



# Internet Freedom

## A free market digital manifesto

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### Introduction

Margaret Thatcher's legacy of economic liberalisations were based on the privatisation and deregulation of state-controlled industries to private sector competition. Underlying these reforms was the principle that individual liberty harnesses people's creative powers for the good of themselves and others and has allowed deregulated sectors of the economy to flourish.

Famously, in an argument against 'pragmatic' third way politics, she reached into her purse and took out F. A. Hayek's *The Constitution of Liberty* and said, "This is what we believe in, this Constitution of Liberty." The key to the success of the Thatcher-era privatisations and deregulations was a belief in the principle of liberty, which stopped policy from focusing only on the short-term 'seen' effects of a policy in favour of an appreciation for the 'unseen' long-term benefits of policy change.

The lack of a consistent ideology coupled with the lack of any long-term vision in the current Coalition government makes for disjointed policy and incoherent policy approaches. Margaret Thatcher espoused the ideology of FA Hayek as outlined in *The Constitution of Liberty*, and this informed her long-term thinking and the way she ran her government. The insights that *The Constitution of Liberty* provide are more relevant than ever, especially in the world of digital policy, where the consequences of policy are especially difficult to determine.

The core theme in *The Constitution of Liberty* is that individual freedom is of the utmost importance to the flourishing of society. Freedom allows for individuals to make choices and act in ways that are not only important to the individual herself, but to her family, friends, and community. Freedom of action – the freedom to engage, create, trade, and discuss without interference from the government – is critical. In a free society individuals can

develop and follow their own life plan, much like Bill Gates, Steve Jobs, and Jeff Bezos did as founders of three of the biggest tech companies in the world.

No individual has all of the knowledge and information in the world therefore social interactions and spontaneous growth are necessary to move society forward. FA Hayek, in writing *The Constitution of Liberty* in the late 1950's, recognised even then that we as a society would lose faith in ideology of freedom and liberty. Opinions and misguided 'pragmatism' that always focused on the short-term would determine government policy – a not dissimilar situation from what we see today.

In a free society, government power must be constrained by the application of general rules to all of its citizens, even those who hold positions within the government. As the late James Buchanan argued, rules-based regulatory systems are less prone to abuse and corporate capture than discretionary ones.<sup>1</sup> Government should provide the legal foundations for society and the economy to operate on, but not try to run people's lives and dictate the daily running of private firms.

In short, *The Constitution of Liberty* provides us with a loose framework in which government, society and individuals can co-exist, underpinned by the belief in freedom. Though Thatcher's government was far from perfect, she herself believed in the human capacity to contribute to their own community and society in general. It is this fundamental, optimistic belief and trust in humanity that made the UK a freer and more productive society under her.

This paper will apply the insights of *The Constitution of Liberty* to the new frontier of digital policy in the hope that the government will carry on in the spirit of Hayek and Thatcher in defending the freedom of the individual, for the better of society and the economy. What would a

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government seeking to emulate the Thatcher-era economic liberalisations do about the rise of digital communications and the Internet? How would it enshrine the values of liberty?

This paper recommends that the government commits to a ‘Digital Freedom Charter’, and outlines the key points that aims to set out both top-level principles as well as specific suggestions that would ensure competition, innovation, and growth in and around digital communications and the Internet in the UK for years to come.

## Guiding principles for a free internet

In the context of the Internet regulation, the freedom to be able to conduct business, engage with others and communicate freely should be fundamental to government policy, and should be safeguarded against regulatory restrictions. The market ecosystem is where all of this takes place, but the market must have a rule of law, limited regulation, and the ability to deliver products and solutions privately without crowding out by government.

### The market

The growth of the Internet has allowed for a deep division of labour to take place, as geographical location has become less important to exchange. Entrepreneurs with online reach beyond their immediate locales have been able to flourish while traditional high streets have stagnated. This process has been wealth-creating. In 2011, McKinsey reported that 2.6 jobs were created for every 1 job lost due to the Internet. 21% of the GDP growth in economically mature countries can be attributed to the Internet.<sup>2</sup> The Internet economies of developing markets in the G20 will grow, on average, of 17.8% through 2016.<sup>3</sup>

In 2010, the UK Internet economy contributed £121 billion to the overall economy with that set to increase to £225 billion in 2016.<sup>4</sup> The number of businesses in the UK helped by the Internet is unquantifiable; there is no doubt that the Internet has provided the ability to advertise local businesses at a national and international level. And that doesn’t take into account the many thousands of self-published authors and musicians as well as the amount of buying and selling that takes place in online marketplaces.

In this context, the UK government should see the Internet an opportunity to promote the benefits of the digital age. Allowing businesses of all kinds to flourish thanks to the opportunities and communication capabilities that the Internet provides should be of the utmost importance and should underpin the approach to any new policy.

