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The protection of freedom of expression and information on the Internet and online media

Report¹

Committee on Culture, Science, Education and Media

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Summary

Article 10 of the European Convention on Human Rights binds public authorities not to restrict freedom of expression and information, but it also entails the obligation for member States to ensure that this fundamental freedom is not threatened by any non-governmental or private sector participants. Access to ICT-based media for each individual and the public at large is mainly determined by private intermediaries. Due to the complex corporate and technical structures of such intermediaries, their often unclear corporate localisation and their co-operation with corporate partners in other countries, users may have difficulties in ensuring court jurisdiction.

Therefore, member States should encourage intermediaries of ICT-based media to set up self-regulatory codes of conduct for the respect of their users' right to freedom of expression and information, and ensure the jurisdiction of domestic courts in case of violations, in accordance with Articles 10 and 13 of the European Convention on Human Rights.

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A. Draft resolution²

1. The Parliamentary Assembly recalls the universal human right to freedom of expression and information under Article 10 of the European Convention on Human Rights (ETS No. 5, hereafter "the Convention") and Article 19 of the United Nations International Covenant on Civil and Political Rights. This right is typically exercised through the media and, nowadays, in particular through media based on new information and communication technologies (hereafter "ICT") such as the Internet and online media including mobile communication devices.
2. Aligning itself with the United Nations Millennium Declaration of 8 September 2000, the Assembly welcomes the fast growing access to ICT-based media by the general public globally. Hence, it seems much more difficult for non-democratic regimes to deprive their population of information and an exchange of opinions necessary for any popular control of government. The Assembly strongly condemns the restrictions of access to the Internet and online media applied by the governments of China, Belarus and other countries.
3. The Assembly also welcomes the new possibilities for individuals to share publicly, through the Internet and online media, information which is of public concern, such as information about misgovernment, corruption and organised crime as well as human rights violations. In this respect, the Assembly appreciates the efforts of journalists and media to collect, analyse and disseminate in a professional manner the raw information provided by Internet sources.
4. Recalling its [Resolution 1729 \(2010\)](#) on the protection of "whistle-blowers", the Assembly reaffirms the right of everyone to disclose information of public concern which corresponds to the right of the public to be informed under Article 10 of the Convention. Member States must not curtail the right of the public to be informed by restricting the right of individuals to disclose information of public concern, for example by applying defamation and insult laws as well as national security and anti-terrorist laws in an overly broad and non-proportional manner
5. Referring to Articles 10, paragraph 2, and 17 of the Convention, the Assembly recalls, however, that no State, group or person may exercise freedom of expression and information for the destruction of any rights and freedoms set forth in the Convention, in particular the right to life, the right to a fair trial, the respect for private life and the protection of property. The Assembly puts strong emphasis on Article 20 of the United Nations International Covenant on Civil and Political Rights: any propaganda for war and any advocacy of national, racist or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
6. Recalling its [Recommendation 1543 \(2001\)](#) on racism and xenophobia in cyberspace, the Assembly regrets that some member States have not yet signed and ratified the Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189). This protocol may be applicable, for example, in cases of incitement through the Internet to violence and terrorism based on racist or religious extremism.
7. Article 10 of the Convention binds public authorities not to restrict freedom of expression and information, but it also entails the obligation for member States to ensure that this fundamental freedom is not threatened by any non-governmental or private sector participants. In this context, the Assembly refers also to Committee of Ministers Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet and the Declaration of the Committee of Ministers of 29 September 2010 on network neutrality.
8. The Assembly notes that access to ICT-based media for each individual and the public at large is mainly determined by private intermediaries. Many of them, such as Internet access or service providers and mobile phone or telecommunications companies, have a dominant position vis-à-vis individual users because they are system-relevant or exercise significant market power. In this context, the Assembly welcomes Resolution 17/4 on human rights and transnational corporations and other business enterprises adopted by the United Nations Human Rights Council on 16 June 2011.
9. The Assembly is concerned that the intermediaries of ICT-based media might unduly restrict the access to, and dissemination of, information for commercial and other reasons without informing their users and in breach of the latter's rights. Due to the complex corporate and technical structures of such intermediaries, their often unclear corporate localisation and their co-operation with corporate partners in other countries, users may have difficulties in ensuring court jurisdiction in such cases.

