

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

REFERENCE:
OL OTH 73/2020

3 November 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 43/4 and 40/16.

In this connection, we would like to bring to your attention information we have received concerning a **new draft ‘Regulation on preventing the dissemination of Terrorism Content Online’, proposed by the Presidency of the Council of the EU**. We note that the explanatory note to the Regulation stresses that one objective of the Regulation is to enable “safeguards of human rights”, and some specific new references to rights augmentation are identified including para 2(a)(line 76); the insertion of a new paragraph 5(a); new recital 9(a); a new recital explaining paragraph 5(a); new procedural protection in article 4(a) and fundamental rights protection in the context of the exercise of such powers by national competent authorities (para 12(2)).

The Proposal for a Regulation on preventing the dissemination of terrorist content online was the subject of a communication sent to European institutions on 7 December 2018 (OL OTH 71/2018). We regret that, to date, we have not received a response regarding this communication. On the other hand, we note with appreciation that the European Parliament addressed many of the concerns we raised in a report issued on 17 April 2019. We also note positive engagement by the European Commission on the issues raised in our communication with the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while countering terrorism during a working-level visit to the EU in 2019 as well as with the European Union’s Special Representative for Human Rights during a working level visit in January 2020. As a redrafted version was made public on 29 September 2020, we note with regret that despite of a number of positive proposed changes to the text we previously commented, some serious risks for fundamental rights remain in the text currently under discussion. Given the overarching function of our mandates to advance the protection and promotion of human rights and acknowledging that the Proposal has significant human rights implications, we convey our views to support the work of relevant European Union organs in advancing full respect for human rights.

Recognizing the challenging regulatory context and the laudable goal of using legal tools to prevent misuse of Internet platforms in the context of terrorism, we raise some matters of general concern. In particular, we wish to express our views regarding the overly broad definition of terrorist content in the draft Regulation that may encompass legitimate expression protected under international human rights law.

We note with serious concern what we believe to be insufficient consideration given to human rights protections in the context of to the proposed rules governing content moderation policies. We are particularly concerned that the overbroad definition of terrorist content may limit freedom of expression more than is necessary and proportionate to protect national security, public order or safety. We are further concerned that the proposed legislation does not provide adequate guarantees of judicial oversight for restrictions to freedom of expression, which may lead to arbitrary implementation. We continue to be troubled by the lack of attention to human rights responsibilities incumbent on business enterprises in line with the United Nations Guiding Principles on Business and Human Rights. We are also concerned that the procedure for removal orders may lead to undue limitations to the right to freedom of expression in the 27 Member States of the EU.

1. Definition of ‘terrorist content’

Under the revised draft Regulation, the definition of ‘terrorist content’ would include “material that is inciting the commission of [terrorist acts] or supplying information or material resources, funding its activities in any way, or otherwise supporting its criminal activities.” which is not further defined. Although the draft text provides that “material disseminated for educational, journalistic, artistic or research purposes shall not be considered terrorist content”, we are concerned that such a broad definition of terrorist content may result in potential interferences with a range of speech protected by international human rights treaty obligations. Unless restrictions are rigorously and narrowly defined in line with human rights law, broad formulation risks to lead to restrictions to the freedoms of opinion and expression, including the right to seek, receive and impart information.¹ We underscore that legal frameworks must be formulated with sufficient precision so that any individual can regulate his or her conduct accordingly.²

We recall that although there is no agreement on a multilateral treaty on terrorism, counter-terrorism legislation must be limited to criminalizing conduct which is properly and precisely defined on the basis of the provisions of international counter-terrorism instruments and is strictly guided by the principles of legality, necessity and proportionality.

The definition of terrorism should be guided by the acts defined in the Suppression Conventions,³ the definition found in Security Council resolution 1566 (2004) and also by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly.⁴ We recall the model definition of terrorism advanced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while

¹ [A/HRC/44/49](#) para. 6

² [E/CN.4/2006/98](#), para 46

³ See e.g. the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) of 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970); the International Convention on the Taking of Hostages (Hostages Convention) of 1979; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973; [E/CN.4/2006/98](#) paras. 25-50.

