

VĚRA JOUROVÁ
Member of the European Commission

Brussels, 21 June 2016
Ares(2016)

Dear Mr Jeppesen,

Thank you for your letter of 3 June, 2016, concerning the Code of Conduct on illegal online hate speech announced on 31 May 2016. In particular, you express concerns that the practices enshrined in the Code of Conduct may be insufficient to ensure that the free expression rights of people using Internet are protected and respected.

We have examined your submission with great interest and in addition to addressing the specific questions that you have raised we would like to provide some general explanations that are necessary to put the Code of Conduct in its correct context.

As reflected in the Code of Conduct, its conception has taken full account of the need to scrupulously respect the right to freedom of expression as expressed in the EU rules and in line with the European Court of Human Rights' jurisprudence. As you are probably aware this standard corresponds to the very highest level of fundamental rights protection which is also reflected in international comparisons, showing that the European region is a world leader in terms of freedom of the press¹.

The need to safeguard freedom of expression is also why the Code expects IT Companies to take action only against content that is illegal and that is considered as incitement to violence and hatred in accordance with the standard set in the EU Framework Decision on Racism and Xenophobia² which fully reflects that careful line to be drawn between illegal hate speech inciting to violence or hatred and content that is protected by freedom of expression.

Mr Jens-Henrik Jeppesen
Center for Democracy & Technology
Representative and Director for European Affairs
1401 K Street NW, Suite 200,
Washington, DC 20005
USA

¹ Reporters without borders - 2016 World Press Freedom Index. <https://rsf.org/en/ranking>

² Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law OJ L 328, 6.12.2008, p. 55–58

The European Court of Human Rights has made it clear that states may sanction or even prevent genuine and serious incitement to violence and hatred; but it has also found that the fundamental right to freedom of expression protects speech which "offends, shocks or disturbs the State or any sector of the population".

Contrary to what is stated in your letter, the definition of illegal hate speech is not unclear. Recital 5 of the EU Framework Decision explains exactly why it was necessary through the Framework Decision to define a common criminal-law approach in the European Union in order to ensure that the same behaviour constitutes an offence in all Member States. In other words, the Framework Decision addressed the fragmentation that previously existed in terms of the definition of what constitutes illegal hate speech. To ensure the correct implementation of the definition of the types of acts that constitute illegal hate speech, Member States can rely on a long line of case law, starting with the Jurisprudence of the European Court of Human Rights to offer guidance as concerns this question. In terms of the ability of the IT companies to abide to the law, it should be recalled that rules and accompanying jurisprudence on hate speech content have always been applied by newspapers, radio and TV stations in Europe, including on their internet website, where millions of third party comments need to be moderated, without this being perceived as a problem. For more succinct information on this topic, as well as information on the most salient case law of the European Court of Human Rights, I refer you to the Council of Europe Manual on hate speech³ and the European Court of Human Right's factsheet on hate speech⁴.

The effective criminalisation of hate speech which incites to violence and hatred depends first and foremost on a robust system of implementation and enforcement of the relevant criminal law provisions against the individual perpetrator of hate speech by national authorities. This is also why the Commission, separately from the Code of Conduct, is committed to monitoring closely the implementation at the national level of the EU Framework Decision (2008/913/JHA) on combating Racism and Xenophobia by means of criminal law.

However, given the fact that the phenomena of hate speech is increasingly moving "online" and features frequently on social media where it can spread virally, the work of enforcing the Framework Decision at national level against the individual offenders must be complemented with measures aimed at ensuring that illegal hate speech is expeditiously removed, where necessary, by online intermediaries and social media platforms.

To address the worrying increase in antisemitic and anti-Muslim hatred in Europe, the issue of "hatred online" featured prominently in the first Annual Colloquium on Fundamental Rights on 1-2 October 2015, which focussed on "Tolerance and respect: preventing and combating antisemitic and anti-Muslim hatred in Europe"⁵. There was a strong consensus that action by online intermediaries is needed to better tackle hate speech in the online world. The importance of addressing the matter was underlined in the Joint Statement issued by the extraordinary Justice and Home Affairs Council of 24 March 2016 on the terrorist attacks in Brussels which indicated that "the Commission will intensify work with IT Companies to develop by June 2016 a Code of Conduct against hate speech online".

