

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

REFERENCE:
OL GBR 1/2017

9 January 2017

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression pursuant to Human Rights Council resolutions 25/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the draft legislation « **Digital Economy Bill** », which passed its third reading in the House of Commons in November 2016. The bill, in particular its lack of data sharing safeguards, raises concerns regarding the right to privacy and the right to freedom of expression.

According to the information received:

The Digital Economy Bill (hereinafter "the bill") was announced by the UK Government on 18 May 2016 and introduced to Parliament on 5 July 2016. The bill was introduced as a measure to protect children by preventing them from accessing pornographic content online. It aims to put into law the commitment made in the Government's manifesto stating that "*we will stop children's exposure to harmful sexualised content online, by requiring age verification for access to all sites containing pornographic material*".

Beyond this initial aim, the bill has come to contain provisions that regulate a broad range of issues concerning the digital space. One of its key commitments is the sharing of publicly held datasets "*to improve service delivery while maintaining safeguards on privacy*". It will do so through regulation that aims to "*make provision about electronic communications infrastructure and services; to provide for restricting access to online pornography; to make provision about protection of intellectual property in connection with electronic communications; to make provision about data-sharing, to make provision about functions of OFCOM in relation to the BBC; to provide for determination by the BBC of age-related TV licence fee concessions; to make provision about the regulation of direct marketing; to make provision about OFCOM and its functions; to make provision about payment systems and securities settlement systems; to make provision about qualifications in information technology; and for connected purposes*" (preamble of the bill).

The bill consists of 91 articles divided into seven parts: (1) access to digital services; (2) digital infrastructure; (3) online pornography; (4) intellectual property; (5) digital government; (6) miscellaneous; and (7) general. In addition, the bill contains three schedules as well as a section on consequential amendments.

In this communication, I would like to bring the concerns raised under the provisions contained in part 3 of the law to the attention of your Excellency's Government. These provisions concern mandatory age-verification in order to access websites containing pornographic content.

Before identifying the concerns raised by these provisions, I want to note that article 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the UK on 20 May 1976, protects everyone's right to maintain an opinion without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. Under article 19(3) of the ICCPR, restrictions on the right to freedom of expression must be "provided by law", and necessary for "the rights or reputations of others" or "for the protection of national security or of public order (ordre public), or of public health and morals". Permissible restrictions on the Internet are the same as those offline (A/HRC/17/27).

In addition, article 17(1) of the ICCPR, provides for the rights of individuals to be protected, *inter alia*, against arbitrary or unlawful interference with their privacy and correspondence, and provides that everyone has the right to the protection of the law against such interference. "Unlawful" means that no interference may take place except in cases envisaged by the law which in itself must comply with the provisions, aims and objectives of the ICCPR. Articles 17 and 19 of the ICCPR are closely connected, as the right to privacy is often understood to be an essential requirement for the realization of the right to freedom of expression (A/RES/68/167, A/HRC/27/37/, A/HRC/23/40, A/HRC/29/32).

Under the article 19(3) requirement of legality, it is not enough that restrictions on freedom of expression are formally enacted as domestic laws or regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34). While surveillance measures and other restrictions on freedom of expression may be established to protect a legitimate objective under the provision, they must be "necessary" to protect such objectives, and not simply useful, desirable or reasonable. The requirement of necessity "also implies an assessment of the proportionality" of those restrictions. A proportionality assessment ensures that restrictions "target a specific objective and do not unduly intrude upon other rights of targeted persons". The ensuing "interference with third parties' rights must also be limited and justified in the light of the interest supported by the intrusion" (A/HRC/29/32). Finally, the restrictions must be "the least intrusive instrument among those which might achieve the desired result" (CCPR/C/GC/34).

The full texts of the human rights instruments and standards outlined above are available at www.ohchr.org and can be provided upon request.

In light of the above standards of international human rights law, I would like to present the following preliminary observations and concerns raised by the bill's provisions on age-verification requirement.

Age-verification requirement

The bill enforces age-verification on pornographic websites to prevent that they are accessed by children under the age of 18 years (articles 15-26). The bill does not provide any guideline or technical requirements or conditions for the design of the age-verification mechanisms that it imposes. The only mentioning of what age-verification should entail is found in article 15(1) which requires that such a verification system is designed “*in a way that secures that, at any given time, the material is not normally accessible by persons under the age of 18*”.

The age-verification requirement applies to all websites regardless of where they are based. They therefore also apply for websites based outside of the UK as long as they are accessible within the UK.

The age-verification requirement applies to all those who “*make pornographic material available on the internet on a commercial basis to persons in the United Kingdom*” (article 15(1)). “*Pornographic material*” is defined in article 16(1) as “*a video in respect of which the video works authority has issued an R18 certificate*”; material included in such a work; material that “*it is reasonable from its nature*” would result in R18 certificate; and any other material if it is reasonable from its nature to assume “*that it was produced solely or principally for the purposes of sexual arousal, and that any classification certificate issued for a video work including it would be an 18 certificate.*”

The requirement for R18 certificate is set out in article 16(2), which refers to the Video Recordings Act 1984.

