[FR] Digital technology and fundamental rights – 50 proposals from the Conseil d'État

IRIS 2014-9:1/17

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To what extent does the protection of fundamental rights need to be rethought in the face of the upheaval brought about by the digital era? In its annual study made public on 9 September 2014, the Conseil d'État – as the guardian of fundamental rights and freedoms – attempts to answer the question, drawing up a statement of the current situation and putting forward fifty proposals. The study addresses a number of topical issues (neutrality of the Internet, the right to be forgotten, data ownership, the use made of data and its incorporation in Big Data, etc). This article focuses on those issues concerning audiovisual communication and freedom of expression.

The Conseil d'État's study proposes confirming the principle of the neutrality of the Internet, particularly with regard to the fundamental guarantee of freedom of expression, in positive law. It points out that the dominant position of certain content suppliers and the share of the volume represented by a small number of large sites broadcasting videos, currently constitute threats to the observance of this principle. The electronic communications operators are not the only stakeholders to play a decisive role; the Conseil d'État advocates creating a new legal category for 'platforms', separate from both the editors and the hosts provided for in Article 6 of the LCEN Act of 21 June 2004. Platforms offer services for classifying, sharing, and referencing goods and services put on-line by third parties. Although it is pointed out that the platforms cannot be subjected to the same obligation of neutrality as the operators of electronic communications, they should be subjected to an obligation of loyalty to their users, including the definition in clear, comprehensible, and non-discriminatory terms of the criteria for withdrawing illegal content. The platforms are involved in the debate on combating illegal content. Beyond their legal obligations, they are taking voluntary steps under their 'policies' on acceptable content and making tools to detect infringement of copyright available to rightsholders. This is a controversial role, regarded by some as constituting 'private policing'. The Conseil d'État nevertheless considers that it would not be realistic to deny private stakeholders the right to decide on the withdrawal of content by reserving this right for the courts and, therefore, advocates making provision for an obligation for hosts and platforms to prevent the reappearance of content previously withdrawn, for a specified period of time. According to the Counseil's study, this obligation would be imposed by an administrative authority.

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The study also indicates the need to provide audiovisual regulations with instruments adapted to the digital environment. It is noted that the two theoretical foundations of audiovisual regulation, i.e. occupation of the public domain and the need to regulate linear broadcasts, cannot be transposed to audiovisual services that may be accessed via the Internet. On the other hand, the third theoretical foundation – constituted by the objectives of the constitutional importance of maintaining public order, respecting the liberty of other people, and preserving the diverse nature of socio-cultural movements of expression – is just as relevant to the Internet as to the conventional media for audiovisual communication. So as not to jeopardise the neutrality of the Internet, the study therefore proposes not requiring communications operators to differentiate between lawful content on the generalist Internet. On the other hand, such obligations could be envisaged for the distribution of specialist services. It would also be appropriate to revise the methods for checking media concentration in order to provide a better guarantee of diversity, given the multiplicity of information media. The final proposal is to develop mediation in order to settle disputes connected with the use of digital technologies.

The study does not fail to point out that many of the proposals put forward fall within the remit of the European Union's institutions, either because they require existing EU law to be amended, or because the EU is the relevant level for action. In national terms, the Government has announced that a bill on digital technology is to be submitted to Parliament in 2015. Prior consultation, which has been placed in the hands of the National Digital Council (Conseil National du Numérique), will begin soon.

Etude annuelle 2014 du Conseil d'Etat - Le numérique et les droits fondamentaux

http://www.ladocumentationfrancaise.fr/rapports-publics/144000541-etude-annuelle-2014-du-conseil-d-etat-le-numerique-et-les-droits-fondamentaux

2014 annual study by the Conseil d'État on digital technology and fundamental rights

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