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COMPARATIVE STUDY
ON
BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT

Excerpt, pages 594-596

This document is part of the Comparative Study on blocking, filtering and take-down of illegal Internet content in the 47 member States of the Council of Europe, which was prepared by the Swiss Institute of Comparative Law upon an invitation by the Secretary General. The opinions expressed in this document do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of Council of Europe member States, the Council of Europe's statutory organs or the European Court of Human Rights.

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National reports current at the date indicated at the end of each report.

I. INTRODUCTION

On 24th November 2014, the Council of Europe formally mandated the Swiss Institute of Comparative Law (“SICL”) to provide a comparative study on the laws and practice in respect of filtering, blocking and takedown of illegal content on the internet in the 47 Council of Europe member States.

As agreed between the SICL and the Council of Europe, the study presents the laws and, in so far as information is easily available, the practices concerning the filtering, blocking and takedown of illegal content on the internet in several contexts. It considers the possibility of such action in cases where public order or internal security concerns are at stake as well as in cases of violation of personality rights and intellectual property rights. In each case, the study will examine the legal framework underpinning decisions to filter, block and takedown illegal content on the internet, the competent authority to take such decisions and the conditions of their enforcement. The scope of the study also includes consideration of the potential for existing extra-judicial scrutiny of online content as well as a brief description of relevant and important case law.

The study consists, essentially, of two main parts. The first part represents a compilation of country reports for each of the Council of Europe Member States. It presents a more detailed analysis of the laws and practices in respect of filtering, blocking and takedown of illegal content on the internet in each Member State. For ease of reading and comparison, each country report follows a similar structure (see below, questions). The second part contains comparative considerations on the laws and practices in the member States in respect of filtering, blocking and takedown of illegal online content. The purpose is to identify and to attempt to explain possible convergences and divergences between the Member States’ approaches to the issues included in the scope of the study.

II. METHODOLOGY AND QUESTIONS

1. Methodology

The present study was developed in three main stages. In the first, preliminary phase, the SICL formulated a detailed questionnaire, in cooperation with the Council of Europe. After approval by the Council of Europe, this questionnaire (see below, 2.) represented the basis for the country reports.

The second phase consisted of the production of country reports for each Member State of the Council of Europe. Country reports were drafted by staff members of SICL, or external correspondents for those member States that could not be covered internally. The principal sources underpinning the country reports are the relevant legislation as well as, where available, academic writing on the relevant issues. In addition, in some cases, depending on the situation, interviews were conducted with stakeholders in order to get a clearer picture of the situation. However, the reports are not based on empirical and statistical data, as their main aim consists of an analysis of the legal framework in place.

In a subsequent phase, the SICL and the Council of Europe reviewed all country reports and provided feedback to the different authors of the country reports. In conjunction with this, SICL drafted the comparative reflections on the basis of the different country reports as well as on the basis of academic writing and other available material, especially within the Council of Europe. This phase was finalized in December 2015.

The Council of Europe subsequently sent the finalised national reports to the representatives of the respective Member States for comment. Comments on some of the national reports were received back from some Member States and submitted to the respective national reporters. The national reports were amended as a result only where the national reporters deemed it appropriate to make amendments. Furthermore, no attempt was made to generally incorporate new developments occurring after the effective date of the study.

All through the process, SICL coordinated its activities closely with the Council of Europe. However, the contents of the study are the exclusive responsibility of the authors and SICL. SICL can however not assume responsibility for the completeness, correctness and exhaustiveness of the information submitted in all country reports.

2. Questions

In agreement with the Council of Europe, all country reports are as far as possible structured around the following lines:

1. What are the legal sources for measures of blocking, filtering and take-down of illegal internet content?

Indicative list of what this section should address:

- Is the area regulated?
- Have international standards, notably conventions related to illegal internet content (such as child protection, cybercrime and fight against terrorism) been transposed into the domestic regulatory framework?

- Is such regulation fragmented over various areas of law, or, rather, governed by specific legislation on the internet?
- Provide a short overview of the legal sources in which the activities of blocking, filtering and take-down of illegal internet content are regulated (more detailed analysis will be included under question 2).

2. What is the legal framework regulating:

2.1. Blocking and/or filtering of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content blocked or filtered? This part should cover all the following grounds, wherever applicable:
 - the protection of national security, territorial integrity or public safety (e.g. terrorism),
 - the prevention of disorder or crime (e.g. child pornography),
 - the protection of health or morals,
 - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
 - preventing the disclosure of information received in confidence.
- What requirements and safeguards does the legal framework set for such blocking or filtering?
- What is the role of Internet **Access** Providers to implement these blocking and filtering measures?
- Are there soft law instruments (best practices, codes of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

2.2. Take-down/removal of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content taken-down/ removed? This part should cover all the following grounds, wherever applicable:
 - the protection of national security, territorial integrity or public safety (e.g. terrorism),
 - the prevention of disorder or crime (e.g. child pornography),
 - the protection of health or morals,
 - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
 - preventing the disclosure of information received in confidence.
- What is the role of Internet Host Providers and Social Media and other Platforms (social networks, search engines, forums, blogs, etc.) to implement these content take down/removal measures?
- What requirements and safeguards does the legal framework set for such removal?
- Are there soft law instruments (best practices, code of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

3. Procedural Aspects: What bodies are competent to decide to block, filter and take down internet content? How is the implementation of such decisions organized? Are there possibilities for review?