Articles 17-18 of the bill set out the requirements for establishing the *age-verification regulator*, which is designated by the Secretary of State. The bill empowers the age-verification regulator to assess whether websites hosting pornographic material have strong enough age-verification in place, and whether they are showing “prohibited content”. The bill does not make a distinction between prohibited content with respect to age-verification and illegal content.

The age-verification regulator has the power to request information from Internet Service Providers (ISPs) and others that are believed to be involved in making

pornographic material available on the Internet. The age-verification regulator also has the power to impose financial penalties for failing to comply with the requirement to impose age-verification on websites (articles 19, 20 and 21).

Article 23 outlines the age-verification regulator's power to require ISPs to block non-compliant websites. Websites will be judged non-compliant if either they host pornographic material that is not secured behind an age-verification mechanism, or if they host "prohibited material", which in the context of the bill means pornographic content that would not be passed for DVD release by the video works authority. The age-verification regulator will be able to order ISPs to block websites without first getting a court order. Article 23(9) suggests that the regulator can go on to get a court injunction if the ISP does not follow orders.

Concerns related to the bill's disproportionate measures, lack of data sharing safeguards and adequate judicial process

The protection of children, the protection of the right to freedom of opinion and expression, and the right to privacy are grounded in the fundamental values of human dignity and autonomy. Perceiving these rights as opposed interests limits the policy options available for dealing with threats to both child protection and freedom of expression online.

There is no doubt that the protection of children is a legitimate objective under international human rights law, including under article 19(3) of the ICCPR which establishes criteria for permissible restrictions to freedom of expression. The question that arises relates to the way in which the bill seeks to achieve to protect children. Does the proposed way achieve this legitimate objective and is it lawful under international human rights law, in particular with respect to the UK's obligations under articles 17 and 19 of the ICCPR?

Offline, the protection of children against pornographic content is regulated through the British Board of Film Classification (BBFC)'s system of classification for DVD releases. The bill appears to be applying the same system for offline classification to online content. However, the online version of BBFC control through the age-verification system raises a number of particular concerns due to the character of digital space, which would otherwise not arise in the context of the offline system of classification.

Firstly, I am concerned that the age-verification provisions give the Government access to information of viewing habits and citizen data. Data provided to one part of government can be shared with other parts of government and private sector companies without a person's knowledge and consent. Moreover, the age-verification requirement may easily be subject to abuse, such as hacking, blackmail and other potential credit card

fraud. In this connection the age-verification provisions do not seem to comply with the “necessity” requirement under article 19(3) of the ICCPR.

Identity disclosure requirements in law allow authorities to more easily identify persons, eradicating anonymous expression. One of the important advances facilitated by the Internet is the ability to anonymously access and impart information and to communicate secretly without having to be identified. Restrictions on anonymity facilitate State surveillance by simplifying the identification of individuals accessing or disseminating prohibited content, making such individuals more vulnerable to other forms of State surveillance. This also allows for the collection and compilation of large amounts of data by the private sector, and places a significant burden and responsibility on corporate actors to protect the privacy and security of such data (A/HRC/23/40).

I express concern at the bill’s lack of privacy obligations, yet it effectively makes compulsory to use technologies that limit the right to privacy through the age-verification requirement. I am concerned at the imposition of the age-verification mechanism which has implications for the right to privacy without imposing conditions for the storage of such data. The mechanism does not provide sufficient guarantees against abuse and the bill lacks clear provisions to protect information gathered through the age-verification mechanism, including the length of the storage of such data and their collection by government and private companies. States are required by article 17(2) of the ICCPR to regulate, through clearly articulated laws, the recording, processing, deletion of, use and conveyance of automated personal data and to protect those affected against misuse by State organs as well as by private parties (A/HRC/17/27).

Moreover, I express concern at the lack of judicial oversight with respect to the power of the age-verification regulator to shut down websites that do not comply with the age-verification requirement. Any legislation restricting the right to freedom of expression and the right to privacy, as well as any determination on the shut down of websites must be undertaken by a body which is independent of any political, commercial or unwarranted influences in a manner that is neither arbitrary nor discriminatory (A/HRC/17/27).

Finally, I express concern at the cumulative effect of the Digital Economy Bill and the Investigatory Powers Act (about which I raised concerns in a communication to your Excellency’s Government dated 22 December 2015, GBR 4/2015) . Together, these two pieces of legislation constitute a significant tightening control over the Internet in the UK.

Therefore, while I am cognizant of the need to protect children against harmful content, I am concerned that the provisions under the bill are not an effective way for achieving this objective as they fall short of the standards of international human rights law. The bill contains insufficient procedures without adequate oversight, overly broad

definitions and lack of data sharing safeguards that unduly interferes with the rights of freedom of expression and privacy.

In view of these comments, I would like to call on your Excellency's Government to take all steps necessary to conduct a comprehensive review of the Digital Economy Bill to ensure its compliance with international human rights law. I would also be pleased to discuss the bill in the context of the concerns raised in this communication with representatives of your Excellency's Government.

Finally, I would like to inform your Excellency's Government that this communication will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: (<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>).

Your Excellency's Government's response will also be made available on the same website as well as in the regular periodic Communications Report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression