

DFF – Pre-litigation research grant on Freedom of Thought 2019-20

External Report – Findings, Legal Analysis and Next Steps

This paper reflects the key findings and legal analysis arising from a Digital Freedom Fund pre-litigation research grant to explore the ways in which the rights to freedom of thought and/or opinion could inform litigation in the digital rights field.

Introduction to the Right to Freedom of Thought

The research focus was on the potential for technology to interfere with our right to freedom of thought, as protected in international law instruments including [Article 10](#) of the EU Charter, [Article 9](#) of the ECHR and [Article 18](#) of the ICCPR and the way in which these rights could reinforce digital rights arguments and legal analysis.

According to these instruments, many rights, like the right to private life and the right to freedom of expression, can be limited in certain circumstances to protect the rights of others or in the interests of public order.

The right to freedom of thought,¹ on the other hand, is absolute under international human rights law. This means that where there has been an interference with our right to freedom of thought, as it relates to the thoughts and feelings we experience in our inner world, such an interference can never be justified. This means that the right to freedom of thought could provide an additional layer of legal protection that could be stronger than that provided by the limited right to private life in international human rights law.

Despite this strong level of treaty-based protection, however, the right to freedom of thought has rarely been invoked in the courts. Many legal scholars and commentators have assumed that this is because, in fact, no person or government could ever get [inside our minds](#).

But the [Cambridge Analytica scandal](#) and the use of AdTech and behavioural micro-targeting to produce individual psychological profiling of users so they can be [targeted](#) with tailored adverts that press their unique psychological buttons, indicates that the assumption that no one could ever interfere with our minds was outdated.

There are three main planks to the right to freedom of thought:

- The right not to reveal our thoughts.
- The right not to have our thoughts manipulated.
- The right not to be punished for our thoughts.

All three are potentially relevant in the digital age, where algorithmic processing of Big Data is relied on to profile and understand individual's thought processes in real time for the purpose of targeting them with tailored advertising and other content.

Profiling seeks to infer how we think and feel in real time based on large swathes of data, including our online activity. Research on Facebook claimed that the social media platform could know you [better than](#) your family from interpreting your "likes". In this way, interpretation of your social media activity gives a unique insight into your mind.

¹ For more in-depth analysis see Susie Alegre ["Rethinking Freedom of Thought in the 21st Century."](#) EHRLR 2017

In another experiment, researchers showed that altering the order of Facebook feeds [could manipulate](#) users' mood. The tailored way that information is delivered to us could change the way we think and feel in a very real way.

But it is not only the tracking and manipulation of our thoughts and feelings that is of concern. The way that information could be used against us is equally worrying. Inferences about our personalities and moods drawn from big data can form the basis for decisions that will fundamentally change our life chances whether in [limiting access](#) to financial services, automated [hiring processes](#) or [risk assessments](#) in the criminal justice system.

All three aspects of the right to freedom of thought could give rise to a legal challenge. In most cases, there should be no need to demonstrate that a person's thought processes have been effectively accessed or manipulated. The fact that a service or process is designed to make inferences about the inner mental state of an individual and/or to affect future behaviour in an individually targeted way should provide sufficient basis to challenge its lawfulness in light of the right to freedom of thought. This is particularly relevant in challenges that raise questions relating to positive and negative state obligations to protect and respect human rights.

Potential Fact Patterns

The three aspects of the right to freedom of thought are relevant to a broad range of services or practices including many that are currently at early stages of research or development or where their deployment is still unclear. Several areas stand out where legal arguments using the right to freedom of thought could be useful including:

- Criminal Justice
 - o Lie detectors
 - o Predictive Policing based on individual risk assessments
 - o Algorithmic Risk Assessments for Sentencing or Parole
- Security and Border Controls
 - o Facial Recognition Technology or voice or gait analysis that includes mood analysis
 - o Automated risk assessments based on broad categories of data to infer a state of mind or an individual's opinions
- Social Security
 - o Inferences about fraud risk based on individual profiling (e.g. [SyRi](#))
- EdTech
 - o Monitoring and analysis of children's data to make inferences about their thoughts and feelings
- AdTech and Social Media
 - o Real Time Bidding and targeted advertising based on inferences about an individual's state of mind that is designed to surreptitiously influence a person's thoughts or behaviour
 - o Personalisation and manipulation of social media feeds that impact mental health or manipulate political or other opinions
 - o Political behavioural micro-targeting
 - o Gambling adverts targeted through children's apps
 - o Recommender algorithms

Arguments relating to the right to freedom of thought or freedom of opinion in litigation on these issues could be used to reinforce arguments based on privacy, data protection or equality law. They may also be a useful interpretative tool for relevant regulation and legislation.

Potential Avenues for Strategic Litigation

Legal arguments using the right to freedom of thought may be brought alone or in conjunction with more familiar arguments around privacy and data protection. As these are novel arguments, it may be easiest to use them to strengthen data protection and privacy submissions rather than as a standalone argument.

