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COMPARATIVE STUDY

ON

BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT

Excerpt, pages 20-21

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.

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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.

ANDORRA

1. Legal Sources

The Principality of Andorra does not have in its domestic law a specific body of legislation concerning the Internet. However, from the standpoint both of international and of domestic law, certain aspects seem to be indirectly regulated.

Indeed, the Principality of Andorra on 18 December 2003 enacted a law on personal data protection (LLei 15/2003, del 18 desembre, qualificada de protecció des dades personals). In the same field, the Principality has ratified the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and the Additional Protocol thereto (in force since 1 September 2008).

In the Council of Europe framework, the Principality has also ratified the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (in force since 1 August 2014) as well as the Convention on the Prevention of Terrorism (in force since 1 September 2008). As to the Convention on Cybercrime, the Principality signed it on 23 April 2013 but so far has not ratified it.

In 2014, the government of the Principality approved two bills for a law on electronic commerce and a law on Internet lotteries, but according to our research these bills have not been passed as laws to date. We were not able to obtain copies of the texts of the bills.

2. Legal Framework

Our research did not allow the updating of definite and useful information on measures to block, filter and remove illegal contents on the Internet.

With regard to intellectual property, that is copyright (Llei sobre drets d'autor i drets veïns de 1999), trademarks (Llei de marques, de l'11 de maig de 1995) and patents (llei 26/2014, del 30 d'octubre, de patents),[1] no mention is made of infringement of these rights via the Internet or to any possibilities for blocking or removing illegal content.

Regarding protection of personal data, the law of 18 December 2003 makes no rule on data processing on the Internet, but it seems logical that the computerised use of personal data or the establishment of databases on the Internet should fall within the scope of this law. The law makes no mention, however, of closure of a database because of infringement of these provisions. However, natural and legal persons or a public authority infringing it will be punished by a pecuniary penalty of up to € 50000 for the first offence and up to € 100000 for recurrent offences (art. 33).

3. Procedural Aspects

Our research has not made it possible to discern useful information on the procedure applicable in connection with measures to block, filter and remove illegal Internet contents.

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[1] These three laws are available under: http://www.justicia.ad/es/lleis (19.11.2015).

4. General Monitoring of Internet

Our research has not made it possible to discern useful information on the possible existence of a general Internet monitoring mechanism.

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

In the absence of any legislative framework on measures for blocking, filtering and removal of illegal content on the Internet, our research has not identified measures designed to ensure respect for freedom of expression, apart from general protective provisions. Thus, Article 12 of the Constitution of the Principality of Andorra provides that: "The freedoms of expression, communication and information are recognised. The law settles the right of reply, the right of rectification and professional secrecy. Prior censorship or any other means of ideological control by the public authorities remain prohibited."[2]

Alfredo Santos

19.11.2015

[2] The Constitution is available under: http://www.wipo.int/edocs/lexdocs/laws/fr/ad/ad001fr.pdf (in French) and http://www.wipo.int/edocs/lexdocs/laws/ca/ad/ad001ca.pdf (in Catalan) (19.11.2015).