⁴ [S/RES/1566](#); [A/RES/51/210](#).

countering terrorism, which provides clear guidance on appropriate conduct to be proscribed and best practice.⁵ Those elements include:

- a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages,
- b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act,
- c) Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.⁶

We urge the European Union to maintain a definition of terrorism content consistent with the core legal meanings of terrorism adopted by States and commend the definition of terrorism developed by the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms while countering terrorism for your consideration to this end.⁷

We are concerned about the implications for the protection of the right to freedom of expression if this Regulation is to be adopted by the European Union. According to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which all EU Member States have ratified, the right to freedom of opinion is absolute, permitting no restriction. The right to freedom of expression in article 19 (2) is broad, and protects the right of everyone to freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, through any media of communication. Per article 19 (3) of the ICCPR, limitations on freedom of expression must be determined by law and must conform to the strict test of necessity and proportionality applied only for those purposes for which they were prescribed. While the protection of national security is a legitimate ground for restricting freedom of expression, extreme care must be taken to ensure the legislation is “crafted and applied in a manner that conforms to the strict requirements of paragraph 3”. We note that freedom of expression is also protected by Article 10 of the European Convention of Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (the EU Charter). As we have done previously, the Special Rapporteurs wish to emphasize that the right to freedom of expression extends ‘not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”’.⁸ Moreover, as the right to access to information extends to all types of information, States “bear the burden of justifying any withholding of information as an exception to that right”.⁹

⁵ [A/59/565 \(2004\)](#), para. 164 (d).

⁶ [E/CN.4/2006/98](#), para 37

⁷ [A/HRC/16/51](#).

⁸ *Handyside v. the United Kingdom*, no. 5493/72, 7 December 1976, § 49.

⁹ [A/70/361](#), para. 8.

We are mindful about the threat of terrorism in the EU Member States and acknowledge the legitimate concerns about public order and safety felt by many governments. However, it is precisely the gravity of these contexts that mandate that a thorough and sensitive approach to ensure any regulatory response is strictly defined and does not undermine the fundamental freedoms and values upon which an effective and human rights compliant response to terrorism is based across the EU. Moreover, we are concerned that restrictions on the right to freedom of expression may function to unduly limit information sharing on the threats posed, and function to undermine broader counter-terrorism efforts. In this context, we would encourage and support revision in the definition of ‘terrorist content’ with a view to aligning them with the international standards referenced above.

In this context, we would advise to revise the definition of ‘terrorist content’ with a view to aligning them with the international standards referenced above.

We welcome the insertion of a provision that excludes material disseminated “for educational, journalistic, artistic or research purposes or awareness raising activities” from the scope of the Regulations. We encourage expanding the journalistic exemption to media publishers that are not traditional such as bloggers, and others who engage in the dissemination of information in the public interest such as human rights civil society organisations. We recall, in this context, that the Human Rights Committee previously recognized that the practice of journalism is carried out by full-time professionals “as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere” (CCPR/C/GC/34).

2. Competent authority to remove terrorist content

Article 17 of the draft Regulation provides some clarity about the role of the competent authority which will have the power to issue a removal order requiring the hosting service provider to remove terrorist content or disable access to it. However, this new text does not pursue the proposal of the European Parliament, which had recommended that the competent authority be a “single, independent administrative or judicial competent authority per Member State”. We are seriously concerned that the revised draft Regulation seeks to avoid the intervention of a court or an independent administrative authority for removal orders. We underscore that any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or unwarranted influences in a manner that is neither arbitrary nor discriminatory (A/HRC/38/35, para. 66).

The draft Regulation further provides for the possibility that competent authorities will send referrals regarding terrorist content to hosting service providers for their consideration. Given that service providers retain a wide discretion in the application of their terms of service, which, as noted previously, do not reference human rights and related responsibilities, we are concerned about the effect of such a provision on the guarantees to the right to freedom of expression. As underscored by the Human Rights Council, we underlined that the rights that people have offline must also be protected online (A/HRC/RES/38/7). We underscore, in this context, the recommendations of the Special Rapporteur on freedom of opinion and expression who made clear that “States should not demand – through legal or extra-legal threats –

that intermediaries take action that international human rights law would bar States from taking directly” (A/74/486 para. 57).