### Rule of Law

The principle of the rule of law means that government may not dictate or mandate how individuals, families, and organisations work on a case-by-case basis. Regular and predictable law makes it possible for there to be an accepted understanding of how to act legally and illegally in a society and freedom to act is supported by it.

But the rule of law goes hand in hand with economic growth. Robert Higgs has shown that during times of crisis, “an outpouring of business-threatening laws, regulations, and court decisions” and in particular the uncertainty of property rights, which may include current and future investment in new business ideas, cause reduced risk taking and investment in business.<sup>5</sup> The same can be said of the current business regulations in the UK. The constantly changing advice and approach to digital policy in the UK right now only guarantees certainty in the uncertain. In spite of this, we continue to see individuals take risks and start new businesses, but who knows what that would look like with consistent regulation from the UK and the EU in particular.

A troubling aspect in Internet regulation proposals is talk of extra-judicial governing bodies. Any so called body that is left to determine of search results are ‘appropriate’ or if websites are ‘appropriate’ undermines the very open and democratic society that we have.

The digital rule of law is being constantly undermined by massive amounts of legislation and directives coming from the UK and the EU that seems to attempt to engineer the Internet.

Website blocking and copyright legality, to name a few current issues, simply must be challenged in court of law. The ability for the government to intervene and require public and private entities alike to prevent the dissemination of information – like legal pornography or copyrighted material – needs to be tested in the court system. Making individuals and organisations act by requirement provides uncertainty in future actions. Though an establishment of precedence through court cases, rule of law is enforced and legal certainty is created. The ever changing policy of the government to require blocking, or not require it or maybe require it means that there is no guarantee towards consensus action.

The most obvious example of this is the Digital Economy Act. Brought into law in the wash up before the 2010 general election, section 16 and 17 of the act provides for a

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three strikes notification of possible copyright infringement online before Internet access is terminated. In practice this would mean that if someone is accused of illegally downloading copyrighted material online for not paying for it and doesn't cease and desist after three notifications by their Internet Service Provider, their service would probably be disconnected. The accusations of who is doing the illegal downloading could come from copyright holders themselves or third parties, with no legal guarantee.

To this day, this Act and the details around implementation and arbitration after accusation remain unenforced (as it has yet to be fully implemented into law). The uncertainty this provides is not whether or not someone should go ahead and illegally download copyrighted material, but if Internet Service Providers and third party business intermediaries will shoulder the burden of notification and take down. What will this cost businesses and who will shoulder those costs in the long run? It remains uncertain and uncertainty causes different or no business investment decisions to be made.

### **Deregulation**

Both the British government and European Union have a thicket of regulation that, in an age of emerging technologies and instantaneous communications, does not make sense. A recent example is the EU's Privacy and Communications Directive, which came into force on May 26, 2011.<sup>6</sup>

Otherwise known as the Cookie Law, companies that run websites across the European Union have been required to explicitly ask the users coming to their site whether or not they want cookies to be used to track them. Most UK companies loosely complied by using a pop-up window or information button to ask users if they consent.

The problem with this compliance issue is that it forced businesses large and small to take time and money away from their core business in order to figure out how to comply with the EU. The law attempted to secure more privacy for EU residents, but in doing so it did not take into account that cookies are fundamental to running websites. In effect, regulation undermined a key tool that online businesses can use to make money and added unnecessary costs to even the smallest website owners, with effectively no tangible benefit for users.

It is the rule of law and the trust of individuals that maintains an actively growing economy, not regulation. Indeed, regulation can severely inhibit entrepreneurship and investment by creating uncertainty and increasing compliance costs.

### **Privatisation**

A small state is vital to the preservation of free markets. The more active the state is in the economy, the greater the 'crowding out' effects are. In the Constitution of Liberty, Hayek argues that there is a natural tendency within the welfare state to grow and expand as it attempts to solve an ever-greater set of problems. In other words, 'mission creep' sets in.

In the context of any communications regulation, we need to take a look at government based functions that can and should be run privately. The BBC is an enormous barrier to a free media, because it is not subject to the same competitive pressures that its rivals are. If watchers and listeners cannot decide what wins and what doesn't, there is no way for the market to give consumers what they want. The idea of having a public service broadcaster is out of date. The very explosive growth of the Internet has allowed for global competition in news, music, fiction, video, television, sports, and film – to name a few. The BBC spent £186 million in 2012 on their online services including websites and streaming, crowding out dozens of competitors (particularly online divisions of struggling newspapers whose survival depends on making a profit online).

