

## 9 The Council of Europe and Internet Intermediaries: A Case Study of Tentative Posturing<sup>1</sup>

Tarlach McGonagle

Internet intermediaries wield enormous power in the evolving digital ecosystem. The extent of their power, as detailed insightfully throughout this book, has prompted increased scrutiny of their activities and the impact they have on the human rights of Internet users. This chapter offers a critical analysis of the suitability of the Council of Europe's system for the protection of freedom of expression as a framework for regulating the activities of Internet intermediaries. The title of the chapter refers to the Council of Europe's "tentative posturing" in respect of the roles and regulation of Internet intermediaries. The institutional posturing can be described as "tentative" for a number of reasons, not least of which is the difficulty of (re-)calibrating regulation for a relatively new and complex medium. Another reason is the difficulty of bringing powerful private actors under the scope of an international system of human rights protection that is built around the relationship between states and individuals.

The chapter opens with a brief overview of the Council of Europe's system for the protection of freedom of expression, the centerpiece of which is Article 10 of the European Convention on Human Rights (ECHR) (Council of Europe 1950). It will then explore the efforts of the European Court of Human Rights (ECtHR) to keep pace of technological developments and to retain and revamp its general freedom-of-expression principles in an information and communications environment that is increasingly dominated by the Internet and the intermediaries which strongly influence its operation. This exploration will focus in particular on the growth spurts and growing pains of the ECtHR's case law. Besides the court, other bodies within the Council of Europe contribute to and strengthen the system of protection for freedom of expression, in particular the Committee of Ministers

with its political standard-setting activities. The chapter will also focus on the legal complications involved in bringing Internet intermediaries into the fold of a traditional, international, and treaty-centric system of human rights protection. It will conclude with a reflection on the rights, duties, and responsibilities of Internet intermediaries that flow from the existing system. “Hate speech” will be used to illustrate how frictional the relationship between intermediaries’ rights, duties, and responsibilities—and those of their users—can be in practice.

### **A System for the Protection of Freedom of Expression**

The Council of Europe has developed an elaborate system for the protection of freedom of expression, which is a source of guidance for the organization’s forty-seven member states in respect of their national media laws and policies. The system comprises principles and rights, as enshrined in treaty law and developed in case law; political and policy-making standards; and state reporting/monitoring mechanisms. Each of the instruments and mechanisms has its own objectives and emphases and/or mandates and working methods. To understand these instruments and mechanisms as a systemic whole is to “take into account the actual forces at work and make possible the realistic achievement of the objectives sought” (Emerson 1970, 4). Each has its place in the system due to the overall “unity of purpose and operation” (*ibid.*).

The interplay between each of the system’s components determines how the right to freedom of expression is exercised in practice. The system strives to operationalize abstract theories of freedom of expression and turn them into a right to freedom of expression that is meaningful and effective in practice. It seeks to create an enabling environment for freedom of expression, including as exercised by journalists, the media, and others who contribute to public debate. Internet intermediaries are important actors within this enabling environment, insofar as they can facilitate or obstruct access to the online forums in which public debate is increasingly conducted. The operators of social network services, for instance, “possess the technical means to remove information and suspend accounts,” which makes them “uniquely positioned to delimit the topics and set the tone of public debate” (Leerssen 2015, 99–100; see also Jørgensen’s Introduction to this volume and Land’s chapter in this volume). Search engines, for their

part, have the aim and the ability to make information more accessible and prominent, which gives them influence over how people find information and ideas and what kinds of information and ideas they find (see, generally, van Hoboken 2012). Both of these types of Internet intermediary therefore have clear “discursive significance” in society (Laidlaw 2015, 204).

The ECHR is the most important instrument in this system. Article 10 protects the right to freedom of expression (see further below), but that protection is integrated into the ECHR’s broader, more general scheme of protection for human rights. The rights safeguarded by the ECHR, as interpreted by the ECtHR in its jurisprudence, are the drivers of the whole. This must remain the case when exploring new dimensions to freedom of expression, such as Internet intermediary regulation, and when overcoming persistent and emerging threats and challenges to the exercise of the right to freedom of expression.

Over the years, various other treaties have been adopted by the Council of Europe, which reflect the general principles of the ECHR in their own theme-specific focuses. A systemic approach to freedom of expression helps to ensure that relevant treaties remain largely consistent and complementary in their focuses.

There is an important measure of interplay between the Council of Europe’s treaties, which are legally binding on contracting states, and political standard-setting texts, which typically take the form of declarations and recommendations and are not legally binding. Political and policy-making texts (hereinafter, “standard-setting texts”) ought to be grounded in the ECHR and the case law of the ECtHR, but they can also influence the development of that case law.

As standard-setting texts tend to focus on particular (human rights) issues or (emerging) situations with democratic or human rights implications, they can serve to supplement existing treaty provisions and case law. They can do so by providing a level of detail lacking in treaty provisions or by anticipating new issues not yet dealt with in treaty provisions or case law. It is noteworthy that judgments of the ECtHR refer to the Committee of Ministers’ standard-setting texts in an increasingly systematic and structured way. It has referred to Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media (Committee of Ministers of the Council of Europe 2011a), in its *Yildirim* and *Delfi* judgments (ECtHR 2012a and 2015a, respectively).<sup>2</sup> These standard-setting

texts can also facilitate the interpretation of existing treaties by applying general principles to concrete situations or interpreting principles in a way that is in tune with the times.