³Manual on hate speech Anne Weber, Council of Europe Publishing
http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/Hate_Speech_EN.pdf

⁴European Court of Human Rights Factsheet – Hate speech, March 2016,
http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf

⁵Annual Colloquium on Fundamental Rights 2015, conclusions http://ec.europa.eu/justice/events/colloquium-fundamental-rights-2015/files/fundamental_rights_colloquium_conclusions_en.pdf

It was against this background that the Commission negotiated and presented on 31 May 2016 a Code of Conduct on hate speech with Facebook, Microsoft, Twitter and YouTube. As regards the concerns expressed in your letter on the lack of participation by civil society in this process, it should be underlined that while the Code contains only commitments on behalf of the IT Companies and the Commission, this does not mean that the Code of Conduct was drafted in isolation from the situation on the ground or from input from the stakeholders. On the contrary, the provisions of the Code aims exactly to address the issues and policy responses that had been identified in the conclusions of the Annual Colloquium on Fundamental Rights on 1-2 October 2015, including through a public consultation which took place between 1 April and 31 May 2015⁶. Similar concerns and suggested policy responses were also reiterated by the Member States and the civil society in bilateral exchanges and in dedicated meetings of 24 November 2015 with Member States, 22 January 2016 with IT companies and civil society and a coordination meeting with the IT companies, Member States and civil society on 4 March 2016⁷. For this reason, we cannot agree that the advice or input from civil society organisations, including on the topic of freedom of expression, was not considered in the process. The code was presented on 31 May 2016 in a Coordination Meeting with Member States, IT companies and Civil Society in the context of the Dialogue with IT Companies on online hate speech where it was welcomed by all civil society partners with the exception of EDRi and Access Now that decided to withdraw from the discussions.

As to the concerns expressed in your letter on the impact on fundamental rights, including freedom of expression of the Code, we can assure you that the Commission has taken every step to ensure that the commitments set in place have been carefully assessed against the EU Charter of Fundamental Rights. In this respect it is recalled that the Code only commits the IT Companies to act in response to content that is considered as illegal under national laws transposing the Framework Decision 2008/913/JHA.

Given that the Framework Decision has been developed fully in line with the need to defend the right to freedom of expression, the implementation of the Code of Conduct as such can therefore not lead to any undue restrictions of the right to freedom of expression or excessive take downs also of legal content. Looking at effects beyond what is required by the Code it is true that some of the available studies have suggested that the removal policies of internet intermediaries may lead to excessive take downs for certain types of content such as copyright⁸. These findings can however not be simply transferred to the field of hate speech since the push factors for reporting are different and since there are no economic incentives to trigger notices, and resulting take-downs, for hate speech. These differences between take-down of hate speech and copyright protected material are confirmed by data on the actual situation on the ground demonstrating that there is no ascertainable risk of excessive take downs of legal content in the field of hate speech. In fact, information and data obtained from civil society and Member States in the meetings leading up to the presentation of the code of conduct showed that the a large proportion of notices provided to IT companies in respect of hate speech are left without action even when constituting clearly illegal hate speech according to the notice providers. These findings are confirmed also by studies published by

⁶Public consultation summary report of the Annual Colloquium on Fundamental Rights 2015:

http://ec.europa.eu/justice/events/colloquium-fundamental-rights-2015/files/colloquium_public_consultation_summary_web.pdf

⁷Record of the Coordination Meeting with Member States, IT companies and Civil Society in the context of the Dialogue with IT Companies on online hate speech, 4 March 2016

http://ec.europa.eu/justice/fundamental-rights/files/press_hate_speech_meeting_04_03_2016_en.pdf

⁸See by way of example the study *Role and Responsibility of the Internet Intermediaries in the field of copyright and Related Rights*, Lilian Edwards, Professor of E-Governance, University of Strathclyde

http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf

civil society such as l'Union des Etudiants Juifs de France (UEJF) and SOS Racisme⁹ According to their recently published data, out of 586 cases of reported hate speech in a given time period, only 4% were taken down by Twitter, 7% by YouTube and 34% by Facebook. In view of these findings it is highly unlikely that the Code of Conduct would lead to excessive take downs including take down of legal content. The expected result of the Code of Conduct must rather be that at least a higher share of the illegal content is removed.

In addition to the fact that the commitments by IT Companies to remove or disable access to illegal hate speech would not be in breach of the right to freedom of expression, a proper fundamental rights impact assessment would also have to take into account the impact of the foreseen policy measures on all other concerned stakeholders. Beyond the impact on freedom of expression of those wishing to spread incitement to violence and hatred online or indeed aggressive and abusive speech that is close to but does not pass the threshold of illegal hate speech, such an assessment would also have to factor in the chilling effect on freedom of expression caused by the hate speech itself on the general public. Faced with the real risk of receiving threats and hate, which may materialise into physical acts of violence, lack of action to combat illegal hate speech online, would lead to a situation where activists, bloggers, journalist and public office-holders may think twice before expressing their opinions online. Examples of the impact of hate speech on journalism including journalists deciding to withdraw their presence from social media due to being victims of hate speech have already been reported¹⁰.

Your submission also expresses concerns that the Code does not provide guidance as to the type of content that should be notified by Member States and the remedies available to citizens should they consider that an IT company has incorrectly decided to remove or restrict access to content.