Online revenue streams for content are becoming increasingly viable. As consumption online increased and the market changed, firms like Amazon, Channel 4 and Netflix are adapting to provide streaming content along single-payment, advertising and/or subscription models. Soon they will launch bespoke content channels as well. And all of this is happening without government funding. If the BBC and other public service broadcasters were privatised we would enjoy more competition in the media market.

### **A Digital Freedom Charter: Specific proposals**

In order to safeguard a communications framework that protects the Internet, communications industries and digital commerce from harmful regulation, politicians in government and Opposition should commit themselves to a Digital Freedom Charter that establishes their commitment to protect the internet in the following issues.

#### **Freedom from EU/EC regulation**

Compliance with the EU's Privacy and Communications Directive has been mentioned earlier in this paper, but another example is the draft General Data Protection Regulation. Meant to streamline all data protection

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directives, this is supposed to put individual human rights before businesses operations. One example of this is that businesses need to conduct impact assessments if data storage might interfere with human rights.

This sounds good, but the increasing amount of compliance with EU regulation means that businesses in the UK will take time and money away from their businesses and invest more in compliance with regulations. This will only serve to negatively impact consumers at the end. This is an example of the dangers of piecemeal regulation – well-intentioned legislators lose sight of the bigger picture and ultimately erode the core freedoms of the system they’re trying to ‘improve’.

Instead of complying with onerous regulations, the UK should enforce existing competition and antitrust laws. There is already a significant amount of legal precedent that restricts monopolistic business practices. These are laws that apply to everybody, and should be sufficient for internet commerce as well. Law that applies generally ought to be the standard, not industry-specific regulation that has proved costly and ineffective in the past.

The complex interactions of UK and EU regulation combined with the vague timeline of the EU’s revision of the General Data Protection Regulation and the e-Privacy Directive make it difficult for most companies to even plan for how to deal with personal and corporate data. Uncertainty guarantees that innovation, investment, and new business creation will happen less and less.

### **Freedom of contract**

A necessary component of the rule of law is the contract. This is often forgotten by legislators and privacy campaigners. Contracts underpin business relationships and high value purchases, to name a few areas. Contracts also underpin the relationships that users have with the firms they do business with.

It is a common fallacy that government can protect a user’s relationship with websites. When a user signs up to websites that offer services, including Facebook, Twitter, and Google, the user agrees to terms and conditions that are laid out by the company in advance. In effect, the user and the website enter into a contract, regardless if she reads the terms and conditions she agrees to. There is nothing forcing anyone to contract with any websites that offer free services, and nothing forcing them to skip over terms of their contract.

Users often call for the government ‘to do something’ when the relationship between the user and the website goes wrong. But because the user has entered into a contract with the business providing an online service, laws already exist to deal with breaches of contract, and can be applied to online businesses as much as to high street businesses. There is no need for special regulation; indeed, additional regulation will increase costs for businesses without offering any extra protection to users.

The basis of contract law is that, under normal circumstances, it is the responsibility of the individual to know and understand the contract that they are entering into. It is also the responsibility of the business to provide the terms and conditions in a clear and concise manner. Both users and businesses alike have to assume a certain level of responsibility in signing up to a contractual agreement.

This should be a truism. However, many digital privacy advocates have called for regulations that supercede the principle of contract law. The European Union’s Data Protection Directive calls for websites like Facebook’s terms of use to be regulated in order to ‘protect users’. This is misguided on two levels: the first is that if users are unhappy with the terms of use offered by Facebook, they are free to ‘protect’ themselves simply by refusing to sign up to it.

The second problem is that many of the largest social media websites offer a free service that makes money along an advertising model. User data is crucial to providing a targeted advertising service that makes money. Without access to a deep amount of user data that can be used to target advertising, many of these websites would not be able to operate at all. There is a strong danger that privacy regulation called for by a vocal but small minority will end up punishing all users by killing the dominant and popular free-to-use social media business model.

### **Freedom of finance**

In conjunction with freedom to contract is the freedom of finance. Individuals and firms need to be responsible for how we spend and invest their money, in order to allow market discovery processes to take place.

Government investment in content creation, broadcasting, and communications infrastructure are distortionary, crowding out the private sector and using up resources in an inefficient way. In order to foster more content creativity and content distribution a widespread reduction

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in government spending on media is necessary.

The market, not the government, should decide the type of content created or through consumer preferences. And the market will deliver broadband rollout through private investment, not through the government picking winners. Examples of this can be seen with the community-based initiatives to rollout Internet access like B4RN in the rural north of the UK, WiSpire in Norfolk and Gigaclear in Oxfordshire. All use private and community investment instead of money from the public purse to roll out both fixed and mobile Internet access in the UK. And they do it successfully.