- EU Law, in particular GDPR

In most EU jurisdictions, including Ireland and Spain, these rights may be included in submissions to supervisory authorities to clarify the correct interpretation of the GDPR in light of all rights contained in the EU Charter of Fundamental Rights and Freedoms. The right to freedom of thought, the right to freedom of opinion and the right to mental integrity are all relevant to the interpretation of the GDPR. Including these arguments in submissions to supervisory authorities is the most straightforward way to begin raising these arguments with limited cost implications. They may also be raised in litigation relating to GDPR in courts. Where the interpretation of the GDPR in light of the Charter is in dispute, this could give rise to a referral to the European Court of Justice from a national court or tribunal for definitive clarification on the correct interpretation.

- ECHR and domestic human rights law

Freedom of thought arguments may also be brought through relevant domestic human rights law challenges using ECHR rights that may ultimately lead to the European Court of Human Rights once domestic remedies are exhausted.

In the UK, for example, s.3 of the Human Rights Act 1998 provides that “So far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Therefore, domestic legislation, such as the Data Protection Act 2019, should be read in a way which is compatible with the rights to freedom of thought and freedom of opinion in the ECHR. s.6 of the Human Rights Act 1998 also makes it unlawful for a public authority to act in a way that is incompatible with a person’s rights under the ECHR. In cases where the activity or decision complained of is done by a public authority, breach of the right to freedom of thought and/or freedom of opinion as contained in the ECHR could form the basis of a legal challenge through judicial review.

Similarly, in Ireland, s. 2 of the European Convention on Human Rights Act 2003 includes similar provisions on the interpretation of law in accordance with ECHR rights and s.3 (1) provides “Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.”

The Spanish Constitution provides for “ideological freedom” at Article 16 and Article 10(2) provides that these rights should be interpreted in line with the Universal Declaration on Human Rights and other international treaties and agreements on human rights ratified by Spain including the ECHR and the ICCPR. Article 16 could therefore be used to bring constitutional challenges based on the right to freedom of thought and/or the right to freedom of opinion as they are defined in international human rights law including the UDHR, the ICCPR and the ECHR.

Freedom of Thought, Mental Integrity and Mental Health Data

The potential for using arguments relating to freedom of thought in the digital rights space is broad. In the scope of this project, to demonstrate how this could be useful in a concrete case, legal analysis focused on the specific issue of mental health data with a detailed legal opinion designed to supplement submissions to supervisory authorities or courts on the interpretation and application of the GDPR.

2020 has put the spotlight on many aspects of our lives as individuals and societies. Covid 19 has not only been a threat to physical health, it has also created a shadow mental health pandemic. With lockdowns around the world limiting face to face contact, for many, the only way to get help or support for their mental health has been online.

Accessible mental health services are vital. But as Privacy International's 2019 report ["Your Mental Health For Sale"](#) revealed, online mental health services are being offered at a high, but hidden, cost. They found 97.78% of the websites they analysed were sharing visitors' data, including, in some cases, the answers to self-assessment questionnaires, with third parties mainly for the purposes of advertising including targeted advertising.

Privacy International brought a [complaint](#) earlier this year against the website Doctissimo.fr to the French data protection authority (the CNIL) about the privacy and data protection issues these practices raise. But the sharing of mental health data for the purposes of targeted advertising also engages other human rights including the right to freedom of thought and the right to mental integrity.

Building on Privacy International's investigation, thanks to this grant from the [Digital Freedom Fund](#), I explored the ways that the right to freedom of thought and the right to mental integrity could be used to strengthen the legal protections around the use of mental health data in a commercial context in a [Legal Opinion](#).

The right to freedom of thought in the *"forum internum"* is absolute. This means that the standard of protection afforded by the right may be higher than that provided by rights like the right to private life which allow for proportionate limitations on the right. If the practices revealed in the Privacy International report are found to violate the right to freedom of thought in the *"forum internum"* they could never be justified or compliant with EU law.

The right to mental integrity includes the requirement of "free and informed consent" in the fields of medicine and biology. The prohibition on using body parts for financial gain in the fields of medicine and biology may also be relevant in terms of the way data on mental health may be used.

The Legal Opinion attached to this report explores, in detail, how these rights may be used in the interpretation of the GDPR and other EU instruments that provide relevant protections. The particular questions the opinion addresses are

- a. How could the rights to freedom of thought and/or mental integrity in the EU Charter be relevant to interpretation of EU data protection law in this context?
- b. How is the interpretation of these rights in the EU Charter informed by parallel rights in the ECHR and the ICCPR?
- c. Are there other aspects of EU law that aid in interpretation of the parameters of the rights to freedom of thought and mental integrity in relation to targeted advertising based on data shared from mental health websites?

Next Steps

Much of this analysis is relevant more generally to interpretation of the GDPR in light of EU Charter Rights and is, therefore, relevant to litigation on other topics as well as the facts highlighted in the Privacy International Report.

I would be very happy to discuss further how this could be developed and applied to potential litigation, advocacy or policy development – please get in touch!

Contact details, further information and materials on the right to freedom of thought in the digital age are available on [my website](#) or [Doughty Street Chambers Website](#).

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