Analysis

Policing the internet: from terrorism and extremism to "content used by traffickers to attract migrants and refugees"

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The EU's deal with Turkey on refugees and migrants has been presented by its proponents as a quick and effective way to deal with the ongoing arrival of people in Europe. Its opponents maintain it is morally bankrupt and contrary to international law. Yet the EU's approach to migrants and refugees is not solely concerned with such high-profile actions, and a whole host of new projects have been launched or given a new lease of life in recent months.

One of these projects is a new unit set up within Europol, the Internet Referral Unit (IRU). Originally set up to remove "terrorist and violent extremist" material from the internet, it will now also deal with "content used by traffickers to attract migrants and refugees". The legal basis for the unit was established in secret "trilogue" meetings with the Parliament and the Commission, during negotiations on the new Europol Regulation.

The IRU is supposed to help decrease the number of people arriving in Europe irregularly through the online detection and removal of smugglers' activities and networks. However, until there are changes in the legal and policy framework that makes so much life-threatening migration inevitable, it seems it is unlikely to alleviate the misery at Europe's borders.

Online "combat"

In March 2015 the European Council issued a set of conclusions that authorised Europol to set up an "Internet Referral Unit" (IRU) in order to "combat terrorist propaganda and related violent extremist activities on the Internet". The IRU has four main tasks:

- "to coordinate and share the identification tasks (flagging) of terrorist and violent extremist online content with relevant partners";
- "to carry out and support referrals quickly, efficiently and effectively, in close cooperation with industry";
- "to support competent authorities, by providing strategic analysis and operational analysis";
- "to act as a European Centre of Excellence for the above tasks". [1]

A "pilot phase" began on 1 July 2015. This involves, amongst other things:

- "A first stage of the flagging and referral coordination" based on tools and systems already used by Europol: SIENA (Secure Information Exchange Network Application); Large File Exchange and Check the Web;
- "A first stage of the Open Source Scanning Team, based on the existing Anonymous
- Internet Search service and the testing of a dedicated Open Source scanning tool";
- Cooperation with "Priority Third Countries with an operational agreement," such as Australia;
- Search and analysis of material in Arabic, Dutch, English, Estonian, French, German, Greek, Russian and Spanish.

On 1 January 2016 the IRU moved into "Initial Operating Capability" and is supposed to reach "Full Operating Capability" by 1 July 2016. It will be part of Europol's new European Counter-Terrorism Centre, set up to support national counter-terrorism work by "maximising operational, technical and overall information exchange capabilities in the area of counter terrorism." [2]

The IRU: how does it work?

Europol hosts a central IRU database at its headquarters in The Hague, which is fed with information from web surveillance carried out by national police units and Europol staff. They "carry out and support referrals [recommendations for take-down] quickly, efficiently and effectively, in close cooperation with industry." The unit is also supposed to support Member States "with operational and strategic analysis." [3]

Unlike the UK's effort at policing the internet for terrorist content (see further below), the public is unable to make submissions to Europol, as the agency's legal basis does not allow the receipt of information directly from the public. However, material submitted by the public to a national unit such as the UK's CTIRU could be shared with the EU agency. The unit will also be permitted to receive information directly from private parties (such as internet service providers or social media companies) once the new Europol Regulation comes into force.

According to Europol, once suspect material is found:

> *"An expert evaluation of the content is performed in accordance with the principles set up in Council Framework Decision 2008/919/JHA on combating terrorism. The Council Framework Decision 2008/919/JHA on combating terrorism (amending the Council Framework Decision 2002/475/JHA) sets out a definition on what is to be considered as "public provocation to commit a terrorist offence"."*

As in the UK, there is no judicial involvement or oversight of the process. Essentially, Europol and Europe's police forces are trying to draw the attention of websites and ISPs to potentially illegal activities that may breach commercial terms of service:

> *"Referral activities will not constitute an enforceable act, thus the decision and related implementation of the referral is taken under full responsibility and accountability of the concerned service provider."*