### The Basics and Centrality of Article 10 of the ECHR

Article 10(1) sets out the right to freedom of expression as a compound right comprising the freedom to hold opinions and to receive and impart information and ideas. As such, there are three distinct components to the right, corresponding to different aspects of the communicative process, that is, holding views, receiving content, and sending content. A distinct right to seek information and ideas is conspicuous by its absence. In this respect, Article 10 of the ECHR contrasts with equivalent provisions in other international human rights treaties, such as Article 19 of the International Covenant on Civil and Political Rights (ICCPR). It should be noted, though, that the evolution of the court's case law has served to compensate for and, to an extent, close the gap between the texts of Article 10, ECHR, and Article 19, ICCPR, on this point (ECtHR 2016a).

Article 10(1), ECHR, countenances the possibility for states to regulate the audiovisual media by means of licensing schemes. This provision was inserted as a reaction to the abuse of radio, television, and cinema for Nazi propaganda during the Second World War. Article 10(2) then proceeds to delineate the core right set out in the preceding paragraph. It does so by enumerating a number of grounds, based on which the right *may* legitimately be restricted, *provided that* the restrictions are *prescribed by law* and are *necessary in a democratic society*. It justifies this approach by linking the permissibility of restrictions on the right to the existence of *duties* and *responsibilities* which govern its exercise. Whereas the right to freedom of expression is regarded as being subject to general duties and responsibilities, the ECtHR sometimes refers to the specific duties or responsibilities pertaining to specific professions, for example, journalism, education, military service, and so forth. The court has held that those duties or responsibilities may vary, depending on the technology being used. In light of the case-by-case nature of the court's jurisprudence on duties and responsibilities and in light of its ongoing efforts to apply its free expression principles to the Internet (see further, below), it is only a matter of time before it begins to

proffer indications of the nature of Internet actors' duties and responsibilities in respect of freedom of expression.

Notwithstanding the potential offered by Article 10(2) to restrict the right to freedom of expression on certain grounds (although legitimate restrictions must be narrowly drawn and interpreted restrictively), as the ECtHR famously stated in its *Handyside* judgment, information and ideas which "offend, shock or disturb the State or any sector of the population" must be allowed to circulate in order to safeguard the "pluralism, tolerance and broadmindedness without which there is no 'democratic society'" (ECtHR 1976). The question of how far the *Handyside* principle actually reaches in practice is very pertinent as regards online content because of the widely perceived permissiveness of the Internet as a medium. It is of particular relevance for the reflection, below, on what duty of care can be expected of Internet intermediaries to combat hate speech.

Aside from the permissible grounds for restrictions set out in Article 10(2), ECHR, the right to freedom of expression may also be limited, or rather denied, on the basis of Article 17, ECHR ("Prohibition of abuse of rights"). It reads, "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." In the past, the court has applied Article 17 to ensure that Article 10 protection is not extended to racist, xenophobic, or anti-Semitic speech; statements denying, disputing, minimizing or condoning the Holocaust; or (neo-)Nazi ideas (McGonagle 2013b). This means that in practice, sanctions for racist speech do not violate the right to freedom of expression of those uttering the racist speech. In other words, national criminal and/or civil law can legitimately punish racist speech. The straightforward application of Article 17 can lead to a finding that a claim was manifestly ill founded and a declaration of inadmissibility. Such a finding means that the court will usually not examine the substance of the claim because it blatantly goes against the values of the ECHR. That is why Article 17 is sometimes referred to as a "guillotine" provision (Tulkens 2012, 284). However, the criteria used by the court for resorting to Article 17 (as opposed to Article 10(2)) are unclear, leading to divergent jurisprudence (Cannie and Voorhoof 2011; Keane 2007).

The scope of the right to freedom of expression is not only determined by the permissible restrictions set out in Articles 10(2) and 17, ECHR. It is also determined by the interplay between the right and other ECHR rights, including the right to privacy, freedom of assembly and association, and freedom of religion.

The ECtHR has developed a standard test to determine whether Article 10, ECHR, has been violated. Put simply, whenever it has been established that there has been an interference with the right to freedom of expression, that interference must first of all be prescribed by law. In other words, it must be adequately accessible and reasonably foreseeable in its consequences. Second, it must pursue a legitimate aim (i.e., correspond to one of the aims set out in Article 10(2)). Third, it must be necessary in a democratic society, that is, it must correspond to a “pressing social need,” and it must be proportionate to the legitimate aim(s) pursued.

The particular importance of the media for democratic society has been stressed repeatedly by the court. The media can make important contributions to public debate by (widely) disseminating information and ideas and thereby contributing to opinion-forming processes within society. As the court consistently acknowledges, this is particularly true of the audiovisual media because of their reach and impact. The court has traditionally regarded the audiovisual media as more pervasive than the print media. It has yet to set out a clear and coherent vision of online media, but it has ventured to say, in 2013, that “the choices inherent in the use of the Internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information” (ECtHR 2013a, para. 119). It continued by stating that notwithstanding “the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently serious shift in the respective influences of the new and of the broadcast media in the [United Kingdom] to undermine the need for special measures for the latter” (ibid.). Commentators have been left guessing as to what *would* amount to a “sufficiently serious shift” in the eyes of the court (Plaizier 2018). The media can also make important contributions to public debate by serving as forums for discussion and debate. This is especially true of new media technologies which have considerable potential for high levels of individual and group participation (see further: ECtHR 2012a).

