

FREE, TRANSBOUNDARY FLOW OF INFORMATION ON THE INTERNET



Recommendation CM/Rec(2015)6

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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Recommendation CM/Rec(2015)6
adopted by the Committee of Ministers
of the Council of Europe
on 1 April 2015

French edition:
*Libre circulation transfrontière
des informations sur internet*

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Recommendation CM/Rec(2015)6

*(Adopted by the Committee of Ministers on 1 April 2015,
at the 1224th meeting of the Ministers' Deputies)*

1. The right to freedom of expression, including the right to receive and impart information and ideas without interference and regardless of frontiers constitutes a cornerstone of democratic society and is one of the basic conditions for its sustainability and progress and for the development of every human being. The provisions on rights and freedoms set out in the European Convention on Human Rights (ETS No. 5, hereinafter the ECHR) and Article 19 of the International Covenant on Civil and Political Rights apply equally online and offline. Article 10 of the ECHR applies not only to the content of information, but also to the means of dissemination or hosting, since any restriction imposed on the means of dissemination necessarily interferes with the right to receive and impart information.

2. Similarly, the right to freedom of assembly and association, as guaranteed by Article 11 of the ECHR, is also fundamental to democracy. In addition, safeguarding the right to respect for private and family life, as enshrined in Article 8 of the ECHR, and ensuring the protection of personal data in accordance with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, hereinafter Convention 108) underpin the exercise of the right to freedom of expression and contribute to the free flow of information on the Internet.

3. The unimpeded, transboundary flow of information on the Internet is critical for the full realisation of these rights and freedoms, safeguarding pluralism and diversity of information, the development of culture, education and innovation, and economic growth. National policies or measures, commercial activities or technological practices which interfere, whether deliberately or inadvertently, with Internet traffic or which place restrictions on Internet content or services within one State may have consequences beyond that State's frontiers on the exercise of the right to freedom of expression and the right to freedom of assembly and association. Consequently, the exercise of national sovereignty may be affected.

4. Several States may claim jurisdiction over the same information and services on the Internet, which may leave individuals subject to inconsistent or conflicting rules. The variety and diversity of national laws on illegal content and services, as well as the application of competing and conflicting national laws, create a complex legal environment which can make it difficult for users to claim the protection to which they are entitled under Article 10 of the ECHR. Developments in technology, for example content delivery networks and the growth of services that store and process data in remote locations (cloud services) rather than in locations close to the information owner, custodian or recipient may increase complexities.

5. There is a need to promote a common international understanding, to consolidate norms and adhere to best practices on the free, transboundary flow of information on the Internet, while ensuring full compliance with international agreements on the protection of children online, combating cybercrime, the protection of personal data and other relevant international agreements. State action in this context should rely on Recommendation CM/Rec(2011)8 of the Committee of Ministers on the protection and promotion of the universality, integrity and openness of the Internet, which sets out a commitment for member States in this respect. This includes State responsibility to ensure that actions within its jurisdiction do not interfere illegitimately with access to information in other States or negatively impact the transboundary flow of information on the Internet. States should also have due regard to the other Council of Europe instruments listed in the appendix to this recommendation, as well as to the importance of self-regulation. This contributes to the elaboration of best practices and new models of behaviour that promote the unhampered flow of information, opinions and ideas on the Internet.

6. Therefore, the Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe, recommends that member States, when

developing and implementing Internet-related policies at national level and within the international community:

- promote and protect the free, transboundary flow of information, having due regard to the principles of this recommendation, in particular by ensuring that these principles are reflected in regulatory frameworks or policies and in practice;
- encourage the private sector, civil society and technical communities to support and promote the implementation of the principles included in this recommendation.

Principles for the free, transboundary flow of information on the Internet

1. General principles

1.1. States have an obligation to guarantee to everyone within their jurisdiction the right to freedom of expression and the right to freedom of assembly and association, in full compliance with Articles 10 and 11 of the ECHR, which apply equally to the Internet. These rights and freedoms must be guaranteed without discrimination on any ground such as gender, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

1.2. States should protect and promote the global free flow of information on the Internet. They should ensure that interferences with Internet traffic within their territory pursue the legitimate aims set out in Article 10 of the ECHR and other relevant international agreements and do not have an unnecessary or disproportionate impact on the transboundary flow of information on the Internet.

2. Due diligence principles

States should exercise due diligence when assessing, developing and implementing their national policies with a view to identifying and avoiding interferences with Internet traffic which have an adverse impact on the free transboundary flow of information on the Internet. This implies taking the following points into consideration.

