

ARTICLE 19

ARTICLE 19's Response to the  
Council of Europe Consultation  
on Search Engines and Social  
Networking Sites

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September 2011

Submission

# Summary

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ARTICLE 19 generally welcomes the Council of Europe Draft Recommendations, Principles and Guidelines on search engines and social networks to ensure that human rights are respected.

We note however that the due process provisions concerning blocking and filtering measures at the request of public authorities could be significantly strengthened. In addition, we recommend that the language used in relation to the protection of children against harmful content and behaviour in the Draft Principles and Guidelines on social networking services should be tightened up. Our key recommendations are set out below.

## **ARTICLE 19's Key Recommendations:**

1. It should be made clear throughout the Draft Recommendations, Principles and Guidelines on search engines and social networking services that filtering or blocking should not be allowed without a proper judicial process *prior to* the imposition of such measures, regardless of the origin of the filtering or blocking requests.
2. The references to human dignity and vulnerable groups in paragraphs 4 and 7 of the Draft Principles on social networking services should be deleted.
3. Paragraphs 7 (i) and (iii) of the Draft Principles on social networking services should be modified to clarify that any particular online content should only be deemed illegal by a court. At the same time, a provision recommending that users are informed of domestic legislation and international standards applicable to online content could be added.
4. References to "cooperation" between law enforcement bodies and social networking services in the Draft Principles and Guidelines on social networking services should be clarified to ensure that any such cooperation must not by-pass the procedural safeguards required under Articles 8 and 10 of the Convention.
5. References to "nationwide general" blocking should be dropped, bearing in mind the stated purpose of the Draft Recommendations, Principles and Guidelines, namely the promotion of self-regulation. The sentence "*avoiding the general blocking of offensive or harmful content for users who are not part of the groups for which a filter has been activated to protect*" should also be clarified.



# Introduction

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This submission contains ARTICLE 19 comments on the Draft Recommendations and Principles on the measures to protect and promote respect with regard to social networking services and the Draft Recommendations and Guidelines on the measures to protect and promote respect with regard to search engines.<sup>1</sup>

ARTICLE 19, the Global Campaign for Free Expression (ARTICLE 19) is an independent human rights organization based in London, which works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression, nationally and globally. It frequently issues legal analysis and policy interventions on domestic legislation and regional and international standards on issues of freedom of expression. ARTICLE 19 is a recognised observer to the Council of Europe and has worked with the Secretariat, the Council of Ministers, and the Parliamentary Assembly on FOE issues for over twenty years.

ARTICLE 19 welcomes the opportunity to provide further input to the Council of Europe standards on social networking services and search engines from the freedom of expression perspective.

In March 2011, ARTICLE 19 already responded to the Council of Europe Committee of Experts on New Media's call for comments on an earlier version of both Draft Recommendations and Guidelines ("March submission").<sup>2</sup> In our March submission, ARTICLE 19 welcomed the guidelines as a good start. However, we recommended that they should be strengthened to ensure that companies offering search engines and social networking services act in a more transparent manner and provide better protection of users' rights of freedom of expression when providing access to information and collecting personal data.

ARTICLE 19 is pleased to see that our recommendations were largely reflected in the revised drafts, especially as regards search engines and transparency, collection of information about users, and user control of information.

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<sup>1</sup> The texts of the Draft Recommendations and Principles on the measures to protect and promote respect with regard to social networking services and the Draft Recommendations and Guidelines on the measures to protect and promote respect with regard to search engines are available on request from ARTICLE 19.

<sup>2</sup> <http://www.article19.org/data/files/medialibrary/1743/Article19-submission-3-11.pdf>

At the same time, we have identified a number of areas in which the guidelines could be improved. Our concerns are discussed in a greater detail in the subsequent sections.

# Comments

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ARTICLE 19 submits that the current version of Draft Recommendations and Principles and the Draft Recommendations and Guidelines can be improved through the following amendments.

## **1. Blocking and filtering**

In our March 2011 submissions, ARTICLE 19 noted that blocking or filtering of Internet content are severe types of censorship. Accordingly, we recommended that filtering and blocking should only be allowed in the most limited circumstances. Moreover, we advised that filtering or blocking should not be allowed without a proper legal process *prior to* the imposition of such measures.

Whilst we appreciate that this recommendation is echoed in paragraph 6 of the Draft Recommendation on search engines, we are concerned that the corresponding Principles provide insufficient due process safeguards in relation to blocking or filtering requests made by public authorities.