Furthermore, the role of “public watchdog” is very often ascribed to the media in a democratic society. In other words, the media, acting as the Fourth Estate, should monitor the activities of governmental authorities vigilantly and publicize any wrongdoing on their part. In respect of information about governmental activities, but also more broadly in respect of matters of public interest generally, the court has held time and again that “[n]ot only do the media have the task of imparting such information and ideas: the public also has a right to receive them” (ECtHR 1979, para. 65). The extent to which Internet intermediaries also fulfill or facilitate the public watchdog role depends on their actual functions (see further, below).

To date, the ECtHR has engaged meaningfully with the Internet generally (ECtHR Research Division 2015; Murphy and Ó Cuinn 2010, 636), and the specific features of the online communications environment in particular, in a surprisingly limited number of cases (ECtHR Press Unit 2017; McGonagle 2013a). It has focused on the duty of care of Internet service providers (ECtHR 2008a, para. 49), the added value of online newspaper archives for news purposes (ECtHR 2009a, 2013b), and the challenges of sifting through the informational abundance offered by the Internet (ECtHR 2011a). How the court dealt with the final point is of interest:

It is true that the Internet is an information and communication tool particularly distinct from the printed media, in particular as regards the capacity to store and transmit information. The electronic network serving billions of users worldwide is not and potentially cannot be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology’s specific features in order to secure the protection and promotion of the rights and freedoms concerned. (ibid., para. 63)

The court made these observations in a case involving a newspaper that, owing to a lack of funds, “often reprinted articles and other material obtained from various public sources, including the Internet” (ibid., para. 5). In short, the court is calling for a rethink of familiar principles of media freedom and regulation in the expansive, global context of the Internet.

Again, these findings by the court focus on journalists and professional media, but in light of the expanding understandings of the roles such

professions play, they are also of relevance for other actors. This reading is confirmed by the reference to the importance of the Internet “for the exercise of the right to freedom of expression generally” (ECtHR 2009a, para. 27). The court has repeatedly recognized that besides professional journalists and media, an expanding range of actors—such as individuals, civil society organizations, whistle-blowers, academics, and bloggers—can all make valuable contributions to public debate, thereby playing a role similar or equivalent to that traditionally played by the institutionalized media (ECtHR 2016a; McGonagle 2015, 19 et seq.).

From the passage cited above, it is clear that the court places the onus on states’ authorities to develop a legal framework clarifying issues such as responsibility and liability. It is unclear, however, to what extent an equivalent self-regulatory framework would suffice. The court has held in other case law that self- and coregulatory mechanisms can suffice, provided they include effective guarantees of rights and effective remedies for violations of rights (Hans-Bredow-Institut 2006, 147–152, especially paras. 108 and 109). In any case, it is clear that “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals” (ECtHR 1993c, para. 27, and 1983, paras. 29–30). As will be explained below, state responsibility can, in certain circumstances, be triggered indirectly by the acts or omissions of private bodies.

In its *Ahmet Yildirim v. Turkey* judgment of December 18, 2012, the court recognized in a very forthright way the importance of the Internet in the contemporary communications landscape. It stated that the Internet “has become one of the principal means for individuals to exercise their right to freedom of expression today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest” (ECtHR 2012a, para. 54).

This recognition clearly places great store by the participatory dimension of free expression. The court found that a measure resulting in the wholesale blocking of Google Sites in Turkey “by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect” (ibid., para. 66; ECtHR 2015b, para. 64). The interference “did not satisfy the foreseeability requirement under the Convention and did not afford the applicant the degree of protection to which he was entitled by the rule of law in a democratic society” (ibid., para. 67). In addition, it produced arbitrary effects (ibid., para. 68).

Furthermore, the court found that “the judicial-review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general” (ibid.). This reasoning suggests that the court would also disapprove of other intrusive or overly broad blocking techniques.

In the case of *Delfi AS v. Estonia*, the Estonian courts held a large online news portal liable for the unlawful third-party comments posted on its site in response to one of its own articles, despite having an automated filtering system and a notice-and-takedown procedure in place (ECtHR 2015a). The Grand Chamber of the ECtHR found that this did not amount to a violation of Article 10, ECHR. The judgment has proved very controversial, particularly among free speech advocates, who fear that such liability would create proactive monitoring obligations for Internet intermediaries, leading to private censorship and a chilling effect on freedom of expression.

The contentious nature of the judgment stems from a number of the court’s key lines of reasoning therein. First, the court took the view that “the majority of the impugned comments amounted to hate speech or incitements to violence and as such did not enjoy the protection of Article 10” (ibid., para. 136). By classifying the comments as such extreme forms of speech, the court purports to legitimize the stringent measures that it sets out for online news portals to take against such manifestly unlawful content. The dissenting judges objected to this approach, pointing out that “[t]hroughout the whole judgment the description or characterisation of the comments varies and remains non-specific” and “murky” (ibid., Joint Dissenting Opinion of Judges Sajó and Tsotsoria, paras. 12 and 13, respectively).

