

FREEDOM OF EXPRESSION

OPEN RIGHTS GROUP BRIEF



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Issue

The freedom to access and share information and to hold and express personal ideas and opinions has particular resonance in the digital age. As our digital ability to exercise rights of expression and information increases, challenges for protection and enforcement become more complex.

Post-Brexit, the UK must decide what action it will take to continue to protect our rights to information and expression online, including evaluating whether we should continue to adhere to EU-wide laws and frameworks developed for this purpose.

Open Rights Group are fighting for balanced copyright laws, researching the reach and impact of web blocking and censorship, and standing up for the respect of freedom of speech online.

EU and the Right to Freedom of Expression and Information

The right to freedom of expression and information is protected at EU level by Article 11 of The Charter of Fundamental Rights of the European Union, the E-Commerce Directive 2000, Open Internet Regulation 2015, General Data Protection Regulation 2018 (“GDPR”) and Copyright Directive 2019. These laws are brought together under the EU’s Digital Single Market policy, which aims to ensure equal and seamless access to online activities for individuals and businesses across the EU.

EU LEGISLATION

The E-Commerce Directive 2000 regulates certain legal aspects of information society services (“ISS”), online commercial services involving processing and/or storage of data, e.g. web shops/marketplaces, search engines, online advertising and video hosting/streaming. Articles 12-14 of the Directive prohibit Member States from making ISS providers automatically liable for information or content transferred or stored on their services. Article 15 further prohibits Member States from requiring ISS providers to monitor information

they process or store or to actively seek facts or circumstances indicating illegal activity.

The Open Internet Regulation 2015 enshrines the principle of net neutrality, which states that internet traffic shall be treated without discrimination, blocking, throttling or prioritisation. National Regulatory Authorities are required to monitor net neutrality compliance at country level and submit annual reports to the Body of European Regulators for Electronic Communications (“BEREC”). The Regulation also subjects blocking and filtering to due process requirements.

The Copyright Directive 2019 sparked intense debate as it progressed through the EU legislative process. Whilst it has some positive content, it also contains provisions that effectively require upload filters, going against E-Commerce and Open Internet prohibitions on general monitoring of internet users and impacting heavily on rights to freedom of expression and information.

Other proposed Regulations raise similar concerns, including the Regulation on preventing the dissemination of terrorist content online, which would force platforms into using automated decision-making to remove terrorist content. There are concerns that with a target of removing content within one hour and unclear definitions of “terrorist content”, this Regulation may bypass due process and threaten legitimate expression with censorship.

EUROPEAN COURT OF JUSTICE JUDGMENTS

The Court of Justice of the European Union (“CJEU”) has generally protected freedom of expression and information when balancing this against intellectual property and copyright. Notably, in the cases of Scarlet (2011) and Netlog (2012), the CJEU twice ruled against the imposition of generalised online filtering systems.

These cases both involved the unlawful use by online individuals of peer-to-peer systems (direct file-sharing software and a social media platform respectively) to share copyrighted material. The Court considered whether the named internet/hosting service provider could be obliged to impose a general filtering requirement monitoring and blocking all electronic file exchange communications for an indefinite period of time in order to prevent further copyright infringements. In both cases, the Court determined that this type of filtering was incompatible with Article 15 of the E-Commerce Directive and illegitimately infringed end

users’ rights to freedom of expression and information.

THE DIGITAL AGENDA IN EUROPE 2019-2024

In the next European parliamentary term, there are significant opportunities to shape the digital landscape. The EU will continue to legislate for the Terrorist Content Regulation. It will conduct a review of E-Commerce. National governments have two years to implement the Copyright Directive, which is likely to lead to CJEU analysis. Artificial Intelligence (AI) is a high policy priority for the EU, and developments in this area will impact how filters etc are applied in practice.

The Impact of Brexit

After the United Kingdom (UK) leaves the EU:

- The UK will be outside the Digital Single Market. It will no longer be party to or regulated by European institutions such as the Body of European Regulators for Electronic Communications (“BEREC”).
- The Open Internet Regulation will continue to apply in the UK by virtue of the Communications Act 2012. Any other EU legislation in force before Brexit, including the E-Commerce Directive and Copyright Directive, will become UK law via the European Union (Withdrawal) Act 2018.
- The Charter of Fundamental Rights will not apply in the UK and the CJEU will no longer have jurisdiction to decide cases referred to it by UK courts. UK courts will be able to refer to past (and potentially future) CJEU decisions including Scarlet and Netlog, however, as standards developed by the CJEU are to be read as if they were references to fundamental rights or principles.
- The UK will continue to be a member of the Council of Europe (separate to the EU) and be therefore bound by the European Convention on Human Rights (“ECHR”), which protects the right to freedom of expression and information at Article 10.
- It is unclear whether Article 15 of the E-Commerce Directive 2000, which prohibits imposing general monitoring obligations on ISS providers, will remain under UK law. Article 15 was not directly implemented by the UK’s Electronic Commerce (EC Directive) Regulations 2002. However it was recognised by domestic courts which could mean it is considered retained law.

What the Government has said

“On Digital, the UK will not be part of the EU’s Digital Single Market, which will continue to develop after our

withdrawal from the EU. This is a fast evolving, innovative sector, in which the UK is a world leader. So it will be particularly important to have domestic flexibility, to ensure the regulatory environment can always respond nimbly and ambitiously to new developments.”

Theresa May, 2 March 2018, Speech on the UK’s future economic partnership with the European Union.

What ORG wants to see

The UK taking active steps to continue to protect the right to freedom of expression and information online, including:

- Protecting against intermediary liability that would have a negative effect on citizens fundamental rights;
- Maintaining principles of net neutrality;
- Prohibition of a general obligation on information society services to monitor users, including e.g. for copyright and intellectual property infringements;
- Confirmation that Article 15 of the E-Commerce Directive is part of UK domestic law.
- A copyright policy balanced to promote free expression and not just to protect rights holders;
- UK courts exercising full powers to review, read down and challenge surveillance/privacy legislation infringing on fundamental rights, including assessing its adequacy against European standards of robust governance.

Open Rights Group (ORG) is the UK’s only grassroots campaigning organisation that works to protect your digital rights.

We believe people have the right to control their technology, and oppose the use of technology to control people.

We raise awareness of threats to privacy and free speech and challenge them through public campaigns, legal actions, policy interventions and tech projects.

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