In response questions from *Statewatch*, Europol noted:

> "*The overall process of the EU IRU reporting terrorist and extremist online content to the online service provider is no different from any citizen flagging content for removal by the respective online service provider."*

Starting up

In mid-September 2015, two-and-a-half months after the IRU was launched, a Europol representative told the Council of the EU's Working Party on Terrorism that "seven persons, [including a Netherlands and a UK] national expert, formed part of the IRU, expecting to expand to 12 persons within a year… Overall Internet providers had been responding positively to requests." [4] By the beginning of October, according to the EU's Counter-Terrorism Coordinator (CTC), the IRU had "carried out 500 referrals, over 90% of which have been successful leading to the removal of the flagged content." [5]

The IRU builds upon Europol's 'Check the Web' project (which began in 2007) [6] and a system devised in the UK, the Counter Terrorism Internet Referral Unit (CTIRU). This was established in in February 2010. Between then and March 2015 it oversaw the removal of "75,000 individual items," and "by June 2015 it was taking down an average of 1,000 'pieces' per week." [7]

UK-based Internet Service Providers (ISPs) are asked to remove material the CTIRU considers in breach of anti-terrorism law, while websites hosted by ISPs outside the UK that do not comply with police requests for removal can be added to a blacklist incorporated into internet filters used by a number of major UK ISPs. [8]

The inspiration that the UK model provided for the EU apparently received some criticism from Member States' delegations in the Council:

> *"Some Member States agreed with the UK approach, while others were more cautious regarding the removal of online content from the internet and underlined the importance of basing the work on respect for fundamental rights and values in Europe. The COM [Commission] representative confirmed that under the current circumstances where there is no unanimity at EU level, the UK approach cannot be supported by COM. The work underway should nevertheless be continued and concentrate on areas where there is consensus."* [9]

That consensus presumably included setting up the IRU and putting it into action.

A "concept note" on the IRU drafted by Europol sets out grand visions: it should ultimately "be in a position to **anticipate and pre-empt terrorist abuse of social media** and play a pro-active advisory role vis-à-vis Member States and the private sector" (emphasis added). [10] However, according to a paper issued by the EU's Counter-Terrorism Coordinator in early October 2015, the Unit "has insufficient resources" to monitor anything other than "the major platforms". [11]

In the future the Commission "intends to support the IRU in reaching out to more internet companies, as well as encouraging the companies to have adequate arrangements in place to receive referrals from the EU IRU." [12]

Another Commission initiative may be useful to the IRU. An "EU Internet Forum" that will examine "reducing accessibility to terrorist content" was launched at the end of 2015 and will involve cooperation with giant corporations such as Facebook, Google and Microsoft. The European Digital Rights Initiative (EDRi) examined documents on the Forum provided by the Commission and concluded that:

> *"The Commission is about to officially launch an initiative that lacks a clear definition, scope and impact assessment. What does this say about the prevention and fight against terrorism in Europe and the tackling of the underlying societal problems? At*

least the Commission can tell the press and the Member States that it's "doing something"." [13]

From terrorism to migration

In April 2015 – before the IRU had officially begun operations – the European Council extended its remit to cover migration as well, announcing its intention to "use EUROPOL to detect and request removal of internet content used by traffickers to attract migrants and refugees, in accordance with national constitutions." [14] This proposal was further developed in a set of Council conclusions agreed in November 2015, which invited Europol to "accelerate the establishment of the European Migrant Smuggling Centre (EMSC)," as well as noting the role of EU agencies Eurojust (which has a new "thematic group on migrant smuggling" to support investigations and prosecutions) and Frontex. [15]

Within the EMSC, the IRU will work to detect and have removed adverts and messages offering smuggling services. A number of press reports this year have highlighted the use of the internet by smugglers, with the *Associated Press* reporting in January that those making irregular journeys to Europe "have their pick of social media sites that work like an online travel agent." [16]