Second, the court endorses the view of the Estonian Supreme Court that Delfi could have avoided liability if it had removed the impugned comments “without delay” (ibid., para. 153). This requirement is problematic because, as pointed out by the dissenting judges, it is not linked to notice or actual knowledge (ibid., Joint Dissenting Opinion, para. 8) and paves the way for systematic, proactive monitoring of third-party content.

Third, the court underscored that Delfi was “a professionally managed internet news portal run on a commercial basis which sought to attract a large number of comments on news articles published by it” (ibid., para.

144). The dissenting judges aptly argued that the economic activity of the news portal does not cancel out the potential of comment sections for facilitating individual contributions to public debate in a way that “does not depend on centralised media decisions” (ibid., Joint Dissenting Opinion, paras. 39 and 28).

Fourth, the court failed to appreciate or articulate the broader ramifications of far-reaching Internet intermediary liability for online freedom of expression generally. It was at pains to stress that “the case does not concern other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any input from the forum’s manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby” (ibid., para. 116). The dissenting judges again took great exception to this line of reasoning, describing it as an exercise in “damage control” (ibid., Joint Dissenting Opinion, para. 9).

The court subsequently revisited the issues of the responsibility and liability of Internet service providers for comments posted on their sites by users of their services in *MTE & Index.hu v. Hungary* (ECtHR 2016b). Unlike in *Delfi* and perhaps smarting from the critical fallout to *Delfi*, the court seemed keen in *MTE & Index.hu* to talk up the importance of Internet intermediaries in fostering public debate online. It referred to them as “protagonists of the free electronic media” (ibid., para. 88; see also para. 69). This is an important realization of the broader implications of intermediary liability for robust public debate. Similarly and more recently, in *Tamiz v. the United Kingdom*, the court referred to “the important role that ISSPs [Information Society Service Providers] such as Google Inc. perform in facilitating access to information and debate on a wide range of political, social and cultural topics” (ECtHR 2017a, para. 90).

The court emphatically distinguished the *Delfi* and *MTE & Index.hu* cases on the basis of the nature of the comments. Whereas it had deemed that some of the comments in *Delfi* amounted to hate speech, it described the comments at issue in *MTE & Index.hu* as “offensive and vulgar,” but found that they “did not constitute clearly unlawful speech” and “certainly did not amount to hate speech or incitement to violence” (ECtHR 2016b para. 64). The court has followed this line in a more recent inadmissibility decision in

*Pihl v. Sweden*, a case involving a defamatory blog post and an anonymous online comment (ECtHR 2017b). This distinction shows how important it is to be clear-sighted about what “hate speech” entails in legal terms.

### Political Standard Setting by the Council of Europe

While the above developments remain quite tentative in the case law of the ECtHR, they are more advanced in other Council of Europe standard-setting activities (see, generally, Benedek and Kettemann 2013). Although such standard-setting work, notably by the organization’s Committee of Ministers and Parliamentary Assembly (see Nikoltchev and McGonagle 2011a and 2011b, respectively), is not legally binding, it is politically persuasive and offers a number of advantages over treaty-based approaches. It can, for example, engage with issues in a more detailed way than is possible either in treaty provisions or case law or monitoring pursuant to treaty provisions. It can also address issues that have not arisen in case law but are nevertheless relevant. In the same vein, it can identify and address emergent or anticipated developments, thereby ensuring a dynamic/modern approach to relevant issues.

Standard setting by the Committee of Ministers includes a number of focuses that are relevant for Internet intermediaries (as also noted by Jørgensen in her Introduction to this volume), for example, self-regulation concerning cybercontent; human rights and the rule of law in the information society; freedom of expression and information in the new information and communications environment; the public service value of the Internet; respect for freedom of expression and information with regard to Internet filters; network neutrality; freedom of expression, association, and assembly with regard to privately operated Internet platforms and online service providers; human rights and search engines; human rights and social networking services; risks to fundamental rights stemming from digital tracking and other surveillance technologies; human rights for Internet users; the free, transboundary flow of information on the Internet; and Internet freedom. These normative texts generally explore their subject matter in an expansive way, while grounding the exploration in relevant principles that have already been established by the ECtHR. As such, the texts tease out the likely application of key legal principles to new developments, thereby also giving an indication of the likely content of specific state obligations

in respect of those principles. Their role and influence, while not legally binding, can nevertheless be seen as instructive.