In particular, paragraph 14 of the Principles seems to suggest that mere regular "review" of blocking or filtering measures, which are imposed at the request of public authorities to comply with legal obligations, is an adequate form of due process. There are a number of problems with this. First, the Principles fail to specify how and by whom such review should be carried out. Secondly, it is not clear under this paragraph that blocking or filtering measures should only be imposed *following* a proper legal process.

Moreover, we are concerned that the Principles seem to adopt a two-tier approach to due process safeguards depending on whether or not the removal requests comes from a public authority or a private party. Unlike paragraph 14, for instance, paragraph 15 of the Principles expressly mentions due process and access to independent and accountable redress mechanisms in relation to request for filtering or blocking made by private parties. Similarly, whilst paragraph 10 of the Guidelines for search engine providers makes explicit reference to due process principles in relation to individual filtering requests, that same paragraph merely refers to transparency and foreseeability by the public when dealing with "systematic nationwide filtering or blocking at the request of public authorities".

In ARTICLE 19's view, the due process safeguards in relation to removal requests by public authorities are clearly insufficient and fail to comply with the requirements of Article 10 (2) of the European Convention on Human Rights ("the Convention"). In this regard, we note that the four mandates on the protection of freedom

of expression recently stated in their 2011 Joint Declaration on Freedom of Expression and the Internet that:

"At a minimum, intermediaries should not (...) be subject to extrajudicial content takedown rules which fail to provide sufficient protection for freedom of expression (which is the case with many of the 'notice and takedown' rules currently being applied)."<sup>3</sup>

Likewise, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression recently recommended that:

"Any requests submitted to intermediaries to prevent access to certain content, or to disclose private information for strictly limited purposes such as administration of criminal justice, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences"<sup>4</sup>.

In ARTICLE 19's view, due process in the context of blocking and filtering means that such measures should only be applied as sanctions by a court following a fair hearing of the issues arising out of specific online content. This process should be followed regardless of whether the removal request was made by a public authority or private party.

#### **Recommendation:**

We urge the Council of Europe to make clear throughout the Draft Recommendations and Guidelines on search engines that filtering or blocking should not be allowed without a proper judicial process *prior to* the imposition of such measures, regardless of the origin of the filtering or blocking requests.

## **2. Protection of children against harmful content**

ARTICLE 19 recognises the importance of protecting children against harmful content and behaviour. In our previous submissions to the

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<sup>3</sup> Joint Declaration on Freedom of Expression and the Internet by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2011: <http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf>

<sup>4</sup> Emphasis added. See Report A/HRC/17/27 of 16 May 2011: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf)

Committee of Experts on New Media, we emphasised that online content and behaviour could only be limited in line with the requirements of Article 10 of the Convention.

Whilst ARTICLE 19 generally welcomes the current Draft Recommendation on social networking sites, we find that the Principles appended to that Draft Recommendation fall short of these standards in a number of respects.

### ***Incorrect test for restrictions on freedom of expression***

In particular, paragraph 4 of the Principles fails to reflect Article 10 of the Convention and relevant case-law of the European Court of Human Rights ("the Court"). Paragraph 4 reads as follows:

"Freedom of expression includes the freedom to impart and receive information which may be shocking, disturbing and offensive and/or content that is unsuitable for particular age groups. In some cases, human dignity and the duty to respect and protect the rights of vulnerable groups may outweigh this right to freedom of expression".

The first sentence of this paragraph is correct. It stems directly from the Court's well established case-law in *Handyside v. the United Kingdom* (judgment of 7 December 1976, Series A no. 24). The second sentence, however, is too broad. First of all, we consider that the reference to "human dignity", while understandable, is much too broad as a ground on which to restrict freedom of expression. While human dignity is clearly the value that underpins the rights and freedom guaranteed under the Convention, its concrete application is generally limited to the right to be free from torture under Article 3 ECHR, where it has specific meaning. The use of human dignity in the context of Article 10, by contrast, is much too vague and subjective, and is therefore likely to give rise to unnecessary and disproportionate interference with freedom of expression. This is why Article 10 (2) exhaustively sets out the legitimate grounds on which freedom of expression can be limited<sup>5</sup>.

For the same reason, we find that the reference to the duty to respect and protect the rights of vulnerable groups is equally inadequate. While the protection of vulnerable groups is important, in practice, it falls under the legitimate aim of protecting the rights of others.

### **Recommendation:**

We recommend that the references to human dignity (at paragraphs 4 and 7) and vulnerable groups (at paragraph 4) should be deleted.

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<sup>5</sup> The same remark applies to the opening sentence of paragraph 7 which makes reference to "human dignity".