The theme was picked up by a *Guardian* article in May, with a headline suggesting that migrants were being "lured" by smugglers using social media, while *EurActiv* reported in September that Facebook is far from being the only source of information used by migrants, nor are migrants helpless victims: "On top of this, messaging apps such as WhatsApp and Viber help them en route to contact smugglers, friends and families alike, while mapping apps ensure they don't get lost." [17]

The nature of supply and demand means that opportunities abound. As an article in *The Spectator* pointed out:

> *"If you can't find a deal in Aksaray [a suburb of Istanbul], offers abound on the internet. Facebook groups, set up in Arabic, advertise a range of services. One reads, 'Istanbul to Greece, only $650/person. Leaving every night, call Muhammad for details.'"* [18]

Top priority

Europol's press release at the launch of the EMSC noted that: "The launch of the Centre reflects the top priority status that migrant smuggling has now acquired." [19] This status is also reflected in Europol's 2016-2020 strategy, which states that "special focus will be placed in the area of facilitated illegal migration." The strategy explains:

> *"Europol will establish and develop in early 2016 the European Migrant Smuggling Centre (EMSC) which will provide increased operational support to MS in their fight against organised people smuggling networks. The EMSC will utilise a combination of operational capabilities to ensure the best operational support; the existing Focal Points, JOT-Mare [Joint Operational Team Mare] and regional task forces deployed at Migration hotspots will be further strengthened with EU mobile investigation support teams, providing on-the-spot operation al and analytical support. The expertise of the EU Internet Referral Unit will also be used to identify and refer online content relating to the provision of illegal migration services."* [20]

Yet another set of Council conclusions, this time from March 2016, addressed migrant smuggling specifically and provided reinforced political backing for Europol and high-level

direction for the EU's crusade against migrant struggling. In this respect they also demonstrate the thinking of the EU's governments.

While the preamble notes the need to develop a policy that "fully respects human rights and the dignity of the smuggled migrants as well as of those providing humanitarian assistance, as well as the principle of non-refoulement, and the prohibition of collective expulsion," the right to asylum is not mentioned once, nor is the term "refugee" or "international protection" (except in the context of removing people from EU soil).

The Council is also moving towards a conflation of trafficking and smuggling. Whilst "acknowledging" that the two acts are "two distinct forms of crime, covered by distinct legal frameworks at EU and international level," (notably, smuggling takes place without violence, coercion or deception, unlike trafficking) the Council argues that "both forms of crime can be interlinked". Furthermore:

> "migrant smuggling has become an increasingly violent form of crime, which may involve serious physical or psychological violence and human rights abuse, exposing women and children to particular risk." [21]

The Council of Europe's human rights commissioner has also noted that "women and girls, especially those travelling alone, face particularly high risks of certain forms of violence, including sexual violence by smugglers, criminal groups and individuals." [22] Yet the conclusions have little to say on what the needs of affected individuals may be, and how they should be supported by the authorities with whom they come into contact. Neither is there any reflection on the obligations authorities would have towards people found to have been trafficked rather than smuggled. The emphasis lies squarely on detection and prosecution of smuggling networks – whatever they are taken to mean.

The legal basis: developed behind closed doors

New rules governing Europol are now close to formal approval, having been agreed in secret "trilogue" negotiations between the Council, the Parliament and the Commission. One topic that came up for discussion was how to make sure that the new legal basis ensures that Europol can maintain its role in policing the internet.

The Council agreed its negotiating position on the new Europol Regulation in June 2014, [23] but the text did not include provisions that would allow the IRU to function in the way now envisaged by the Member States and Europol. Given all the subsequent Council conclusions backing the establishment of the IRU, this looked set to cause a problem.

The relevant part of the Council's position, Article 32, explicitly prohibited the transfer of personal data (for example, the URL of Facebook pages or Twitter accounts) to private parties (such as internet service providers, ISPS) unless it is "undoubtedly in the interests of the data subject" or "the transfer is absolutely necessary in the interests of preventing imminent danger associated with crime or terrorist offences."

