



Net Filtering of Online Gambling Services in Unacceptable

La Quadrature du Net's response to the European Commission's consultation on online gambling.

Executive Summary

As an advocacy organization defending freedom of communication on the Internet, La Quadrature du Net is deeply concerned with the rapid development of filtering and blocking mechanisms aimed at preventing access to unauthorized online gambling services in the European Union.

As we outline in our response to the EU Commission's consultation, we believe more generally that the growing resort to Internet filtering in Europe – regardless of their purpose – leads to the development of an Internet censorship infrastructure and that it must be stopped. This is especially true in the case of the regulation of online gambling services (whether they are based in the EU or abroad), for which such measures are vastly disproportionate and unjustifiable. From a citizen viewpoint, recent member States regulation has raised additional concerns that it was conducted for the benefit of players with strong connections to the political power.

As the EU Commission moves towards creating an EU-wide instrument for regulating online gambling, we call on policy-makers to abrogate any filtering scheme implemented in the name of online gambling regulation, and instead to promote less restrictive measures such as payment blocking.

Response to questions on filtering

(50) *Are any of the methods mentioned above, or any other technical means, applied at national level to limit access to on-line gambling services or to restrict payment services? Are you aware of any cross-border initiative(s) aimed at enforcing such methods? How do you assess their effectiveness in the field of on-line gambling?*

(51) *What are your views on the relative merits of the methods mentioned above as well as any other technical means to limit access to gambling services or payment services?*

1. France : A case example of why filtering must be banned

On May 12th, 2010, France adopted a law on online gambling¹, which created a administrative authority (“ARJEL”²) in charged of regulating the sector. Article 61 granted ARJEL the power to seek for a judiciary injunction forcing hosting providers and if needed Internet service providers to block access to unlicensed online gambling websites and forcing search engines to stop referring to such sites.

In the summer of 2010, ARJEL sent its first cease and desist letter to the operator of StanJames.com, based in the United Kingdom, requiring it to stop all gambling activity destined to France-based users. Faced with the operator's lack of compliance, ARJEL then brought legal action and obtained a blocking injunction on August 6th, 2010³. French ISPs had two months to comply with the order, which instructed them to take “*any measure suited to prevent access to the services, i.e. any filtering measure, that can be obtained (...) through the blocking of the domain name, of the known IP address, of the URL, or through the analysis of the content of the messages*”⁴.

According to the order, the ISPs remained free of using any mean they wish in order to attempt to prevent access to the website, including deep packet inspection techniques which have been widely criticized for their adverse effect on the privacy of Internet users. In practice, filtering based on the domain name system (DNS) or IP addresses have been used, but more privacy invasive methods have clearly not been ruled out.

Internet policy developments in France also demonstrate the ongoing mission creep in Internet filtering. Once blocking measures are put in place by ISPs to respond to legal obligations, the door is be open for the generalization of such schemes as enforcement methods. In France, after the online gambling law was enacted, website blocking was established against child pornography. It is now being considered for consumer protection, the protection of public health, national security, and other public policy motives.

1 Law n° 2010-476 of May 12th, 2010 on the opening to competition and on the regulation of online gambling and games of chance. Address: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022204510&dateTexte=&categorieLien=id>

2 ARJEL stands for Autorité de Régulation des Jeux en Ligne.

3 Tribunal de Grande Instance of Paris, August 6th, 2010, ARJEL v. Neustar, Numéricable and others. Address: http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2967

4 In French : “(...) toutes mesures de nature à permettre l'arrêt de l'accès au service en cause, soit toute mesure de filtrage, pouvant être obtenu (...) par blocage du nom de domaine, de l'adresse IP connue, de l'URL, ou par analyse du contenu des messages.”

2. Why blocking is illegal

The French case provides an example of why, under EU law and developing case law, filtering should be banned. In the infamous *Scarlet v. Sabam* case currently pending before the EU Court of Justice, Advocate General Cruz Villalón rendered conclusions⁵ that underlined the need for any filtering measure to respect the principle of **proportionality**, respond to the principle of necessity and effectively seek to fulfill objectives of general interest recognized by the EU or respond to the need to protect the rights and liberties of others.

These criteria are reasserted by the EU's obligation to respect the European Convention on Human Rights as it is required under the Lisbon Treaty. The case law of the European Court of Human Rights reinforces Advocate Villalón's conclusions, since it provides that any restriction infringing on the right to freedom of expression on the Internet must effectively achieve the legitimate objective it pursues while being the least restrictive alternative to do so (principle of necessity), and meet the proportionality requirement.

Let's study these three criteria:

Effectiveness: In practice, regardless of the method used – whether based on IP addresses, DNS, URL or Deep Packet Inspection – circumventing a blocking measure is quite simple. The circumvention tools used by political dissidents in authoritarian countries can be used in Europe to bypass these measures. Using a proxy, a virtual private network (VPN) or encryption techniques are only some of the numerous tools that users can implement to access gambling sites that could be blocked.

In France, even after the injunction leading to the “blocking” of StanJames.com, experiments showed that it was still very easy for France-based Internet users to access the website⁶. Even non-professional websites can readily use circumvention methods to remain available online. For instance, an antisemitic and revisionist website Aaargh, is still easily accessible to all French Internet users, even though it is supposed to be blocked by French ISPs following a 2008 court order⁷

Proportionality: The greatest problem with Internet filtering is its dangerous inaccuracy: it leads to the over-blocking of perfectly legitimate online content. The most famous example is that of Wikipedia, which was blocked during three days in late 2008 by British ISPs after the child abuse hotline sought to block a specific article containing a contentious although not illegal picture⁸.