Thus, the Committee of Ministers has highlighted the gravity of violations of Articles 10 and 11, ECHR (“Freedom of assembly and association”), “which might result from politically motivated pressure exerted on privately operated Internet platforms and online service providers” (Committee of Ministers of the Council of Europe 2011b, para. 7). It has insisted that the use of filters be strictly in accordance with Articles 10 and 6, ECHR (“Right to a fair trial”), and specifically be targeted, transparent, and subject to independent and impartial review procedures. It encourages member states and the private sector to “strengthen the information and guidance to users who are subject to filters in private networks, including information about the existence of, and reasons for, the use of a filter and the criteria upon which the filter operates” (Committee of Ministers of the Council of Europe 2008, Guidelines, section 3). It has also called on member states to “promote transparent self- and coregulatory mechanisms for search engines, in particular with regard to the accessibility of content declared illegal by a court or competent authority, as well as of harmful content, bearing in mind the Council of Europe’s standards on freedom of expression and due process rights” (Committee of Ministers of the Council of Europe 2012a, para. 8). Finally, in the present string of examples, the Committee of Ministers has stated that social networking services should refrain from “the general blocking and filtering of offensive or harmful content in a way that would hamper its access by users” (Committee of Ministers of the Council of Europe 2012b, para. 11); develop and communicate editorial policies about “inappropriate content,” in line with Article 10, ECHR (*ibid.*, para. 10, and see also para. 3), and “ensure that users are aware of the threats to their human rights and able to seek redress when their rights have been adversely affected” (*ibid.*, para. 15). It has called on member states to “encourage the establishment of transparent co-operation mechanisms for law-enforcement authorities and social networking services,” which “should include respect for the procedural safeguards required under Article 8 [“Right to respect for private and family life”], Article 10 and Article 11,” ECHR (*ibid.*, para. 11).

Another prong to the Committee of Ministers’ standard setting that is important for Internet intermediaries, without addressing their role explicitly, is its Recommendation CM/Rec(2016)3 to member states on human

rights and business. A central aim of this recommendation is to ensure that states “effectively implement the UN Guiding Principles on Business and Human Rights as the current globally agreed baseline in the field of business and human rights” (CM 2016, Appendix, para. 1). The recommendation includes focuses on the state’s obligation to protect human rights as well as on the kinds of state action that can enable corporate responsibility to respect human rights. Such action includes the application by states of “such measures as may be necessary to encourage or, where appropriate, require that” businesses based within their jurisdiction apply “human rights due diligence throughout their operations” and businesses “conducting substantial activities” within their jurisdiction “carry out human rights due diligence in respect of such activities” (ibid., para. 20). States should also ensure that access to judicial mechanisms, namely, courts and remedies, is available for everyone in respect of (allegations of) business-related human rights abuses (ibid., para. 31).

Many of the above principles and recommendations are played out in detail in the Committee of Ministers’ Recommendation CM/Rec(2018)2 to member States on the roles and responsibilities of Internet intermediaries (Committee of Ministers of the Council of Europe 2018). In the Preamble to the recommendation, the Committee of Ministers observes, “A wide, diverse and rapidly evolving range of players, commonly referred to as ‘Internet intermediaries,’ facilitate interactions on the internet between natural and legal persons by offering and performing a variety of functions and services” (ibid., Preamble, para. 4). It goes on to acknowledge that individual intermediaries are capable of performing different functions and services simultaneously (ibid., para. 5). Referencing the UN Guiding Principles on Business and Human Rights, it further states, “Owing to the multiple roles intermediaries play, their corresponding duties and responsibilities and their protection under law should be determined with respect to the specific services and functions that are performed” (ibid., para. 11). Taken together, these observations and recommendations plead for a targeted and differentiated regulatory approach—not a “one-size-fits-all” model.

In its Appendix, the recommendation sets out detailed and extensive Guidelines for states on actions to be taken vis-à-vis Internet intermediaries with due regard to their roles and responsibilities. The Guidelines have a dual focus: obligations of states and responsibilities of Internet intermediaries. The identified obligations of states include ensuring the legality

of measures adopted; legal certainty and transparency; safeguards for freedom of expression, privacy, and data protection; and access to an effective remedy. The responsibilities of Internet intermediaries include respect for human rights and fundamental freedoms, transparency and accountability, responsibilities in respect of content moderation, the use of personal data, and the ensuring of access to an effective remedy.

## Positive Obligations

### General Observations

The international legal system for the protection of human rights pivots on the linear relationship between individuals (rights holders) and states (duty bearers). The recognition that different types of non-state/private actors should also be (explicitly) positioned within the system has come about in a gradual and frictional manner. And even that reluctant recognition has only been achieved through the dynamic interpretation of existing legal norms and the interplay between those norms and policy-making documents. As noted by Land in her chapter in this volume, this presents a real conceptual and regulatory “dilemma” (for extensive and insightful analysis, see the chapters by Land and Callamard and the Introduction by Jørgensen in this volume).

All international human rights treaties share the primary objective of ensuring that the rights enshrined therein are rendered effective for everyone. There is also a predominant tendency in international treaty law to guarantee effective remedies to individuals when their human rights have been violated. In order to achieve these dual objectives, it is not always enough for the state to simply honor their negative obligation to refrain from interfering with individuals’ human rights: positive or affirmative action will often be required as well. This may, on occasion, require the state to intervene in relations between third parties. It is therefore important to acknowledge the concomitance of negative and positive state obligations to safeguard human rights. While this acknowledgement typically informs treaty interpretation, relevant formulas and approaches tend to vary per treaty.