2. Draft resolution adopted unanimously by the committee on 6 December 2011.

10. In order to protect freedom of expression and information on the Internet and online media, the Assembly calls on the member States of the Council of Europe to:

10.1. ensure, in accordance with Article 10 of the Convention and the case law of the European Court of Human Rights, respect for freedom of expression and information on the Internet and online media by public as well as private entities, while respecting the protection of privacy and personal data;

10.2. encourage intermediaries of ICT-based media to set up self-regulatory codes of conduct for the respect of their users' right to freedom of expression and information, and to create or join commercial associations with such codes of conduct and the power to implement them against non-compliant members;

10.3. ensure that intermediaries of ICT-based media are transparent to the public and inform users of any measures which may impact their right to freedom of expression and information; such transparency may include the requirement to publicise corporate policies affecting the dissemination of, or access to, information and opinions;

10.4. implement the Committee of Ministers Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet; particular attention should be paid to the obligation not to refuse, provide in a discriminatory manner or terminate services to users without the right to do so;

10.5. hold intermediaries of ICT-based media responsible for unlawful content, if they are the author of such content or have the obligation under national law to remove unlawful third-party content; particular emphasis should be paid to child pornography and content which incites racist and xenophobic discrimination, hatred, violence or terrorism;

10.6. seek to ensure that intermediaries of ICT-based media can be held accountable for violations of their users' right to freedom of expression and information; this shall include ensuring the jurisdiction of domestic courts in case of violations, in accordance with Articles 10 and 13 of the Convention;

10.7. review, if need be, the mandate of their national regulatory authorities for audiovisual media and telecommunications in order to reinforce freedom of expression and information on the Internet and online media in accordance with this resolution.

B. Draft recommendation³

1. Referring to its Resolution (2011) ... on the protection of freedom of expression and information on the Internet and online media, the Parliamentary Assembly recalls the Action Plan of the Warsaw Summit of 2005 which instructed the Council of Europe to elaborate principles and guidelines to ensure respect for human rights and the rule of law in the information society and to address challenges created by the use of information and communication technologies with a view to protecting human rights against violations stemming from the abuse of such technologies.
2. The Assembly therefore recommends that the Committee of Ministers:
 - 2.1. take account of Resolution (2011) ... in its own work and forward it to the competent national ministries and regulatory authorities responsible for media based on information and communication technologies (ICTs);
 - 2.2. develop guidelines on domestic jurisdiction over, and the legal and corporate responsibility of, private companies which are intermediaries for ICT-based media, focusing such work in particular on the responsibility of intermediaries for the functioning of the Internet and online media and the respect for freedom of expression and information;
 - 2.3. co-operate with the European Commission and the European Union Body of European Regulators for Electronic Communications (BEREC) to ensure a common application of Article 10 of the European Convention on Human Rights (ETS No. 5) and Article 11 of the European Union Charter of Fundamental Rights with regard to freedom of expression and information on ICT-based media;
 - 2.4. promote the signature and ratification of the Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) by all member States as well as by non-member States and the European Union.

3. Draft recommendation adopted unanimously by the committee on 6 December 2011.

C. Explanatory memorandum by Ms Postanjyan, rapporteure

1. Introduction

"La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui." [Freedom consists of the power to do everything which does not harm others.] Paragraph 4 of the Declaration of the Rights of Man and of the Citizen, adopted by the French National Assembly on 26 August 1789

1. In December 2009, my former colleague, the late Andrew McIntosh tabled a motion for a resolution on the protection of freedom of expression and information in electronic media (Doc. 12094). The Committee on Culture, Science and Education appointed me rapporteur on this subject in October 2010.

2. The phrase "electronic media" was commonly introduced as a technical term for radio and television. It may also cover Internet and other online media. However, the most important challenges today are with the latter, but not so much with radio and television. The committee therefore followed my proposal and changed the title of my report from "The protection of freedom of expression and information in electronic media" to "The protection of freedom of expression and information on the Internet and online media".

3. In preparation of this report, the Sub-Committee on the Media organised an Open Forum on Internet openness and privacy at the United Nations Internet Governance Forum (IGF) in Vilnius (Lithuania) on 15 September 2010. A panel of that Open Forum looked specifically at Internet freedom - structural and operational openness online. The transcript of this event is available on the IGF website.⁴

2. The issues at stake

4. Thanks to the rapid development of information and communication technologies (ICTs), the Internet and online media such as mobile communications devices are rapidly expanding. A growing number of access and service providers are offering an ever wider range of services.