The Luxembourg Presidency of the Council therefore suggested in mid-September 2015 new provisions allowing Europol to transfer personal data to private parties, which would "ensure that Europol can take appropriate action to secure the removal of certain internet content in voluntary cooperation with online service providers." [24]

The Presidency also suggested that "allowing Europol to receive personal data directly from private parties could maybe be discussed." Such data currently has to be passed through intermediaries such as the Europol National Units, located in the Member States. The Presidency said the idea should be discussed "if delegations consider that there is an

operational need for such direct receipt," but that such amendments "might be rather difficult for the EP [European Parliament] to accept." Apparently the Member States did consider there to be an "operational need", and the European Parliament agreed to the proposals, as explained in a Council note. [25]

Dealing with "root causes"?

EU institutions are aware that people smuggling is a symptom, rather than a cause, of migration to Europe. Recent draft conclusions approved by national delegations in the Council's Africa Working Party and the Political and Security Committee state that:

> *"The high number of people in the region [the Horn of Africa] who are willing to migrate is by far larger than the limited possibilities of legal avenues for migration, be it within the region or outside. Lack of opportunities for legal migration or complex and expensive procedures mean that many migrants feel that they have no other option than to use irregular channels."* [26]

It is precisely those "irregular channels" that are being advertised through Facebook groups, websites and messaging apps to anyone desperate enough to use them. They are the inevitable result of people's inability to legally migrate to Europe due to policies and laws intended to stop them, such as carrier sanctions [27] the impossibility of obtaining humanitarian visas, [28] or simply greater physical barriers to entry. Zeid Ra'ad Al Hussein, the UN High Commissioner for Human Rights, stated recently:

> *"the increasing militarisation of borders, with higher fences, bigger guns, drones and armed warships, is folly. It comes at enormous human cost, firstly, but huge financial cost too, and it is creating a market for criminal smuggling – on a level of organisation that is able to circumvent this military-grade technology that is being deployed."* [29]

Noting the ability of terrorist and extremist propagandists to adapt to changing situations and circumstances, Europol has concluded:

> *"Therefore, prevention strategies such as suspending social media accounts or removing terrorist and violent extremist content need to be combined with pro-active measures… the EU IRU should not be confined to playing a "whack-a-mole" game with terrorists. It should look beyond current challenges, towards future developments and emerging social media trends and resources. In addition to helping with the suspension of individual accounts distributing terrorist propaganda, the EU IRU should have the capacity to support the Member States in challenging the core of the networks that distribute content and to limit the effectiveness of the social media strategies of terrorist and extremist groups in their efforts to radicalise and recruit vulnerable individuals."* [30]

This strategy presumably now extends to the attempt to remove "internet content used by traffickers to attract migrants and refugees". Extending the IRU's remit to shutting down websites and services offering transport to migrants and refugees is simply an attempt to repress a problem caused by the EU's own policies. It is hard to see how the "whack-a-mole" situation can be overcome.

A police unit that is to encourage companies to remove material from the internet with no judicial oversight has thus been brought into existence based on high-level decisions by the Member States, the Council and the Commission, and subsequently approved by the European Parliament through secret meetings. Whether MEPs will attempt to hold the IRU accountable for its actions in future under the new parliamentary scrutiny arrangements in the Europol Regulation remains to be seen.

Meanwhile, until the EU and its Member States change the legal and policy structures that make life-threatening migration inevitable, the cat-and-mouse game between smugglers and border guards at the EU's frontiers will continue online. Thousands of people will continue to risk their lives in rubber dinghies and unseaworthy boats, regardless of how many websites are shut down or social media posts removed. As one refugee who was smuggled into Europe from Turkey explained to a journalist: "Everybody knows that nobody can stop a smuggler — they'll always find a way… It will simply become more expensive." [31]

Footnotes

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