In the context of Internet intermediary self-regulation as well, in addition to the traditional *negative obligations* that bind public authorities, the *positive obligations* of the state to safeguard human rights can mean that public authorities may be obligated to prevent private parties from engaging

in different types of behavior that endanger the fundamental rights of third parties. This can result in restrictions by public authorities on the use of self-regulation as a regulatory paradigm for the online environment.

The positive obligations doctrine has developed in piecemeal fashion, and its precise scope and finer details continue to evolve (for extensive analysis, see McGonagle 2015). As correctly noted by Land (see chapter 11 of this volume), the doctrine is germane to European human rights law. Besides the doctrinal evolution in the case law of the ECtHR, it is also instructive to consider the potential guidance offered by relevant standard-setting work by the Council of Europe's Committee of Ministers. For analytical purposes, it is useful to group positive state obligations relating to the rights to freedom of expression, privacy, and data protection as well as media freedom (hereinafter, for convenience, "communication rights") online into three categories: preventive, promotional, and remedial. These categories are not, however, mutually exclusive. As will be shown, preventive and promotional obligations, for example, overlap to an extent.

### Preventive Obligations

States are required to put in place regulatory frameworks (including legislative frameworks) to ensure the effective exercise of communication rights in the online environment. These frameworks should include legislative frameworks (ECtHR 2011a) and, more specifically, criminal-law frameworks, as appropriate—for instance, for combating child pornography (ECtHR 2008a). In respect of medical data, which constitutes "highly intimate and sensitive" data, states must ensure that the law affords "practical and effective protection to exclude any possibility of unauthorised access" to such data (ECtHR 2008b, paras. 38, 39, and 47, and 1997, paras. 95–96). States must ensure that laws not only meet the *Sunday Times* criteria concerning the quality of law (foreseeability and accessibility (ECtHR 1979); see also Council of Europe Commissioner for Human Rights 2014, Recommendation 16, p. 24) but in particular for surveillance of communications, for example, additional criteria apply in the interests of transparency/avoiding chilling effect and to ensure safeguards against various possible abuses (see, in particular, ECtHR 2006a, para. 95, and, generally, ECtHR 1984, 1990, and 1993b, and Eskens, van Daalen, and van Eijk 2015).

The obligations described in the previous paragraph exist regardless of the existence of self-regulatory mechanisms. While states may enjoy discretion as to the means they use to fulfill their fundamental rights obligations,

they may not delegate those obligations to private parties (ECtHR 2006b, 2012b; see also ECtHR 1985, 2000, 2003; see also Land's chapter in this volume). Relatedly, these obligations also exist regardless of states' obligations under other international treaties, especially when the source of those obligations is an international organization with "equivalent" levels of human rights protection (ECtHR 2005, 2011b). Thus, EU law, for example, may neither displace nor dilute positive state obligations identified and developed by the ECtHR pursuant to the ECHR.

### **Promotional Obligations**

States also have positive obligations to actively promote different values, such as pluralistic tolerance in society and media pluralism. Whereas the role of the state as "ultimate guarantor" of media pluralism has traditionally concerned the audiovisual media sector (ECtHR 1993a, 2001, 2009b), it is likely—in light of the living instrument and practical and effective doctrines—that this principle will have to be developed and applied *mutatis mutandis* to the online environment. Similarly, states' positive obligation to ensure an environment that is favorable to freedom of expression (ECtHR 2010, para. 137) necessitates adaptation for optimal realization in the online environment. Étienne Montero and Quentin Van Enis (2011, 24) have posited that states' positive obligations, when "[t]ransposed to the digital universe," include the adoption of "a genuinely reassuring framework for intermediaries in order to avoid the private censorship they are liable to effect through fear of liability action."

### **Remedial Obligations**

Review and redress are also important elements of states' positive obligations to uphold communication rights in an online environment. In accordance with Article 13, ECHR ("Right to an effective remedy"), states must, first and foremost, ensure that effective remedies are available for violations of communication rights. Remedies should have corrective, compensatory, investigative, and punitive functions and effects. These obligations mean that states must ensure that alleged violations of communication rights by private parties are subject to independent and impartial judicial review (see also Council of Europe Commissioner for Human Rights 2014, Recommendation 16, p. 24). Such review would necessarily consider the extent to which policies and practices of private actors, for example, for blocking and

filtering content, show due regard for process values such as transparency and accountability, as well as respect for rule of law (ECtHR 2003).

### **General Guidance**

Primary guidance for ongoing attempts to clarify the scope and content of states' positive obligations to guarantee the effective exercise of communication rights in an online environment is provided by the ECHR, as interpreted by the ECtHR. In that context, the ECtHR has stated that the legitimate aims of restrictions on, for example, the rights to privacy and freedom of expression (as set out in Articles 8(2) and 10(2)) may be relevant for assessing whether states have failed to honor relevant positive obligations (ECtHR 1986, 2012c). The ECtHR has also found that the margin of appreciation is, in principle, the same for Articles 8 and 10, ECHR (2012c, para. 106). In all cases involving competing rights guaranteed by the ECHR, a fair balance has to be struck between the rights involved, as relevant for the particular circumstances of the case. However, when restrictions are imposed on a right or freedom guaranteed by the ECHR, in order to protect "rights and freedoms" which are not guaranteed by the ECHR, the ECtHR has insisted that "only indisputable imperatives can justify interference with enjoyment of a Convention right" (ECtHR 1999, para. 113).