We are deeply concerned that the proposed legislation does not provide for judicial intervention to limit freedom of expression. The lack of judicial review and effective appeal mechanisms for takedown orders is likely to have adverse effects on freedom of expression. We recall that under international law, expression/content can only be restricted pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy (A/HRC/38/35, para. 66). We respectfully urge you to refrain from delegating responsibility to companies as adjudicators of content. Not only would it strengthen their dominant corporate position and judgment over human rights interests, but it would place them as the arbiters of lawful expression.

In this context, the draft Regulation seeks to provide some safeguards. It specifies that: “Where the hosting service provider has reasonable grounds to believe that the removal order manifestly and seriously breaches the fundamental rights and freedoms set out in the EU-Charter of Fundamental Rights”, it will be allowed to request the issuing competent authority “to review the issued removal order”. Despite the notable reference to regional human rights norms, we are concerned that this provision seems place the onus upon service providers to respect human rights treaties, not on the authorities. We underscore that it is for the authorities to seek a court order and demonstrate that the content at issue is unlawful and that a removal order is necessary and proportionate.

3. Enforcement of removal orders

While the recent Presidency text prolongs the one-hour timeframe for compliance with removal orders to 12 hours, in practice this timeframe still appears to be insufficient for an adequate and careful assessment of any concerned content. Short time frames will impose a burden on service providers. While we strongly share the view that all companies in the ICT sector must rigorously apply their responsibilities under the Guiding Principles on Business and Human Rights of the United Nations, we are concerned that this short timeframe and the threat of penalties are likely to incentivize platforms to exercise extra caution and may decide to pre-emptively remove content that is legitimate or lawful and/or develop automated tools to that end. The Special Rapporteur on freedom of expression has urged States to ensure that content removals are undertaken “pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy” (A/HRC/38/35, para. 66).

In this context, concerns have been brought to our attention that the draft Regulation does not exclude automated measures for the removal of content. The Special Rapporteur on freedom of opinion and expression previously expressed concerns at the overreliance on automated flagging, removal and pre-publication filtering may “come at a cost to human rights.” (A/73/348). In a report on content moderation (A/HRC/38/35), the Special Rapporteur notably noted that: “Hash matching is widely used to identify child sexual abuse images, but its application to “extremist” content — which typically requires assessment of context — is difficult to accomplish without clear rules regarding “extremism” or human evaluation” (para.

33). In fact, even if a particular image is illegal when used with intent to incite the commission of acts of terrorism, it may well be legitimate when used for journalistic purposes. A contextualized approach and assessment will be required to ensure the removal orders does not unduly limit freedom of expression. Such an approach requires time and efforts that only humans might be in a position to execute. In this context, we would respectfully urge you to consider the inclusion of a provision which would explicitly exclude the mandatory use of automated measures.

The draft Regulation also introduces removal orders with EU-wide applicability. In the absence of an internationally-recognised definition of terrorism, there is a serious risk of double standards which may be used to curtail legitimate speech at a wide scale. We note that there are different legislative enactments containing a variety of definitions of terrorism to be found in the 27 Member States of the European Union. The fragmentation of definitions at the national level may further compound the challenge of ensuring consistent protect for freedom of expression across the Union, a pattern that may be exacerbated by this Regulation. In fact, serious concerns have been brought to our attention that this provision may allow some EU Member States to determine what stays online and what should be removed for the whole EU with serious implication for the freedom of expression, association and political participation in the 27 Member States of the EU. We are seriously concerned that this term may violate Article 19 (2) of the ICCPR, which protects the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

Conclusion

We understand that the fifth and final trialogue negotiations will take place in the coming days.

In light of the above-mentioned observations, we would like to invite the Presidency of the European Union, the European Parliament and the European Commission to continue our dialogue in order to provide responses to the points and concerns raised in this communication. As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful if you could provide any additional information and/or comment(s) you may have on the above-mentioned issues.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from the European Union will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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