

Meijers Committee

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

CM1910 Tackling the dissemination of terrorist content online

Comments on the European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online (COM(2018)0640 - C8-0405/2018 - 2018/0331(COD))

13 November 2019

1. Introduction

The Meijers Committee commends the efforts by the European Parliament to amend several of the elements of the Commission's proposed 'Regulation on preventing the dissemination of terrorist content online,' that the Meijers Committee has criticized in its previous comments.¹ Not only have some of the far-reaching duties for hosting service providers been toned down (e.g. the duties of care and the proactive measures), more safeguards have been included (e.g. with regard to transparency of competent authorities) as well as more concrete definitions (e.g. the definitions of 'competent authority' and 'hosting service provider').

With this note, the Meijers Committee would like to point out some possibilities for further improvements of the regulation.

2. Definition 'terrorist content' and freedom of expression

The Meijers Committee is pleased to learn that the European Parliament's proposed definition of terrorist content is narrower than the European Commission's, in the sense that 'advocating the commission of terrorist offences' is not included anymore. The amended definition also aligns more closely with article 5 of the combating terrorism directive (Directive 2017/541). Moreover, it is positive that the duty to inform investigation and prosecution authorities about terrorist *offences* (article 13(4) in the Commission's proposal), which is much broader than terrorist *content*, has been removed.

In addition, the Meijers Committee commends the explicit reference to protecting 'content disseminated for educational, artistic, journalistic or research purposes, or for awareness raising purposes against terrorist activity' and 'content which represents an expression of polemic or controversial views in the course of public debate' in article 1(2)(a). The Meijers Committee also commends the explicit reference to freedom of speech, freedom of the press and the freedom and pluralism of the media in article 1(2)(b) and article 1(1)(b).

However, the Meijers Committee is of the opinion that aligning with article 5's definition of 'public provocation of terrorism' still leads to a broad prohibition, which risks targeting political opposition and non-violent resistance movements. 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 the

¹ CM1904 Comments on the proposal for a Regulation on preventing the dissemination of terrorist content online (COM(2018) 640 final).

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commission of terrorist offences automatically causes a danger. Making the balancing act between freedom of expression and other interests - including security - is an extremely complex affair. The Meijers Committee considers that this task should only be placed in the hands of non-state actors if expressions clearly incite to terrorist violence in such a way that it manifestly causes a clear, serious and present danger that such offences are committed.

The Meijers Committee commends the improvements proposed by the European Parliament in the definition of terrorist content in article 2(5)(b), 2(5)(c) and 2(5)(d). However, the proposed addition in article 2(5)(da) on 'depicting the commission' of certain terrorist offences is broad and carries risks of stifling the right to freedom of information. Admittedly, measures are only required if such depiction causes a danger that one or more such offences may be committed intentionally, which limits the breadth somewhat. However, it remains unclear when the depiction of terrorist offences actually causes such a danger - this will be very difficult for hosting service providers to assess. Therefore, it may stifle media reporting on terrorist acts, which is essential in a democratic society. After all, for article 2(5)(da) to apply, the proposal does not require that the persons posting such content *themselves* have the intention to incite to further attacks.

3. Referrals

With regard to HSPs' policy on referrals by competent authorities and Union bodies, article 5 of the Commission's proposal included specific rules, which have been removed by the European Parliament's amendments (the EP proposes only to mention referrals by Europol in a recital, no. 27a). The Meijers Committee, in its comments on the Commission's proposal, criticised article 5: this provision obliged hosting service providers to assess the content referred against their own terms and conditions without clearly dealing with the dilemma that could appear if their own terms and conditions went further than the definition of terrorist content (as provided in the Regulation), which could negatively affect freedom of expression and information. The Meijers Committee questions, however, whether it is a good idea to remove all provisions on referrals rather than consider amendments. This leads to a situation where there are no harmonising rules on referrals at all, which also means that the way hosting service providers deal with referrals is no longer explicitly the subject of transparency obligations (article 8) and of freedom of expression and information guarantees. This might imply a risk that authorities prefer to make use of 'voluntary' referral mechanisms above official removal orders, which are subject to more safeguards.

4. Transparency obligations

The Meijers Committee commends the addition of transparency obligations for competent authorities that the European Parliament proposes in article 8a. As regards HSPs' obligations, the Meijers Committee has its doubts concerning the amendment in article 8(2) that only hosting service providers which are or have been subject to removal orders in that year, shall make publicly available transparency reports. If hosting service providers make use of specific measures against terrorist content (pursuant to article 6), there is a public interest in providing information about this, whether or not they have received any removal orders from competent authorities that year.

5. Complaints and judicial review

The European Parliament's amendments have made improvements with regard to the provision of information and complaints mechanisms, such as requiring the competent authority to give a detailed statement of reasons in a removal order explaining why the content is considered terrorist

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content (article 4(3)(b)), and the two-week deadline for hosting service providers to respond to complainants (article 10(2)). Also, the newly proposed article 9a sets forth the right to an effective remedy for content providers whose content has been removed or access to which has been disabled following a removal order, and for hosting service providers that have received a removal order. The Meijers Committee advises to make this right to an effective remedy more concrete. Though the proposed article mentions that Member States shall put in place effective procedures for exercising this right, it does not attempt to harmonise the standards and safeguards for such procedures. It also remains unclear what redress is available if complaints from content providers to hosting service providers (article 10(1)) do not lead to the desired result.

Moreover, the role of other potentially interested parties than the content provider - such as the author or publishers of the material - remains unregulated. The European Court of Human Rights 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.² Such stakeholders should be allowed to contest such bans and be able to effectively participate in the legal proceedings about such banning measures.

The Meijers Committee hopes that these considerations will be taken into account in the further discussions on the proposed Regulation.

² ECtHR Maria Alekhina and others v. Russia, 17 July 2018, appl.no. 38004/12, par. 242 and 247.