

Kyrgyzstan: Platform regulation laws and freedom of expression

Over the last couple of years, several countries around the world have adopted laws that seek to regulate a wide range of online content, such as terrorist, disinformation or hate speech online. ARTICLE 19 has expressed serious concerns regarding their negative impact on freedom of expression. Freedom of expression has a key role in online spaces and any government wishing to regulate these spaces must ensure that any proposed legislation complies with international human rights law. In particular, any restriction on freedom of expression must be (1) provided by law that is sufficiently clear and precise; (2) pursue a legitimate aim as exhaustively listed in Article 19 (3) of the International Covenant on Civil and Political Rights (ICCPR); and (3) be necessary and proportionate to that aim. As a signatory to the ICCPR, the Kyrgyz Republic must ensure that its laws and proposed legislation comply with these requirements.

Current practice

State practice shows that the scope of the laws adopted are often overly broad and key concepts are usually excessively vague. They also lack sufficient procedural safeguards in notice and takedown processes. While reference is made to redress mechanisms, they lack independence (Germany) or a clear commitment to provide the financial resources necessary to their effectiveness (see CNIL qualified person [report](#) on the operation of the French law on the removal of terrorist or child sex abuse material). The actions and responses by companies leave also to be desired as there is often a lack of transparency, of clear standards, of due process and inconsistent application in their practices (see ARTICLE 19's [Missing Voices campaign](#)). In ARTICLE 19's view, State and company practices often fail to provide sufficient safeguards for the protection of freedom of expression.

Germany

In August 2017, ARTICLE 19 published a [legal analysis](#) of the draft version of the German Act to Improve Enforcement of The Law on Social Networks ('NetzDG'). ARTICLE 19 severely criticised the draft law as it effectively delegates censorship to private companies, in particular social media platforms. Private companies are required to remove illegal or manifestly illegal content within unduly short timeframes. When companies fail to comply with a range of transparency and due process obligations, they can be subject to severe penalties. Self-regulatory bodies that can examine challenges to the lawfulness of content must be recognised by the Federal Office for Justice. Their independence is therefore compromised. Moreover, the type of content that must be removed under the German Criminal Code is vaguely defined and is contrary to international standards on freedom of expression (e.g. defamation of religions).

Contrary to the briefing published by the Kyrgyz government, however, the NetzDG law does not address 'false information' or 'fake news'. It is concerned with a range of 'hate speech'-related criminal offences under German law. Whilst ARTICLE 19 does not support the scheme of the NetzDG law, the Kyrgyz briefing fails to mention the following procedural safeguards:

- Social media platforms are not required to monitor content on their networks, they are required to remove *manifestly* illegal content within 24 hours of receipt of a notice containing sufficiently detailed information about the alleged manifest illegality;

- Platforms must remove allegedly illegal content within 7 days of receipt of a notice. However, the law allows for a longer period when the facts are disputed. Sufficient time must be given to the content provider to put his case forward *before* a decision is made. Moreover, decisions about the legality of content can be referred to a self-regulatory body, though the latter must be recognised by the Federal Office for Justice, which is problematic;
- To impose liability for failures to remove or block content, the Federal Office of Justice must first seek a decision of the Administrative Court which deals with objections to regulatory fines (Section 4(5)).

France

The Kyrgyz briefing also mentions the 2018 French law on the manipulation of false information. ARTICLE 19 has found that the law was [incompatible](#) with international standards on freedom of expression. In particular, the definition of ‘false information’ elides the difficulty in distinguishing fact from opinion and is therefore open to abuse. We have also expressed serious concerns about the powers given to the broadcasting regulator to revoke the licence of media channels considered to be under ‘foreign influence’.

Nonetheless, we note that the French law on the manipulation of false information contains a number of safeguards that are not mentioned in the Kyrgyz briefing, including:

- The application of the law is limited to a three-month period before national elections;
- The definition of ‘false information’ makes reference to false information that is disseminated “deliberately, artificially or automatically” on a massive scale to influence the outcome of elections: in other words, it is primarily aimed at ‘false information’ disseminated by bots;
- The regulator does not issue notices demanding the removal of false information as defined under the law. ‘False information’ can only be removed or blocked following a court decision. The role of the regulator is limited to ensuring that social media companies have internal procedures in place allowing users to notify information that they believe to be false.

France also recently adopted a law on countering online hatred. ARTICLE 19 considers that the law under its current form is a [major setback](#) for freedom of expression online. ARTICLE 19 looked at the compatibility of an earlier draft of the law with international standards on freedom of expression and concluded that it [failed to comply](#).

United Kingdom

The Kyrgyz briefing further mentions the UK experience to justify the measures put forward by the government. We note however that the UK has not yet adopted a law on Online Harms. No Bill has been published. The proposals in the UK White Paper on Online Harms are highly controversial and raise [several concerns](#). In particular, a definition of key concepts is missing, including the concepts of ‘duty of care’ and ‘online harms’. It is therefore entirely unclear what measures, if any, companies should adopt in order to meet the new ‘duty of care’. This raises significant legality issues, since any interference with human rights must be provided by a law that is sufficiently clear for natural or legal persons to know how to regulate their conduct. In practice, that would also grant overly broad discretionary powers to a regulator.

Notwithstanding the above, it is important to note that they are currently [no plans](#) for the regulator to decide on the removal of specific pieces of content. Nor would it be tasked to do so for content that is legal but harmful such as disinformation.

In all three examples above, ARTICLE 19 notes that the laws are overly broad in scope, lack clear definitions of key concepts and provide insufficient procedural safeguards.

Excessively vague laws are open to arbitrary interpretation and are easily abused. This is especially so when combined with steep fines. More generally, it is highly questionable that the speech of users should ultimately be overseen by a regulator, particularly in circumstances where the regulator is not independent. The main casualty of these laws is freedom of expression.

The way forward

To protect freedom of expression, States must ensure that legislation that seeks to regulate online content incorporate the following **key principles**:

- Legality/legal certainty
- Transparency
- Accountability
- Due process
- Proportionality
- Rule of law

In practice, ARTICLE 19 believes that for the highest standards of human rights protection to be achieved, online content regulation laws must contain the following **key elements**:

- Strong immunity from liability
- Clear notice and action processes
- Prohibitions on general monitoring
- Legality of content should be decided by the courts. States should refrain from delegating these decisions to private companies or government agencies.
- Social media councils

ARTICLE 19 also strongly encourages that companies respect and endorse the [Santa Clara Principles on Transparency and Accountability in Content Moderation](#). These principles set out minimum standards that companies should implement to ensure that their users have access to due process and receive notification when their content is flagged or removed. Moreover, the Principles set out transparency standards that companies owe to the public about how and why expression is being restricted on their platforms.