### **Internet Intermediaries and "Hate Speech"**

Intermediaries have a complex relationship with freedom of expression and "hate speech." Under the "safe harbour" regime created by the EU's E-commerce Directive, a neutral or passive stance would ordinarily entitle intermediaries serving as hosting providers to exemption for liability for the hosted content (European Parliament and the Council 2000). Service providers hosting third-party content may avail themselves of this exemption on the condition that they do not have "actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent" and that "upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information" (ibid., Article 14). The directive also stipulates that states shall not impose a general obligation on (hosting service) providers to "to monitor the information which they transmit or store, nor a general obligation actively to seek facts

or circumstances indicating illegal activity” (ibid., Article 15). Although the E-Commerce Directive is extraneous to the Council of Europe’s regulatory system, it is an essential reference point for the twenty-eight EU member states which are also members of the Council of Europe. EU Directives require EU member states to achieve certain results but give them some flexibility as to the measures used to achieve those results.

Yet, the binary distinction between active and passive intermediaries that held sway at the time of the adoption of the directive in 2000 no longer adequately reflects the varied relationships that many intermediaries have with third-party content today. Some activities carried out by Internet intermediaries go beyond passive hosting toward editorial, presentational, recommendation, and ranking functions.

The optic through which the Council of Europe examines the question of Internet intermediary liability is rather that of rights, duties, and responsibilities. Intermediaries contribute to public debate by facilitating (or impeding) access to the arenas—and thereby also the content of—public debate. Their ensuing duties and responsibilities are shaped by the nature of their gatekeeping functions and the techniques they employ to carry out those functions. The Committee of Ministers of the Council of Europe (2011a, para. 7) has called for a “new, broad notion of media” encompassing all relevant actors. It advocates “a graduated and differentiated response for actors [ . . . ], having regard to their specific functions in the media process and their potential impact and significance in ensuring or enhancing good governance in democratic society” (ibid.). Furthermore, evolving international norms and expectations of corporate social responsibility and human rights due diligence can provide useful guidance (Committee of Ministers of the Council of Europe 2016; see also Land, this volume). The size and dominance of the intermediary and whether there are viable alternative opportunities for individuals to exercise their right to freedom of expression in a practical and effective manner are all contextual variables that are taken into account in this calculus. The commercial or noncommercial character of the intermediary is another and somewhat controversial contextual variable (see the discussion of the *Delfi* case above). The nature of the expression at issue in a given case is also a central consideration.

When the expression at issue is “hate speech,” it is important to recall that the term does not appear in the ECHR and the court, having first used the term in 1999, does not have a hard-and-fast definition of the term (see,

generally, McGonagle 2013b). Its understanding of the term is subject to continuous development on a case-by-case basis in which the interplay between Articles 10 and 17, ECHR, is crucial. From the court's case law to date, it is possible to distill an approximation of a definition. Hate speech is any type of expression via any medium that intentionally targets someone on the basis of certain fundamental characteristics shared with other members of a specific group, which is hateful in essence and/or incites to hatred, discrimination, or violence or amounts to a grave assault on human dignity and therefore is devoid of redeeming social value and constitutes an abuse of the rights and freedoms safeguarded by international and European human rights law. However, as already noted, the *Delfi* judgment has added to the murkiness of this understanding by omitting a reference to the group dimension usually present in relevant cases.

The upshot of this is that in the absence of a legally binding definition of hate speech, as well as inconsistencies in the court's application of the term, the precise scope of the term remains uncertain and problematic from the perspective of legal certainty and foreseeability. If the Grand Chamber of the ECtHR is prone to depart—without explanation or motivation—from previously held understandings of what hate speech involves, intermediaries cannot be expected to be able to accurately identify types of expression which, from a legal perspective, amount to hate speech. The sophisticated legal knowledge and diagnostic skills required to determine what is hate speech and whether it should be removed are therefore far beyond the competences of what could reasonably be expected of ordinary content moderators employed by intermediaries. Moreover, as submitted by some of the intervening parties in *Delfi*, many intermediaries are small enterprises, compared to the leading global players, and would often lack the resources to proactively make the necessary legal assessment and then, if warranted, block or remove hate speech and other illegal content (ECtHR 2015a, para. 108).

Nevertheless, the problem remains that if hate speech is not removed expeditiously, the harm it causes to victims is aggravated by its perpetuation and/or further dissemination. If multiple postings, cross-posting, or extensive hyperlinking has taken place, the removal of particular material from a particular online source cannot guarantee the unavailability of the same material elsewhere, thus strengthening its “incessant and compounding” aspects (Delgado and Stefancic 2009, 367–368). This pleads strongly

for the need for Internet intermediaries to raise their game when it comes to countering hate speech, a call that is resonating in legal and political circles across Europe at the moment.

Conversely, if the urgency for action leads to intermediaries erring on the side of caution (including to avoid liability) and blocking or removing content that may be offensive while not being illegal, the consequences for freedom of expression can be severe. The practice of private actors making and acting on their own determinations about the (il)legality of content is sometimes described as *privatized law enforcement* or *privatized censorship*, terms which—out of concern for rule of law—question the legitimacy of private actors to determine whether particular content is illegal.

