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Sir Williams Cash MP

Chairman

House of Commons European Scrutiny Committee

By email

7 November 2018

Dear Bill,

EU regulation on the dissemination of terrorist content online

Thank you for your comments following scrutiny of the draft regulation. I am glad you found the Explanatory Memorandum helpful to support this process. Since my last correspondence Member States, including the UK, submitted written comments to the Presidency and Commission and a revised text was circulated ahead of the most recent meeting on 25th October – please find enclosed. Amendments include the extension of the implementation period from six months to twelve months. To date, the UK has not suggested any specific textual changes to draft regulation. Our comments have focused on seeking greater clarification where the text is vague, and questioning how some of the measures (e.g. proactive measures) would work in practice.

Negotiations on the regulation have continued, with fortnightly meetings taking place between the EU Commission, Presidency and Member States, highlighting the commitment at EU level to seek agreement on this proposal by March 2019.

Member States are broadly supportive of the regulation and where there are concerns, they have shown a commitment to work with the Commission to find solutions, in order to progress agreement on the regulation in line with the Commission's desired timelines. A general approach is likely to be agreed by EU Council by December however, the position of the EU Parliament, who have yet to engage on this file, is unknown. As the final text is subject to their agreement, we are unable to determine whether the regulation will be agreed before the UK leaves the EU in March 2019.

Regarding the Regulation's implementation in to UK law the Regulation will have direct effect in domestic law and as such, we do not consider that any changes to domestic law will be necessary.

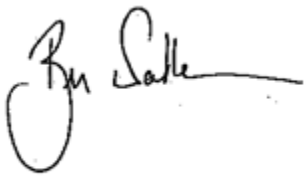
The Committee raised a number of questions concerning the penalty regime of the draft regulation. Negotiations in Brussels have taken the Articles in turn and as such, a substantive discussion on penalties (Article 18), with Member States and the Commission, has not yet taken place. However, when pressed for greater clarity on penalties in early meetings, the Commission has made clear that penalties would be for Member States to define and do not support setting out further rules in the regulation or going beyond the current draft text. In the UK's view, the addition of criminal sanctions into the text would require the addition of a JHA legal base and would trigger the UK's Justice and Home Affairs opt-in Protocol. The Commission have made clear that they would not want to change the legal base from **Article 114 TFEU or combine with a JHA legal base (a position we have supported).** Member States have also suggested whether there could be a minimum penalty threshold, alongside the 4% maximum, however the Commission stated that there was no precedent in EU law for this and therefore would not take this suggestion forward. Taking all this into account, we do not at this stage anticipate the inclusion of more specific penalties within the Regulation itself.

As set out in the Explanatory Memorandum, leaving the rules on penalties to the discretion of Member States (bar the 4% maximum) could lead to the possibility of countries setting different levels, thereby opening up the risk that HSPs would place their headquarters or legal representative in the Member State with lowest penalties. Whether Member States would intentionally undercut one another to secure investment is not certain but the risk of a fragmented approach remains, which is why we would support some agreed non-binding principles or 'guidance', coordinated by the Commission or Presidency, for Member States as an option to mitigate this risk. This could include **greater clarity on what is deemed "effective, proportionate and dissuasive" as well as the degree of non-compliance that might be considered as "systematic failure" and trigger the maximum penalty of 4% global turnover – a question the UK has raised in negotiations.** Should the Commission pursue this idea, any guidance or agreed principles for Member States would be separate to the regulation and therefore would be non-binding. Despite this, we believe it would still be a useful agreement to have in place.

You asked whether I am concerned that the lack of clarity and very high fine may induce excessive caution and overzealous removals from HSPs. A removal order has to match clear parameters of terrorist activity and terrorist content (as set out in Article 2: Definitions), and may also be supported by judicial review. Member States must also supply clear detail, including a URL and where necessary, additional information enabling the identification of the content referred. We therefore believe that there would be very limited instances of HSPs taking down content that is not illegal, goes against the principles of freedom of expression or goes further than the request made by the Member State. There have also been discussions on possibly setting up a central oversight mechanism at EU level to monitor the removal orders being sent to HSPs. More broadly, there are a number of safeguards set out in the Regulation, which would militate against HSPs going too far. These include the transparency obligations (Art 8) and the requirement for complaint mechanisms (Art 10).

Regarding the circumstances under which it would be appropriate to make a referral rather than issue a removal order, this would vary between Member States. The Commission has intentionally included both mechanisms in the regulation in order to allow Member States the flexibility to decide which to use and when. For the UK, we have been working to prevent terrorist use of the internet for many years and the Met's Counter Terrorism Internet Referral Unit (CTIRU) have established a good relationship with some of the major HSPs, taking on trusted flagger status. This has given us a good response rate from companies following referral of terrorist content and has meant that we have relied on the referral mechanism rather than resorting to removal orders (which the UK's Terrorism Act does provide for). However, not all companies are/will be cooperative and it is in these cases, where a HSP shows a reluctance or ambivalence to engage with law enforcement on terrorist content, that a legally binding removal can usefully be imposed on them.

Finally, you queried whether the regulation provides enough legal certainty for HSPs, in particular with regard to its relationship with the E-Commerce Directive (ECD). Our current view, supported by the Commission, is that the proactive measures called for in Article 6 of the draft regulation can be reconciled with Article 15 of the ECD, in view of the fact that it would constitute 'specific' identification of terrorist content and targeted measures, as opposed to a "general obligation to monitor". This is supported by the recitals which also include reference to the ability of this regulation to derogate from the 'general monitoring' approach. That said, we would support specific wording on the regulation's relationship with the ECD, within the Articles themselves, in order to provide greater legal clarity for both industry and Member States.



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