5. At the same time, the ICT world becomes more and more complex. The commercial exploitation of ICT-based media is leading to new and often not very transparent practices, which affect the dissemination of, and access to, information.

6. Internet search websites develop their own content preferences, and content that they have rejected might not be accessible to users. Search websites may give in to commercial or political pressure and censor specific websites by putting them last among the searched websites indicated or not including them in the search results at all. Due to the dominant position of search websites such as Google or Yahoo!, censorship by them would have a serious impact. Microsoft and other companies, for example, filed complaints with the European Commission in 2010 asking it to investigate alleged manipulations of Google's search tool to the detriment of commercial competitors. Google announced in early 2010 that it would no longer give in to political pressure from the Chinese authorities demanding censorship of the Chinese Google search site www.google.cn.

7. Social media and information websites may have a corporate policy which favours certain information and disadvantages other information, for instance for commercial or political reasons. Access and service providers may apply such restrictions for the same reasons. This is particularly likely if such websites are run by companies which are also engaged in other commercial activities. Together with national regulatory authorities, the European Union Commissioner in charge of telecommunications is currently investigating allegations that Internet and mobile access were blocked or throttled.⁵

8. Intermediaries of ICT-based media co-operate with other intermediaries which are established in different countries or offer services abroad or in unclear locations such as cloud computing.⁶ For domestic courts, it therefore becomes difficult to localise geographically and legally restrictions to freedom of expression and information which are imposed by those intermediaries.

4. www.intgovforum.org/cms/2010-igf-vilnius/transcripts/646-1.

5. See the press release by EU Commissioner Neelie Kroes of 19 April 2011: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/486&format=PDF&aged=1&language=EN&guiLanguage=en>.

6. See, for example, the report prepared by Cristos Velasco San Martin for the Council of Europe's Octopus Interface Conference in 2009: [www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/Reports-Presentations / 2079%20if09%20pres%20cristos%20cloud.pdf](http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/Reports-Presentations/2079%20if09%20pres%20cristos%20cloud.pdf).

9. At the same time, it becomes more difficult for national authorities to localise illegal content, for example the abuse of freedom of expression and information. The Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) are key instruments in fighting illegal acts and content on the Internet.

10. National parliaments have the democratic task of setting legal standards through legislation. It is therefore important to raise awareness among parliamentarians about the issues at stake when regulating freedom of expression and information through the Internet and ICT-based media, such as web-based audiovisual services and online telecommunication services.

11. The rapid progress of ICT and the exponential growth of ICT-based media services have challenged traditional media regulation and policies over the past decade. This challenge was not brought about by a change of opinion over the merits of existing standards, but rather by technological difficulties in applying such regulations to new media services. In addition, the increasing globalisation of new media services has caused legal insecurities regarding national jurisdiction and the application of national laws. Over the years, several general principles have been confirmed or have emerged.

3. Freedom of expression and information on ICT-based media

12. Freedom of expression and information is a fundamental human right for every individual and a necessary element for democracy. This right undoubtedly applies to the Internet and online media. It is thus necessary to recall existing standards in this field and clarify the rights and responsibilities of ICT intermediaries in ensuring that the freedom of others is not violated.

3.1. United Nations standards and work within the Organisation for Economic Co-operation and Development (OECD)

13. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) of the United Nations guarantees the right to freedom of opinion and expression. This human right is also recognised under Article 19 of the Universal Declaration of Human Rights of 1948. Article 19 is fully applicable to the Internet and other ICT-based media.

14. Limitations to this right can, in particular, be found in Article 20 of the ICCPR⁷ and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.⁸ The United Nations clarified already in 1997 that the latter Article 4 applies also to the Internet, and discussed possible measures against cyber racism.⁹ Both provisions require States to ensure that adequate laws exist and are applied.

15. At the level of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Federation of Library Associations and Institutions (IFLA) pursued work which led to the IFLA/UNESCO Internet Manifesto Guidelines of September 2006.¹⁰ These contain a series of principles for public access and Internet use, especially through public libraries.