In respect of measures by Member State authorities, it should be noted that the Code of Conduct consists of non-legally binding voluntary commitments that have been agreed between the Commission and the IT Companies and as such, the Code commits the companies. It follows that the Code does not deal with matters pertaining to criminal law proceedings against the authors of hate speech or with the transfer of user data or notification of illegal content to public authorities. Furthermore, the Code does not in any way impose an obligation on Member States or people to notify content or dictate what type of content should be notified. Of course, any person that experiences illegal hate speech online may report the incident to the police or the relevant national authorities for the appropriate follow up and possible prosecution. The European Commission monitors the implementation of the EU Framework Decision on Racism and Xenophobia¹¹ and has taken decisive action, among

⁹ Press release l'UEJF and SOS Racisme "*L'UEJF et SOS Racisme portent plainte contre Twitter, YouTube et Facebook pour non-respect de leurs obligations de moderation*" <http://uejf.org/blog/2016/05/15/uejf-et-sos-racisme-portent-plainte-contre-twitter-youtube-et-facebook-pour-non-respect-de-leurs-obligations-de-moderation/>

¹⁰ See by way of example:

Monica Löfgren Nilsson *Hot och hat mot svenska journalister* NORDICOM-INFORMATION 37 (2015) 3-4: p 51-56 http://www.nordicom.gu.se/sites/default/files/kapitel-pdf/nordicom-information_37_2015_3-4_51-56.pdf.

The Guardian, *The web we want*, 8 April 2016 <https://www.theguardian.com/technology/2016/apr/12/the-dark-side-of-guardian-comments>

NYT Jonathan Wiesman *Why I Quit Twitter — and Left Behind 35,000 Followers*, JUNE 10, 2016 http://www.nytimes.com/2016/06/10/insider/why-i-quit-twitter-and-left-behind-35000-followers.html?_r=0

¹¹ Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law {SWD(2014) 27 final} http://ec.europa.eu/justice/fundamental-rights/files/com_2014_27_en.pdf

others, to increase victims' support as well as to support law enforcement training and awareness on the need to unmask bias motivated hate crime, including illegal hate speech online¹².

The Code does not influence execution of judgements or orders from the court or indeed access to legal proceedings in Member States.

Furthermore it should also be noted that the fundamental right to free speech protects against actions by the state, but not as such against private companies unless imposed through a specific legal obligation. It follows from the right to freedom to conduct a business and the freedom to contract that private companies have to be free to determine the content that they would like to host on their platforms as long as it respects the law. The user conditions of the services that IT Companies offer on their platforms are governed by the contractual relationship that they have with their users and are not subject to review by the European Commission for this purpose.

Notwithstanding the above, we fully agree that that the IT platforms and social media are becoming increasingly important for opinion building and the democratic discourse in Europe. This is also why the Code of Conduct recognises the importance of continuing working on transparency in the procedures relating to notifications and how they are assessed by the IT Companies.

In terms of the question of what constitutes a valid notification, you will have noted that the Code indicates that, to be considered valid, a notification should "not be insufficiently precise or inadequately substantiated". This wording reflects the fact that in order for the IT Companies to be able to effectively deliver on the commitment to take action on notifications on illegal hate speech, they need to have access to notices of a sufficient quality and that are not insufficiently precise or inadequately substantiated, so as to reflect the case law of the Court of Justice, notably in the L'Oreal Ebay case¹³.

You finally also enquire about the follow up of the Code of Conduct. I would like to assure you that the IT companies, the Commission as well as Member States and civil society, recognised at an early stage the need to continue this process in order to review the results of the work and to make progress on transparency. To this effect, you will have seen that the code also contains a commitment for the IT Companies and the European Commission to assess the public commitments in the code of conduct on a regular basis, including their impact.

From our side, a preliminary assessment will be reported to the High Level Group on Combating Racism, Xenophobia and all forms of intolerance by the end of this year. This High Level Group, which met for the first time on 14 June 2016, brings together, Member States authorities, key stakeholders including civil society organisations and community representatives, but also relevant EU agencies, and in particular the EU Agency for Fundamental Rights (FRA), as well as international organisations active in this area and will be used as a platform to monitor and report on the implementation of the commitments undertaken by IT companies and the Member States to fight against online hate speech.

¹² "One stop shop: Tolerant, inclusive and pluralistic societies: A guide to EU initiatives and funding": http://ec.europa.eu/justice/fundamental-rights/racism-xenophobia/one-stop-shop-funding/index_en.htm

¹³ C-324/09 L'Oréal and others v eBay, judgment of 12 July 2011 point 122

I trust that with these explanations you can support us in making the Code of Conduct a success. There is a continuum between illegal hate speech online and hate crime: the horrific and recent killings in Orlando is just one tragic illustration of what hate crimes might mean in the real world. This affects not only the individual victims and their families but also our societies' ability to protect all people, including minority groups. I want to thank you for the engagement that you have shown on this important question and look forward to continued cooperation on questions pertaining to fundamental rights in the digital world.



Věra Jourová