As the French government was forced to recognize⁹, empirical studies show that no filtering technique can rule out the risk of over-blocking legal content which has nothing to do with the targeted website or content.

5 Advocate General's Opinion in Case C-70/10 *Scarlet Extended v Société belge des auteurs compositeurs et éditeurs (Sabam)*, April 14th, 2011. Address : <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-70/10>

6 Rees Marc, August 11th, 2010, “Arjel : Bouygues Télécom bloque StanJames.com... en vain”, *PC INpact*. Address: <http://www.pcinpact.com/actu/news/58727-stanjames-blocage-filtrage-arjel-efficacite.htm> (in French).

7 Aaargh case. Decision n° 707 of June, 19th, 2008. Cour de cassation, first civil chamber. http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_11682.html

8 *Wikinews*, 7 December 2008, “British ISPs restrict access to Wikipedia amid child pornography allegations”. Address : http://en.wikinews.org/wiki/British_ISPs_restrict_access_to_Wikipedia_amid_child_pornograp

9 See the impact assessment of LOPPSI law. <http://www.ecrans.fr/IMG/pdf/pl1697.pdf> (in French).

Least restrictive alternative: Because of the negative side-effects and because they come down to establishing an opaque censoring infrastructure at the heart of the Internet, filtering measures are extremely restrictive. Other enforcement measures can easily achieve the same public-policy goals (for online gambling, such goals include prevention of addiction, protection of vulnerable players, prevention of fraud and money laundering or tax evasion).

In the case of online gambling, instead of forcing Internet technical intermediaries – who essentially give citizens the tools to communicate and express themselves over the Internet, thereby fostering prominent democratic goals –, it seems far less restrictive to exert pressure on financial intermediaries (of course while respecting the right to a fair trial). Online gambling services are profit-seeking organization and can be easily rendered inoperative through effective systems aimed at blocking electronic payments. The EU has already adopted an instrument regarding the participation of financial institutions to public-policy goals with the directive on the prevention of the use of financial system of the purpose of money laundering and terrorist financing¹⁰. By assessing the merits and shortcomings of this directive, the EU could create a powerful instrument to regulate the online gambling sector, and beyond this specific goal to establish a powerful law enforcement mechanism suited to the Internet.

4. The illegality of blocking for online gambling is confirmed by the UN rapporteur and an OSCE study

International organizations aimed at promoting and protecting fundamental rights have recently underlined the dangers of website blocking. In his recent conclusions¹¹, United Nations Rapporteur for freedom of opinion and expression, Frank La Rue, stresses that:

“Even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal”.

The OSCE, for its part, stresses in its recent study on Internet law that:

“Blocking mechanisms are not immune from significant deficiencies, they may result in the blocking of access to legitimate sites and content. Further, blocking is an extreme measure and has a very strong impact on freedom of expression and the free flow of information. Participating States should therefore refrain from using blocking as a permanent solution or as a means of punishment. Indefinite blocking of access to websites and Internet content could result to “prior restraint” and by suspending access to websites indefinitely states can largely overstep the narrow margin of appreciation afforded to them by international norms and standards”¹².

¹⁰ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Address: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32005L0060:EN:NOT>

¹¹ La Rue Frank, 2011, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, United Nations. Address : <http://www.article19.org/pdfs/reports/report-of-the-special-rapporteur-on-the-promotion-and-protection-of-the-right.pdf>

¹² OSCE, 2011, *Freedom of Expression on the Internet : Study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating States*, (p. 33).

5. Conclusions

- Regardless of the technique used, measures aimed at filtering and blocking websites are an ineffective and disproportionate mode of law enforcement, even when they are prescribed by law. They lead to the development of an Internet censorship infrastructure and are in practice subject to a dangerous mission creep.
- The EU should ban filtering measures aimed at regulating on-line gambling, whether they target services based in the EU or abroad.
- The EU should promote less restrictive measures to regulate online gambling, such as payment blocking systems.
- At the very least, the EU should make clear that if member States decide to adopt Internet filtering measures, they should only be used as a last resort, in cases where the removal of online content is impossible. Moreover, these measures should be pronounced after a due process before an independent and impartial court, after a sound proportionality assessment, ensuring that they are both effective and the least restrictive alternative (the court may find that these measures are unworkable, ineffective, that other less intrusive measures are better suited and determine that the proportionality criteria cannot be met).

About La Quadrature du Net

La Quadrature du Net is a France-based advocacy group that promotes the rights and freedoms of citizens on the Internet. More specifically, it advocates for the adaptation of French and European legislations to respect the founding principles of the Internet, most notably the free circulation of knowledge. As such, La Quadrature du Net engages in public-policy debates concerning, for instance, freedom of speech, copyright, regulation of telecommunications and online privacy.

In addition to its advocacy work, the group also aims to foster a better understanding of legislative processes among citizens. Through specific and pertinent information and tools, La Quadrature du Net hopes to encourage citizens' participation in the public debate on rights and freedoms in the digital age.

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