16. On 19 August 2010, academics at the Oxford Internet Institute presented a report for UNESCO on "Freedom of Connection - Freedom of Expression: The Changing Legal and Regulatory Ecology Shaping the Internet".¹¹ From the many recommendations contained in this report, I should like to point out those to continue efforts to support the worldwide diffusion of the Internet, to strengthen and clarify international mechanisms for Internet governance, to monitor and document the diffusion of legal and regulatory initiatives, and to drive corporate social responsibility.

7. Article 20 of the ICCPR: (1) Any propaganda for war shall be prohibited by law. (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

8. Article 4: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race ... and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 on this Convention, inter alia : (a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof; ...

9. See the report of the UN expert seminar on the role of the Internet in the light of the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (Geneva, 10-14 November 1997):

www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5069557b561c0fd4c1256619003267d2?Opendocument.

10. <http://archive.ifla.org/faife/policy/iflastat/Internet-ManifestoGuidelines.pdf>.

11. <http://portal.unesco.org/ci/en/files/30748/12837652519UNESCO-19AUG10.pdf/UNESCO-19AUG10.pdf>.

17. The OECD is also working on the role of Internet intermediaries in advancing public policy objectives. An OECD workshop held in Paris on 16 June 2010 found that Internet intermediaries influence and determine access to and choice between online information, services and goods.¹² While limitations of liability for Internet intermediaries had enabled these entities and the wider Internet economy to flourish in the past, the workshop noted that there was increasing national and international pressure from governments, the commercial sector and consumer groups to hold Internet intermediaries responsible for illegal activities committed through their services, and that European courts had shown increased willingness to find that Internet intermediaries had a duty of care.

18. Although the focus of this OECD work is on criminal liability, some conclusions can also be drawn for the general responsibilities of Internet intermediaries regarding the proper functioning of the Internet and ICT-based media.

3.2. Article 10 of the European Convention on Human Rights

19. Article 10 of the European Convention on Human Rights (ETS No. 5, "the Convention") guarantees the right to freedom of expression and information, including through the Internet and online media. Article 10 obviously applies to ICT-based media services in the sense that individuals have the right to express themselves freely on ICT-based media and to receive information through such media. Article 10 is technology-neutral, that is to say it applies irrespective of the technology used for expressing opinions or receiving information.

20. While Article 10 of the Convention is considered primarily as a right of individuals against interference by State authorities, it might be timely to take into account that freedom of expression and information through ICT-based media is - *de facto* - equally likely to be restricted by private entities such as ICT intermediaries (software producers, network providers, access providers, service providers, content hosts, producers of content search devices, etc.). Article 10 of the Convention may require that member States take appropriate action to ensure that the effective protection of freedom of expression and information is not unlawfully infringed by private persons.

21. The European Court of Human Rights ("the Court") has established extensive case law under Article 10 of the Convention. The Court has recognised that States have a positive obligation to have an adequate legal framework for the effective protection of this freedom with regard to Internet journalists.¹³ Furthermore, the Court has found that the dissemination and collection of information through the Internet is protected by Article 10.¹⁴

22. The case law of the Court consistently holds that hate speech is not protected by Article 10 in accordance with Article 17 of the Convention.¹⁵ In addition, the Court has held that Internet users may claim damages before a domestic court if an Internet service provider acts under the control of public authorities and fails to control or protect effectively against unwanted email messages or "spam".¹⁶

23. The universal human right to freedom of expression and information should not be confused, however, with a general freedom - recognised under most domestic laws - to pursue commercial activities or other services through ICT-based media.

3.3. Other Council of Europe standards

24. The Committee of Ministers of the Council of Europe has developed several general recommendations defining the right to freedom of expression and information through ICT-based media in the light of Article 10 of the Convention.

25. Committee of Ministers Recommendation No. R (99) 14 on universal community service concerning new communication and information services¹⁷ stated for the first time that some universal service principles should also be applied to the Internet, including public support for access to Internet as well as for the provision of content and services.

12. See the summary of the workshop: www.oecd.org/dataoecd/8/59/45997042.pdf.

13. Editorial Board of Pravoye Delo and Shtekel v. Ukraine, judgment of 5 May 2011, Application No. 33014/05.

14. Times Newspaper Ltd v. United Kingdom, judgment of 10 March 2009, Applications Nos. 3002/03 and 23676/03, paragraphs 27, 40 and 41.