Freedom of finance is freedom from government's choices around new media. Trusting that society can choose, invest, innovate, create and thrive in the new media sector is something that is difficult for those in power to accept. However, only until that happens will the UK get the 'competitive new media sector' that is so often promised by government.

### **Family and individual autonomy**

In a free and democratic society, family and individual autonomy is of the utmost importance. There is a growing fashion for government to decide what should and should not be viewed online, most notably with Claire Perry MP's proposals to introduce an automatic content filter on all British Internet Service Providers that would block pornographic material unless users opted out. These proposals seem to have stalled, but the idea of website blocking to prevent access to certain material online is becoming an increasingly reasonable option in politics.

The biggest problem with any suggestion of website blocking is that it puts the UK in the same place as Russia, China and other authoritarian sites. In July last year, the Russian parliament passed a law that allows for the blacklisting of websites for "child protection".<sup>7</sup> This would empower the Russian government to block websites of political dissidents, but there is little different between the content of that proposed law and what the Department for Education is consulting on currently.<sup>8</sup>

Website blocking isn't a panacea, nor is it likely to work. A 2010 OFCOM study concluded as much.<sup>9</sup> It said, "In conclusion, we believe that it is certainly feasible to impede access to prohibited sites using any of the techniques we considered...However, we find that sections 17 and 18 are unlikely to be able to provide for a framework for site blocking which would be effective." In short, though the report researched possible website blocking options like

DNS and IP address blocking, there was no wholly effective solution to the implementation of such a scheme.

A recent book published by Professor Sonia Livingston found that children who are at risk offline are also at risk online.<sup>10</sup> Vulnerability online is a symptom of deeper family problems, and cannot be addressed through simple website blocking, which only focuses on symptoms.

We should be extremely concerned about the idea of a government official or committee deciding what people should and shouldn't be allowed online. How do these committee members know they are right? What knowledge do they possess about children over the knowledge of the family raising those children? And how can a committee decide what is best of each and every family? These are questions that advocates of website blocking cannot answer.

### **Digital Freedom Charter**

The benefits that have come from the internet over the past three decades have been surprises: no central planner could have anticipated them in advance. The biggest threat to the internet is the piecemeal erosion of freedom by piecemeal regulation designed to solve problems and improve the user experience from the top down. This is well-intentioned, but fundamentally misguided.

To counteract this threat, specifically in the cases outlined in this paper, we recommend that the government commits itself explicitly to a baseline of internet freedom that any proposals for regulation would be judged against. This would require that the government does not measure proposals solely by the 'seen' costs of those regulations, but also by the 'unseen' costs of diminished future innovation and eroded personal and business freedoms.

The specific content of this charter will not be laid out here, but it should focus on four key areas:

1. Upholding the rule of law in digital commerce by using and enforcing existing laws around monopoly, antitrust and market conduct instead of creating new legislation.
2. Protecting the freedom of individuals and firms to contract freely, including protection from regulatory interventions aimed at 'protecting' individuals from themselves.
3. Minimizing distortionary government expenditures and sector-specific tax breaks in the media and digital industries.
4. Protecting families from government intervention



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designed to impose state-sanctioned parenting on children.

Apart from these four specific areas, a fundamental reassertion of the importance of the rule of law must be made by any politician discussing digital policy. New legislation, such as the Digital Economy Act 2010, circumvents judicial oversight in punishing internet users accused of copyright infringement, and poses a significant threat to our wider liberties, not just our freedom online.

## Conclusion

Over 50 years ago, in the Constitution of Liberty, Hayek argued that:

“Today we must be particularly aware that, as a result of technological change, which constantly creates new potential threats to individual liberty, no list of protected rights can be regarded as exhaustive.”<sup>11</sup>

Hayek and Thatcher both knew that the individuals who live and work in a society are the ultimate causes of widespread social progress and flourishing. The current government’s growth agenda depends on experimentation by individuals and firms, which cannot happen in a market distorted by regulation and uncertain about the future of legislation.

The ideas presented here are simple and fundamental, but often forgotten when those in power take up the challenge of proposing new legislation. Public choice theory tells us that politicians are ultimately driven by their own goals and ambitions and necessarily not the higher interest of the people. New policy should be framed around a rollback of the government’s existing involvement in communications.

Any communication and Internet policy from government must be focused on creating a framework for people to contract, finance, innovate and live in a society free from censorship, central planning, and extra-judicial law making. It would only make sense for the UK to question the very communication regulation that it has now in order to make this happen. State funded content, state mandated website blocking, and state sanctioning of businesses does not lead to a free and innovative society. If the state picks winners, who wins?

Radical solutions are needed for a radical overhaul of the economy. We must roll back the state’s involvement in an already growing industry order for that to happen.

## Endnotes

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