- *Assessment*: regulatory or other measures that are capable of having such an impact should be assessed with regard to State responsibility

to respect, protect and promote the human rights and fundamental freedoms enshrined in the ECHR.

- *Transparency, foreseeability, accountability*: when developing policy and regulatory frameworks that may impact the free flow of information on the Internet, States should ensure transparency, including the results of evaluations mentioned above, foreseeability as to their implementation and accountability. In particular, proposed regulatory frameworks should be published following proper procedures and with sufficient time to allow public comment.
- *Proportionality and review of measures*: States are obliged to ensure that the blocking of content or services deemed illegal is in compliance with Articles 8, 10 and 11 of the ECHR. In particular, measures adopted by State authorities in order to combat illegal content or activities on the Internet should not result in an unnecessary and disproportionate impact beyond that State's borders. States should strive to develop measures which are the least intrusive and least disruptive and implement them following a transparent and accountable process. Measures adopted or promoted by States should be regularly reviewed to determine their practical effectiveness and whether they are still necessary or proportionate.

3. Value of self-regulation

States should encourage, facilitate and support the development of appropriate self-regulatory codes of conduct so that all stakeholders respect the right to respect for private and family life, the right to freedom of expression and the right to freedom of assembly and association, in full compliance with Articles 8, 10 and 11 of the ECHR, with particular regard to the free flow of Internet traffic.

4. Promoting technical best practices

4.1. States should promote multi-stakeholder co-operation in the development and implementation of technical best practices that respect the right to freedom of expression, the right to freedom of assembly and association and the right to respect for private and family life, including evaluations of the necessity of actions and proportionality of measures that may have a transboundary impact on Internet traffic.

4.2. States should ensure that national policies respect the global Internet architecture. This includes adherence to best practices regarding the domain name system.

5. International dialogue and policy

5.1. When national policies and commercial activities interfere with Internet traffic beyond a State's boundaries, the parties concerned may not have standing to raise their grievances within that State. States should ensure that structures and procedures exist for hearing and resolving the grievances of these parties. In this regard, States should engage in international dialogue to progressively develop shared understandings, international standards and norms and to adhere to best practices with regard to applicable law and competent jurisdiction in cases where competing (conflicting) laws apply to freedom of expression and access to information.

5.2. In the context of development of international policy or regulation for the Internet, States should protect and promote Internet connectivity, as well as the availability and accessibility of diverse and pluralistic information, as these impact the free, transboundary flow of information on the Internet.

5.3. In relation to services that store or process information in remote locations, States should safeguard the right to personal data protection in accordance with Convention 108 and the right to respect for private and family life in compliance with Article 8 of the ECHR. This is also important for the full exercise of the rights guaranteed in Articles 10 and 11 of the ECHR. Regarding such services, States should also engage in international dialogue to develop shared norms, practices and understandings to address questions about jurisdiction and applicable law.

Appendix to Recommendation CM/Rec(2015)6

Reference instruments

- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)
- Convention on Cybercrime (ETS No. 185) and Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)

- Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a Guide to human rights for Internet users
- Recommendation CM/Rec(2011)8 of the Committee of Ministers to member States on the protection and promotion of the universality, integrity and openness of the Internet
- Recommendation CM/Rec(2010)13 of the Committee of Ministers to member States on the protection of individuals with regard to automatic processing of personal data in the context of profiling
- Declaration of the Committee of Ministers on network neutrality (29 September 2010)
- Recommendation CM/Rec(2009)5 of the Committee of Ministers to member States on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment
- Declaration of the Committee of Ministers on protecting the dignity, security and privacy of children on the Internet (20 February 2008)
- Recommendation CM/Rec(2008)6 of the Committee of Ministers to member States on measures to promote the respect for freedom of expression and information with regard to Internet filters
- Recommendation CM/Rec(2007)16 of the Committee of Ministers to member States on measures to promote the public service value of the Internet
- Recommendation Rec(99)5 of the Committee of Ministers to member States for the protection of privacy on the Internet

The unimpeded, transboundary flow of information on the Internet is critical for the full realisation of the right to freedom of expression online and for safeguarding pluralism and diversity of information, the development of culture, education and innovation, and economic growth. The Recommendation CM/Rec(2015)6 provides a set of principles for the free flow of information on the Internet which member states are encouraged to promote and protect when developing and implementing Internet-related policies at national level and within the international community.

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