Indicative list of what this section should address:

- What are the competent bodies for deciding on blocking, filtering and take-down of illegal internet content (judiciary or administrative)?
- How is such decision implemented? Describe the procedural steps up to the actual blocking, filtering or take-down of internet content.
- What are the notification requirements of the decision to concerned individuals or parties?
- Which possibilities do the concerned parties have to request and obtain a review of such a decision by an independent body?

4. General monitoring of internet: Does your country have an entity in charge of monitoring internet content? If yes, on what basis is this monitoring activity exercised?

Indicative list of what this section should address:

- The entities referred to are entities in charge of reviewing internet content and assessing the compliance with legal requirements, including human rights – they can be specific entities in charge of such review as well as Internet Service Providers. Do such entities exist?
- What are the criteria of their assessment of internet content?
- What are their competencies to tackle illegal internet content?

5. Assessment as to the case law of the European Court of Human Rights

Indicative list of what this section should address:

- Does the law (or laws) to block, filter and take down content of the internet meet the requirements of quality (foreseeability, accessibility, clarity and precision) as developed by the European Court of Human Rights? Are there any safeguards for the protection of human rights (notably freedom of expression)?
- Does the law provide for the necessary safeguards to prevent abuse of power and arbitrariness in line with the principles established in the case-law of the European Court of Human Rights (for example in respect of ensuring that a blocking or filtering decision is as targeted as possible and is not used as a means of wholesale blocking)?
- Are the legal requirements implemented in practice, notably with regard to the assessment of necessity and proportionality of the interference with Freedom of Expression?
- In the case of the existence of self-regulatory frameworks in the field, are there any safeguards for the protection of freedom of expression in place?
- Is the relevant case-law in line with the pertinent case-law of the European Court of Human Rights?

For some country reports, this section mainly reflects national or international academic writing on these issues in a given State. In other reports, authors carry out a more independent assessment.

SAN MARINO

1. – 2. – 3. - Legal Framework, including Sources and Procedural Aspects

San Marino ratified the following relevant CoE Conventions:

- the **CoE Convention** on the Protection of Children against Sexual Exploitation and Sexual Abuse, signed in **Lanzarote**, on the 25.X.2007;¹
- the CoE Convention for the Protection of Individuals with regard to **Automatic Processing of Personal Data**.²
- the CoE **Convention on the Prevention of Terrorism**, signed in Warsaw, on the 16.V.2005.³

In addition, specific national laws have been enacted on **e-commerce**:

- Legge 29 maggio 2013 n.58, legge sull'uso delle comunicazioni elettroniche e dell'e-commerce.⁴

On the repression of **sexual crimes against minors**:

- Legge 30 aprile 2002 n. 61, Legge per la repressione dello sfruttamento sessuale dei minori.⁵

On the **processing of Personal Data**:

- Legge 1° marzo 1983, n.27 (pubblicata il 9 marzo 1983), Disciplina raccolta, elaborazione e uso di dati personali nel settore dell'informatica.⁶

Recently, a Decree Law No. 179 of 9 December 2015,⁷ on the "Establishment and Regulation of the Agency for digital development" has been approved: Decreto Delegato 9 dicembre 2015 n.179 -

¹ Decreto consiliare 28 gennaio 2010 n. 31, Ratifica della Convenzione del Consiglio d'Europa sulla protezione dei bambini contro lo sfruttamento e gli abusi sessuali, firmata a Lanzarote il 25 ottobre 2007 <http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17017084.html>. All websites quoted in the present report were last accessed on December, 2nd, 2015.

² Decreto consiliare 29 aprile 2015 n. 58, Ratifica della convenzione sulla protezione delle persone rispetto al trattamento automatizzato di dati a carattere personale <http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17141516.html>

³ Decreto Consiliare 26/07/2010 n.137- Ratifica della Convenzione del Consiglio d'Europa sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato e sul finanziamento del terrorismo, adottata a Varsavia il 16 maggio 2005 e delle relative Dichiarazioni e Riserve <http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17002161.html> and Decreto Consiliare 2 aprile 2013 n.35 - Ritiro e modifica riserve e dichiarazioni notificate in occasione del deposito dello strumento di ratifica della Convenzione del Consiglio d'Europa sul riciclaggio, la ricerca, il sequestro e la confisca dei proventi di reato e sul finanziamento al terrorismo, adottata a Varsavia il 16 maggio 2005 <http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17131595.html>

⁴ <http://www.consigliograndeegenerale.sm/on-line/home/in-evidenza-in-home-page/scheda17132263.html>

⁵ <http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17015249.html>

⁶ <http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti/scheda17012574.html>

⁷ http://www.consigliograndeegenerale.sm/on-line/home/archivio-leggi-decreti-e-regolamenti.html?PO_path=%2Fhome%2Ftomcat%2Findicizzazione%2Findexleggi&PO_paginazione=15&PO_pagina=1&PO_o

Istituzione e regolamentazione dell’Agenzia per lo Sviluppo Digitale. The Decree aims at implementing the directives and objectives established in the European Digital Agenda⁸. In particular, Art. 3 of the Decree establishes an "Agency for Digital Development" with seven members appointed by the "Consiglio Grande e Generale" (Great and General Council, San Marino legislative body). The tasks carried out by the Agency are enumerated in art. 5 of the Decree and will consist – basically - in monitoring the implementation and enforcement of laws and regulations in the field of Information and Communication Technology, including, monitoring the security and the privacy of personal data and citizens' rights.