### **Tentative Conclusions about Tentative Posturing**

The analysis in this chapter offers some modest, initial guidance on the seemingly intractable problem of how to calibrate and operationalize the duties and responsibilities of Internet intermediaries regarding hate speech that is disseminated via their platforms or networks without jeopardizing users' right to freedom of expression. First, states may not delegate their obligation to counter hate speech in an effective manner by passing the buck to Internet intermediaries and requiring them to take sole responsibility for eradicating hate speech within their services/networks. States' positive obligation to uphold individuals' human rights may be triggered when the action or inaction of an intermediary amounts to a human rights violation (see, further, Callamard's chapter in this volume). If such a scenario could and should have been prevented by proactive measures by the state, then the state could well have failed to honor its relevant positive obligations.

Not all interferences with individual human rights involving Internet intermediaries will trigger states' positive obligations, however (ECtHR 2017a, paras. 82–84). If an interference does not attain a certain level of seriousness and the person(s) whose right to freedom of expression has been interfered with can still exercise their right effectively in alternative ways, such as in other forums or through other networks, a state will ordinarily not have a positive obligation to take a particular course of action. It is also important to recall that states' (positive) obligations are not solely grounded in the ECHR but (at least for EU member states) can also arise from the Charter of Fundamental Rights of the European Union (European

Union 2010; Angelopoulos et al. 2016; Kuczerawy 2017, 2018). Moreover, EU member states are also subject to the E-Commerce Directive—another detailed regulatory frame of reference. The intertwined character of relevant regulatory frameworks points to a second piece of guidance: regulators need to have very keen positional awareness, in order to be able to properly gauge the requirements, implications, and interaction of different regulatory instruments.

Third, even though states may not delegate their obligation to counter online hate speech to Internet intermediaries, the latter are coming under increasing political and public pressure to raise their own game in this regard. But this is by no means a straightforward task. “Hate speech” has not been pinned down by an authoritative, legally binding definition, and its precise scope remains somewhat unclear. This makes it very difficult for private actors such as Internet intermediaries to make accurate assessments of borderline cases; it often leaves them trying to hit a moving target. These definitional difficulties, coupled with a desire to avoid legal liability for illegal third-party content, will inevitably lead to instances of intermediaries blocking or removing contested content as a precautionary measure. Such scenarios violate—or at least jeopardize—the right to freedom of expression of their users. Conversely, though, persons targeted by illegal types of expression have the right to be protected against such expression. This is a very difficult circle to square. Emerging principles of corporate social responsibility and human rights due diligence, if developed and operationalized further, may be able to help Internet intermediaries to safeguard their users’ rights to freedom of expression, equality, and nondiscrimination and their right to an effective remedy.

The Committee of Ministers’ Recommendation CM/Rec(2018)2 on the roles and responsibilities of Internet intermediaries would have been an obvious place to provide further, detailed guidance on these issues. However, while it provides much valuable guidance on the roles and responsibilities of Internet intermediaries in various contexts, the recommendation does not contain any explicit references to “hate speech” and only a couple of passing references to “hatred” (Committee of Ministers of the Council of Europe 2018). It therefore remains to be seen how the Council of Europe will concretely engage with these issues in the future. Growing awareness and use of the Committee of Ministers’ standard-setting work and a number of pending cases before the ECtHR focusing on Internet intermediaries

and freedom of expression are sure to keep, and sharpen, the focus on these relevant issues.

This chapter has focused primarily on the approach of the Council of Europe, with intermittent references to the EU's approach. Although the approaches taken by the Council of Europe and the EU are broadly congruent and sometimes overlap and influence each other, they remain distinct legal and political systems, each with its own particular objectives and emphases. All of this can create consistency in European states' national law and policy, but it can also give rise to confusion and uncertainty in situations where the approaches (appear to) diverge. Recent standard-setting work at the Council of Europe has sought to clarify the human rights framework governing the roles and responsibilities of Internet intermediaries, paying particular attention to freedom of expression, privacy, and data protection and effective remedies. The EU's current approach, as typified by the 2016 Code of Conduct on Countering Illegal Hate Speech Online, adopted by leading tech companies and driven by the European Commission (for an overview and analysis, see Jørgensen's chapter in this volume), focuses on the responsibility of intermediaries to remove illegal hate speech very expeditiously. The code pays scant attention to the importance of, and the need for, freedom-of-expression safeguards. This is a significant difference between both approaches and one that will have to be addressed "expeditiously": #WatchThisSpace.

### Notes

1. This is an abridged, updated, and adapted version of the present author's contribution to Christina Angelopoulos, Annabel Brody, Wouter Hins, Bernt Hugenholtz, Patrick Leerssen, Thomas Margoni, Tarlach McGonagle, Ot van Daalen, and Joris van Hoboken, "Study of Fundamental Rights Limitations for Online Enforcement through Self-regulation," commissioned by the Open Society Foundations, Institute for Information Law (IViR), 2016.
2. For further discussion of the added value of standard-setting texts for the court's decision-making, especially on Internet-related issues, see Spano (2016).

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