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Sir William Cash MP

Chair, European Scrutiny Committee

House of Commons

By email

24 July 2019

Dear Bill,

EU regulation on the dissemination of terrorist content online

Further to your Committee's correspondence in January of this year, I am writing to update you with the latest on this draft regulation, now the European Parliament has issued its agreed negotiating position on the proposed text. This position was voted on and agreed by the European Parliament on 17 April, following the finalisation of the report and compromise amendments put forward by the lead committee for this file, the Committee on Civil Liberties, Justice and Home Affairs (LIBE), on 4 April.

Your Committee asked me to write with details of the main changes proposed by the European Parliament, and the Government's position on them. Given the large number of textual amendments proposed, I have attached to this letter the full report adopted by the Parliament, which details all changes made to both the recitals and operative text of the draft regulation. I would however, like to draw the Committee's attention to a number of specific changes, which we see as quite different to the original proposals, and the Government's views on those.

1) **Definitions (Article 2).** Several amendments have been proposed to this article. They include replacing "*third parties*" with the term "*public"*, when referencing the dissemination of content. *Cloud providers* and *cloud infrastructure providers* have been exempted from the scope of this regulation by removing them from the definition of hosting service provider (HSP). A new definition of competent authorities has been added, to mean a "*single designated judicial authority or functionally independent administrative authority in the Member State".*

2) **Removal orders (Article 4 and new Article 4(b)).** An amended cross-border removal order process has been proposed. All competent authorities retain the right to submit removal orders to a HSP. However, if the HSP in question is not legally based in the Member State of the issuing competent authority, the competent authority would not be able to require the removal of the content across the EU, but only disable it for users in that Member State. To allow for total removal across the EU, a competent authority would have to ask the authority in which the HSP was legally based, to issue a removal order. A further amendment has also been made with regards to the one hour removal deadline, with companies gaining a 12 hour buffer period if it is their first removal order. Provisions for referrals (Article 5) have also been completely removed.

3) **Proactive measures (Article 6).** Obligations for companies to implement proactive, automated measures (mandatory or otherwise) have been removed. Instead, the regulation suggests that HSPs "*may take specific measures to protect their services*". Where a HSP has received a substantial number of removal orders, the competent authority may request that HSPs implement "*additional specific measures*" on their platform however, such measures should not include the use of automated technology.

4) **Preservation of data (Article 7).** Amendments would now call for all preserved data (held for investigations or prosecutions) to be deleted after 6 months. Previously there was no request for data to be erased.

5) **Transparency obligations (Article 8).** A new addition has been included to request transparency reporting from competent authorities, as opposed to just from HSPs that have been in receipt of removal orders.

Regarding the Government's position, there are certain elements here (although not all) which, should they remain as drafted and subsequently adopted into a final text for agreement, the Government would find difficult to support. Of most concern is the lack of provision regarding proactive measures. I have been clear since my first correspondence, as has the Government, that in order to see meaningful action against the threat of terrorist content online, HSPs need to proactively prevent their platforms from being misused by terrorists and their supporters, through better content moderation and the use of automated technology to identify and remove content. Notice and takedown regimes will not sufficiently address this problem.

Since I last wrote, the Government has published our Online Harms White Paper which sets out a proposed domestic legislative framework for holding companies to account for harmful user generated content on their platforms. Whilst the Government has committed to leaving the European Union, we want to ensure

alignment of UK and EU law, particularly on an area which is inherently cross-border in nature. We are also mindful that should this regulation be agreed this year, followed by a 12 month application period, the UK could (under the terms of the Withdrawal Agreement) be bound by this regulation before our exit from the EU. Furthermore, in order to set common rules for companies in the digital single market, the draft regulation cites an internal market legal base (Article 114 of the TFEU). This would make it difficult for any country in the EU to go beyond the proposals set out. Given a key tenet of our Online Harms White Paper will be for companies to proactively moderate their platforms for terrorist content, in order to fulfil a duty of care to their users, we are concerned the European Parliament has suggested something substantially weaker, which our domestic legislation would have to align to, while we are still a member of the EU.

I am also concerned by the proposed restrictions and burdens that would fall on to the UK competent authority, in the form of both transparency reporting and a complicated and watered-down removal order process – something other Member States have raised concern about also. Furthermore, while the Government is exploring options for an independent regulator for the purposes of the Online Harms White Paper, the proposal to have only one *judicial* or *independent administrative* body as the UK competent authority, is likely to be problematic in the short term. On definitions, we would like to see greater clarity on what constitutes “public” in order to avoid inadvertently narrowing the amount of user-generated content in scope. Likewise, we would prefer not to place obligations on HSPs to erase preserved data. Finally, on the issue of cloud infrastructure services, this is something we are consulting on as part of the Online Harms White Paper. We will look to align our position on this issue across both pieces of legislation, in due course.

I would also highlight that there have been proposed changes made to provisions regarding user redress and text relating to protections for fundamental rights, both of which have been strengthened throughout, and which the Home Office is content with. These proposed changes are likely to allay some of the concerns previously raised by some Member States around striking the right balance between content removal and fundamental rights.

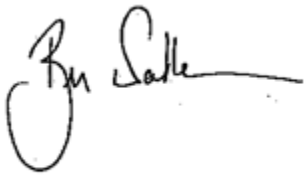
Finally, your Committee raised a specific issue in their most recent correspondence regarding the practicalities of the consultation process for removal orders - although you will note that this has been amended in the Parliamentary version, given their proposed changes to the process overall. While a Member State would have little time to intervene in the process (although it is possible), I believe the efficacy of notifying another Member State of a removal order lies in the transparency it provides, adding a further ‘check’ on the actions of a Member State.

Next steps

It is clear that the revised text put forward by the European Parliament, has in certain parts, moved quite significantly from the versions put forward by the Commission and Council, in September and December respectively. We have clear concerns with this version. Going forward we will look to retain much of the ambitious text put

forward by the Commission and agreed by the Council, during forthcoming negotiations.

To find compromise positions between the different texts is likely to be challenging in trilogues. However, the desire to legislate on this issue at EU level remains, and indeed has arguably been strengthened since the tragic events of the Christchurch attack. As such, we expect all parties will strive to reach an agreeable compromise. My officials have already engaged with the upcoming Finnish Presidency who have set aside time to hold subsequent meetings to progress this file in the autumn. Until trilogues begin, Government officials will look to engage Member State counterparts and newly elected MEPs[1] to influence their position on this file ahead of negotiations. This links in with engagement we are doing across the EU on our Online Harms White Paper, putting the case forward for proportionate and effective regulation, which will meaningfully address the harms we see online.



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[1] The former LIBE rapporteur, Daniel Dalton (ECR, UK), was not re-elected in the May 2019 European Parliamentary elections and will therefore not continue his role as rapporteur on the file in the autumn. We expect the file to remain under the rapporteurship of an ECR member of the newly constituted LIBE committee and will seek to engage the new rapporteur in particular as soon as he/she is selected.