4. General Monitoring of Internet

According to our information, San Marino does not monitor internet content through administrative bodies.

According to the 2015 Report of the NGO Freedom House: “**Freedoms of speech and the press are guaranteed.** There are several private daily newspapers; a state-run broadcast system for radio and television, RTV; and a private FM station, Radio Titano. The Sammarinese have access to all Italian print media and certain Italian broadcast stations. **Access to the internet is unrestricted.**”⁹

This information is confirmed by the US Department of State in its 2014 Human Rights Report on San Marino assessing: “The government **did not restrict or disrupt access to the internet or censor online content**, and there were **no reports that the government monitored private online communications without appropriate legal authority**. According to the International Telecommunication Union, almost 51 percent of the population used the internet in 2013.”¹⁰

The use of internet has been recently **encouraged** through law 10 March 2015 N. 28, *Legge-quadro per l’assistenza, l’inclusione sociale e i diritti delle persone con disabilità*¹¹ as a key-factor to **promote the social integration of disabled persons**.

5. Assessment as to the case law of the European Court of Human Rights

The European Court of Human Rights has never been asked to judge the compliance of San Marino with the Charter as regards to freedom of the internet. In addition, to the best of our knowledge, there is **no relevant case law** as regards to internet monitoring practices in San Marino and Human rights and freedoms protected under the Council of Europe’s Convention.

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⁸ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A Digital Agenda for Europe, /* COM/2010/0245 f/2 */ available at ([http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010DC0245R\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52010DC0245R(01))) (25.4.2016).

⁹ <https://freedomhouse.org/report/freedom-world/2015/san-marino>.

¹⁰ <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dclid=236572#wrapper>.

¹¹ <http://www.consigliograndeegenerale.sm/on-line/home/streaming-video-consiglio/scheda17140780.html>.

On these grounds, however, a balance needs to be found between freedom of the internet and the main problems faced by San Marino, which are **corruption** and **urgency to take AMT/CFT actions** [anti-money laundering / combating the financing of terrorism].

As regards to corruption, according to the aforementioned report of Freedom House: “In recent years, the government of San Marino has placed an emphasis on combating corruption and money laundering. In 2014, the government established several measures to help the country implement suggestions made by the Council of Europe’s Group of States against Corruption (GRECO). One high-profile case ended in September with the conviction of at least seven individuals on bribery and corruption charges connected to the construction industry”.¹²

As regards to AMC/CFT actions, the **Council of Europe** has pointed out that: “Formal **national risk assessment** to assess the areas of vulnerability to money laundering and terrorist financing in San Marino, has not yet been undertaken. However, on 3 April 2014, San Marino formally requested technical assistance to the World Bank in this connection.” In order to address the specific problems related to Designated Non-Financial Businesses and Professions, the CoE requested to San Marino a **wider monitoring of the Internet in connection with gambling activities, denouncing** the following : “*Deficiency [...]: No measures taken to identify whether there are any San Marino residents/citizens who own or operate: (1) an internet casino; (2) a company that runs an internet casino; or (3) a server that is located in the Republic of San Marino and which hosts an internet casino./ Recommended action: San Marino should take measures to identify whether there are any San Marino residents/citizens who own or operate: (1) an internet casino; (2) a company that runs an internet casino; or (3) a server that is located in the Republic of San Marino and which hosts an internet casino.*”¹³

According to San Marino authorities (the Postal Police Unit at Gendarmerie, through the Industry and Commerce Office) there are no San Marino citizens or residents, nor servers which own or operate internet casinos.

However the CoE further recommended to San Marino’s authorities to: “*Ensure supervisory arrangements and performance to provide for fully ascertaining efficiency of implementation of applicable AML/CFT requirements by DNFBPs [Designated Non-Financial Businesses and Professions]*”.¹⁴

Dr Ilaria Pretelli
08.12.2015

Revised on 03.05.2016 taking into consideration comments from San Marino on this report

¹² *Supra* note 7.

¹³ See 2nd Regular Follow-Up Progress Report, 4th Round Mutual Evaluation of San Marino, Council of Europe, Adopted at the 47st Plenary Session and released on April 2015, at 39 [http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/followup%20report%204round/MONEYVAL\(2015\)5_SMR_4thFollowUpRep.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/followup%20report%204round/MONEYVAL(2015)5_SMR_4thFollowUpRep.pdf)

¹⁴ *Ibidem*.