### ***Inaccurate references to illegal content***

ARTICLE 19 is also concerned that paragraph 7 (i) of the Principles fails to accurately reflect the legal position on illegal content on social networking sites. Paragraph 7 (i) provides that Member States, in cooperation with the private sector and civil society, should ensure users' safety whilst at the same time protecting their right to freedom of expression by "*informing users what content is considered 'illegal' according to legal provisions and what content is considered 'inappropriate' according to the core conditions of the social networking services*".

ARTICLE 19 recognises that it is desirable to inform users about which types of content are *likely* to be deemed illegal. To this end, it may be useful to direct users to domestic legislation which is applicable to online content as well as relevant international standards. Contrary to what is suggested in paragraph 7 (i), however, it will not be for a private website to determine which content is illegal by itself. Instead, the determination of whether a particular content is illegal should be made by a court. Until then, any particular content must be assumed to be legitimate<sup>6</sup>.

#### **Recommendations:**

We recommend that paragraph 7 (i) and (iii) should be modified to clarify that any particular online content should only be deemed illegal by a court. At the same time, it would be useful to add a provision recommending that users are informed of domestic legislation and international standards applicable to online content.

### ***Lack of clarity concerning cooperation with law enforcement***

ARTICLE 19 is further concerned that the reference to "cooperation" under paragraph 7 (ii) is unclear. Paragraph 7 (ii) provides that Member States should encourage law enforcement bodies and social networking services to "*establish transparent mechanisms for cooperation and promote qualified initiatives such as hotlines*". In our view, this provision should be clarified to ensure that any such cooperation must not by-pass the procedural safeguards required under Articles 8 and 10 of the Convention, such as judicial authorisation of access to personal information of users.

#### **Recommendation:**

We recommend that the reference to "cooperation" between law enforcement bodies and social networking services should be

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<sup>6</sup> The same remark applies to paragraph 7 (iii) which recommends the creation of mechanism for reporting inappropriate and "illegal" content.

clarified to ensure that any such cooperation must not by-pass the procedural safeguards required under Articles 8 and 10 of the Convention.

### ***Vague provisions on blocking and filtering***

ARTICLE 19 is particularly worried by paragraph 7 (vi) of the Principles, which is extremely vague. This is particularly unfortunate since this particular subparagraph deals with blocking and filtering measures and therefore has important policy implications for freedom of expression on social networking sites. Paragraph 7 (vi) provides as follows:

"7. In cooperation with the private sector and civil society, Member States should ensure users' safety and protect their human dignity while also guaranteeing procedural safeguards and the right to freedom of expression and access to information, in particular by:

(vi) guaranteeing that blocking and filtering, and in particular, nationwide general blocking or filtering measures, are only introduced by the state if the conditions of Article 10, paragraph 2 of the Convention are fulfilled and avoiding the general blocking of offensive or harmful content for users who are not part of the groups for which a filter has been activated to protect. Instead, encouraging social networking services to offer adequate and transparent voluntary individual filter mechanisms may suffice to protect those groups"

In particular, we note that the reference to "nationwide general" blocking or filtering measures is unclear, which is disturbing given its potentially far-reaching implications. Indeed, it seems to suggest that public authorities may have a discretionary power to order the blocking or filtering of entire websites. It also contradicts the stated purpose of the Draft Recommendation and Guidelines which is to promote self-regulation. In any event, in our view, even if there were to be such broad ranging blocking or filtering measures - which we do not support - the Principles should make it clear that any such measures should only be ordered by a court following a hearing of the issues raised by the allegedly illegal online content.

Furthermore, we are at loss to understand what "avoiding the general blocking of offensive or harmful content for users who are not part of the groups for which a filter has been activated to protect" means. This sentence is extremely unclear and should be clarified.

### **Recommendations:**

We urge the Council of Europe to drop references to "nationwide general" blocking, bearing in mind the stated purpose of the Draft Recommendation and Guidelines, namely the promotion of self-regulation. Furthermore, the sentence "avoiding the general blocking

of offensive or harmful content for users who are not part of the groups for which a filter has been activated to protect" should be clarified.

### **Miscellaneous**

Finally, we note that paragraph 5 provides that "there is a need to protect children *against* the inherent vulnerability that their age implies" (our emphasis). However, in ARTICLE 19's view, it would be more accurate to say that children need to be protected *because* of their inherent vulnerability.

### **Recommendation:**

We recommend that paragraph 5 should be amended to reflect that children need to be protected *because* of their inherent vulnerability.

ARTICLE 19 hopes these comments will be useful and would be happy to provide further assistance and information on those issues generally.