Meijers Committee would like to take the opportunity to comment on the Proposal for a Regulation on preventing the dissemination of terrorist content online (COM(2018) 640 final).

The Meijers Committee acknowledges the reasons behind the proposal. As the Commission rightly explains,¹ internet platforms have benefits for society, but at the same time attract criminals who want to misuse the internet for illegal purposes. Certain forms of terrorist content online may create security risks and when platforms have become big and powerful actors themselves, they too have a certain responsibility in addressing these risks.

However, regulating the way platforms deal with online illegal content touches upon the freedom of expression and therefore requires high standards of fundamental rights protections in democratic societies.

The Meijers Committee provides for input in the legislative procedure, to encourage an appropriate and proportionate balancing between, on the hand, the need for effectively combatting the distribution of terrorist content, and, on the other hand, the freedom of expression and information, as laid down in Article 11 of the EU Fundamental Rights Charter (“the Charter”).

Under Article 52 of the Charter, limitations on the exercise of a fundamental right must be necessary in the public interest. In view of the scope of the limitation of the freedom of expression and information in the proposed Regulation, we consider that this limitation should be restricted to situations where there is a manifest connection between the views expressed and possible violence.

Moreover, the Meijers Committee considers that the current proposal lacks sufficient safeguards for freedom of expression in connection to the combat of online terrorist content. In this regard, the Committee submits a number of suggestions.

2. Definition of terrorist content in relation to freedom of expression

The Meijers Committee considers that the freedom of expression and information should only be restricted where the material clearly and directly incites committing terrorist offences and its publication manifestly causes a danger that such offences are committed.

The Meijers committee takes the view, that the definitions in the proposed Regulation are too wide.

The proposal defines 'terrorist content' broadly in art. 2(5), similarly to Directive 2017/541 on combating terrorism (“Directive”). The Regulation’s definition includes inciting or advocating, including by glorifying, the commission of terrorist offences, thereby causing a danger that such acts be committed.

¹ Explanatory Memorandum, 1.1.

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This definition potentially criminalises people who merely sympathize with the ideology underlying terrorist groups, but who do not necessarily accept the violence as such and whose views do not have any direct effect on violence; it could thus make the expression of non-violent resistance illegal as a terrorist offence.²

Moreover, this means that any repressive action against *expressions* relating to terrorism in this broad definition, must be viewed with strict scrutiny.

Condemning and criminalising violence should not automatically mean that any expressions about it should be prohibited too. Although the definition includes the words 'thereby causing a danger that such acts be committed', the Meijers Committee considers that a stronger guarantee is needed - also because the word 'thereby' could be interpreted so as to mean that glorifying (etc.) the commission of terrorist offences automatically causes a danger. The Meijers Committee proposes to limit the instrument to expressions that clearly incite to terrorist violence in such a way that it manifestly cause a serious and present danger that such offences are committed.

The Meijers Committee proposes that art. 2(5)(a) of the Regulation should explicitly exclude glorification or justification of terrorism from its reach, because it is particularly with these types of prohibitions that the risk of encroaching upon freedom of expression is high, and because there is no manifest connection between the expression and violent acts.

Moreover, the draft Regulation also targets 'encouraging the contribution to terrorist offences', a term that is not further specified. 'Encouragement' is potentially even broader than 'inciting or advocating', whereas art. 2(5)(b) does not require the speech to cause a danger that such acts be committed (as 2(5)(a) does). It would be an improvement to follow the Council's proposal of changing the term "encouraging" into "soliciting persons or a group of persons to commit or contribute to...". That phrase is similar to the language of article 6 of the Directive about recruitment.

Similarly, it remains unclear what 'promoting the activities of a terrorist group, in particular by encouraging the participation in or support to a terrorist group' (art. 2(5)(c)) means. This could potentially be interpreted very broadly, stifling legitimate debate.

As noted in the Explanatory Memorandum to the proposed Regulation, a different policy option would have been to limit the scope to content disseminated to directly incite to commit a terrorist act.

3. Our views are supported by the case law of the European Court of Human Rights

The European Court of Human Rights (ECtHR) also warns against unduly limiting freedom of expression. In a case concerning the banning of access to YouTube videos by a domestic court's decision, the ECtHR held:

'Where the views expressed do not comprise incitements to violence – in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporter's goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons – Contracting States must not restrict

² See, in the same sense, Meijers Committee, Note on a Proposal for a Directive on combating terrorism, CM1603, https://www.commissiemeijers.nl/sites/all/files/cm1603_note_on_a_proposal_for_a_directive_on_combating_terrorism_.pdf, par. 11a.

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the right of the general public to be informed of them, even on the basis of the aims set out in Article 10 § 2 [of the European Convention on Human Rights]'.³

As this proposed Regulation goes much further in terms of blocking content (not only by the decision of a court, but also administrative or law enforcement authorities; preventive measures are also required) combined with the fact that 'terrorist content' is defined much more broadly than the ECtHR allowed in the case mentioned, this Regulation will likely lead to violations of the right to freedom of expression.

4. Hosting providers should have appropriate tools for balancing

The draft Regulation itself does not provide hosting service providers with adequate tools to balance freedom of expression and the public interest of preventing terrorism. At a minimum, the main considerations to this end in Recital 9 should become part of the operative provisions.

5. Terms of service

It is unclear how the hosting service provider's duty of care to take 'appropriate, reasonable and proportionate actions in accordance with this Regulation, against the dissemination of terrorist content' and to act 'with due regard to the fundamental rights of the users and take into account the fundamental importance of the freedom of expression and information in an open and democratic society' (art. 3(1)) relates to the role of their own terms of service.

With regard to referrals, the draft Regulation states that hosting service providers shall assess the content against their own terms and conditions (art. 5(5)). Recital 12 explains that this duty of care applies 'in particular when implementing their own terms and conditions, with a view to avoiding removal of content which is not terrorist. The removal or disabling of access has to be undertaken in the observance of freedom of expression and information.'

However, the Regulation does not explain the consequences for hosting service providers if they go further than just removing the terrorist content as defined in the Regulation because their terms of service are broader than that. Recital 25 only states that '[t]he requirement for the hosting service provider to reinstate the content where it has been removed in error, does not affect the possibility of hosting service providers to enforce their own terms and conditions on other grounds.'

In the proposal, penalties - as provided for in article 18 - are available for breach of article 5(5) (assessing the content against their own terms and conditions) and article 3(2) (provisions to prevent the dissemination of terrorist content) but not for the failure to act 'in a diligent, proportionate and non-discriminatory manner, and with due regard to the fundamental rights of the users and take into account the fundamental importance of the freedom of expression and information in an open and democratic society', as meant in article 3(1). Though referrals are voluntary, considering the duties and penalties posed in this Regulation such removals also involve a co-responsibility for competent (state or EU) authorities if content is erroneously removed as a result of their referrals.

It is furthermore proposed to give Hosting Service Providers (HSPs) the obligation to promptly inform investigation and prosecution authorities when they become aware of any evidence of terrorist offences (art. 13(4)). Though this is not a proactive obligation (they do not actively have to look for

³ ECtHR Maria Alekhina and others v. Russia, 17 July 2018, appl.no. 38004/12, par. 260.

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evidence - see recital 31), this is still far-reaching. The Meijers Committee proposes to qualify this obligation further, e.g. to report when they become aware that someone makes concrete plans to commit a terrorist offence. Also, it would be advised to make clear in the operative text (rather than in article 3(1)) that this obligation is limited to the terrorist offences defined in Article 3(1) of Directive (EU) 2017/541 (as is now proposed in recital 31).

6. Right to be informed and judicial review

The content provider is not necessarily the author or original publisher of the material. In the view of the Meijers Committee other persons than content providers should have certain rights to be informed and to complain as well.

The ECtHR has stressed the importance of sending notifications to authors, publishers and owners of the material in a case where a domestic court ordered to ban certain YouTube videos.⁴ Concerned parties should be able to effectively participate in the legal proceedings about such banning measures, according to the ECtHR. If interested parties are not allowed to participate and are deprived of the possibility to contest the allegations made by the public authority that brought the proceedings before the courts, the proceedings cannot be found compatible with Article 10 of the Convention.⁵ According to the Meijers Committee, the Regulation should provide further judicial redress options, also in view of the wide discretion left to the Member States.

Safeguards, such as judicial review, should also be added to ensure that competent state authorities themselves do not require removal of content that is not terrorist.

The Meijers Committee recommends the proposed Regulation to require the competent authority to give a statement of reasons, in accordance with the General Approach of the Council: an assessment of the content explaining why the content is considered terrorist content (art. 4(3)(b)). However, the addition 'at least, by reference to the categories of terrorist content listed in Article 2(5)' indicates that this statement of reasons is likely to be superficial - after all, these categories are very broad and often interchangeable. A more detailed statement of reasons is available upon request (art. 4(4)), but again only to the content provider and not to other interested parties. The same is true of the obligation for the HSP to give reasons (upon request) in article 11.

Also, under article 11(3), the obligation to inform the content provider as in par. 11(1) and (2) shall not apply 'where the competent authority decides that there should be no disclosure for reasons of public security, such as the prevention, investigation, detection and prosecution of terrorist offences, for as long as necessary, but not exceeding [four] weeks from that decision' (in the Council's General Approach: 6 weeks plus another 6 weeks where justified). This is a broad exception. The Meijers Committee proposes that this should only be possible in case of imminent and serious reasons of public security.

The obligations of hosting service providers to deal with complaints (about referrals in article 5 or proactive measures in article 6) are put rather vaguely (art. 10(2)): 'promptly examine' / 'reinstate without undue delay'. These deadlines should be more strict, in line with the Council's General Approach, in view of the possible negative consequences for individuals.

⁴ ECtHR *Maria Alekhina and others v. Russia*, 17 July 2018, appl.no. 38004/12, par. 242.

⁵ *Ibid.*, par. 267.

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7. Proactive measures

The proposed Regulation contains far-reaching obligations to take proactive measures. These are not limited to detection of re-uploads of already removed content, but include the identification of new material (including by automated tools). Though the Explanatory Memorandum makes it seem like this is rather limited (only 'to those hosting service providers exposed to terrorist content, as evidenced by the receipt of a removal order which has become final'), this will likely involve many hosting service providers - especially since the requirements for states to issue a removal order are unclear and not harmonised.

Whereas recital 16 states that this 'should not imply a general monitoring obligation' and article 6(1) requires that 'the measures shall be effective and proportionate, taking into account the risk and level of exposure to terrorist content, the fundamental rights of the users, and the fundamental importance of the freedom of expression and information in an open and democratic society', there are no concrete safeguards to protect this. As hosting service providers should determine what appropriate, effective and proportionate proactive measures should be put in place, there is a risk of censorship, since hosting services should be prevented from general monitoring of all online activities.

Oversight is only exercised by the domestic competent authority which is not necessarily an independent authority. The proposed Regulation incentivises this authority to impose more far-reaching proactive measures rather than to protect fundamental rights - they can first request to take 'additional proactive measures' (art. 6(3), then 'imposing specific additional necessary and proportionate proactive measures' (art. 6(4)). While the latter decision shall take into account 'the effect of such measures on the fundamental rights of the users and the fundamental importance of the freedom of expression and information', the ways in which competent authorities can act if HSPs act in breach of these rights are not specified. The Regulation does not impose an obligation to take *less* far-reaching proactive measures. Recital 38 mentions that 'Member States shall ensure that penalties do not encourage the removal of content which is not terrorist content', but there are no concrete safeguards to achieve this. The Meijers Committee proposes, as a minimum, to include Recital 38 in the operative part of the proposal.

Hosting service providers shall also report about the functioning of any automated tools used and whether, if automated means are used, the hosting service provider has the necessary abilities for human oversight and verification (art. 6(2) and recital 18). In that case, hosting service providers 'shall provide effective and appropriate safeguards to ensure that decisions taken concerning that content, in particular decisions to remove or disable content considered to be terrorist content, are accurate and well-founded. Safeguards shall consist, in particular, of human oversight and verifications where appropriate and, in any event, where a detailed assessment of the relevant context is required in order to determine whether or not the content is to be considered terrorist content' (article 9).

However, besides the fact that a detailed assessment of the relevant context is likely to be necessary in most cases (considering the breadth and contested nature of terrorism and the fact that every expression should be viewed within its context), even if there is human oversight this can still mean a lot of things. Moreover, if it is only for the competent authority to decide whether human oversight and verifications are 'appropriate' then, according to the Meijers Committee, this does not provide enough safeguards against abuse. The Regulation should also deal with the question of how exactly providers will be obliged and enabled to prevent biases and discrimination in automated decision-making, and what legal remedies are available (and to whom) if this goes wrong.

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8. Transparency

Article 8 lays down transparency obligations for hosting service providers; article 21 gives monitoring obligations for Member States about their competent authorities' actions. The Meijers Committee suggests that competent authorities and hosting service providers should also give information about the criteria they use for determining whether content is considered terrorist content, in addition to the information included in Article 8 (3) of the proposal.