15. Gündüz v. Turkey, judgment of 12 April 2003, Application No. 35071/97, paragraph 41.

16. Muscio v. Italy, decision of 13 November 2007, Application No. 31358/03.

17. [www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(1999\)014&ExpMem_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(1999)014&ExpMem_en.asp).

26. Committee of Ministers Recommendation No. R (2001) 8 on self-regulation concerning cyber content¹⁸ provided a set of principles for the protection of users against illegal or harmful Internet content through self-regulation, in particular through content descriptors and selection tools as well as complaints systems.

27. Through their Declaration on freedom of communication on the Internet of 28 May 2003,¹⁹ the Committee of Ministers defined the following seven general principles (see also the Appendix):

- Content rules for the Internet
- Self-regulation or co-regulation
- Absence of prior State control
- Removal of barriers to the participation of individuals in the information society
- Freedom to provide services via the Internet
- Limited liability of service providers for Internet content
- Anonymity

28. In their Declaration on human rights and the rule of law in the Information Society of 13 May 2005,²⁰ the Committee of Ministers reiterated a number of human rights comprising the right to freedom of expression, information and communication, the right to respect for private life and correspondence, the right to education and the importance of encouraging access to the new information technologies and their use by all without discrimination. The Declaration also added the idea of a "multi-stakeholder governance approach for building the Information Society".

29. Committee of Ministers Recommendation CM/Rec(2007)11 on promoting freedom of expression and information in the new information and communications environment²¹ focused on empowering individual users, common standards and strategies for reliable information, flexible content creation and transparency in the processing of information, affordable access to ICT infrastructure, access to information as a public service, and co-operation between stakeholders.

30. Internet filters were addressed in Committee of Ministers Recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters.²² The guidelines appended to this recommendation contained principles for using and controlling Internet filters in order to fully exercise and enjoy the right to freedom of expression and information, appropriate filtering for children and young people, and the use and application of Internet filters by the public and private sectors.

31. On 29 September 2010, the Committee of Ministers adopted its Declaration on network neutrality.²³ It stated that "operators of electronic communication networks may have to manage Internet traffic. This management may relate to quality of service, the development of new services, network stability and resilience or combating cybercrime. In so far as it is necessary ..., traffic management should not be seen as a departure from the principle of network neutrality. However, exceptions to this principle should be considered with great circumspection and need to be justified by overriding public interests".

32. On 21 September 2011, the Committee of Ministers adopted two texts which also set out political guidelines relevant for freedom of expression and information on ICT-based media: its Recommendation CM/Rec(2011)8 on the protection and promotion of the universality, integrity and openness of the Internet²⁴ and its Declaration on Internet governance principles of 21 September 2011.²⁵

18. [www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec\(2001\)008&ExpMem_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Rec(2001)008&ExpMem_en.asp).

19. [www.coe.int/t/dghl/standardsetting/media/Doc/CM/Dec\(2003\)FreedomCommInt_en.asp](http://www.coe.int/t/dghl/standardsetting/media/Doc/CM/Dec(2003)FreedomCommInt_en.asp).

20. [https://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2005\)56](https://wcd.coe.int/ViewDoc.jsp?Ref=CM(2005)56).

21. [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec\(2007\)11](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec(2007)11).

22. [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec\(2008\)6](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Rec(2008)6).

23. <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1678287>.

24. <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1835707>.

25. <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1835773>.

3.4. The European Union Charter of Fundamental Rights and European Union legislation

33. Article 11 of the European Union Charter of Fundamental Rights guarantees the right to freedom of expression and information within the European Union.²⁶ As the Court of Justice of the European Union in Luxembourg has applied EU law in the light of the Convention in the past, it can be assumed that Article 11 will also be interpreted and applied in accordance with the case law of the European Court of Human Rights under Article 10 of the Convention.

34. Article 11 of the Charter of Fundamental Rights is binding on EU organs and requires that secondary EU law is in conformity with the right to freedom of expression and information. Such secondary EU law includes various EU Directives, in particular the so-called Telecoms Reform Package of 25 November 2009.²⁷

35. The EU Telecoms Reform Package revised several EU Directives and allows member States to set minimum quality levels for network transmission services, including the obligation of network neutrality, and to disconnect Internet users for illegally downloading copyright-protected content. The right of users to be notified of certain breaches of data protection was also established, as well as the right to have service disconnections reviewed by a judicial body. Finally, the EU Telecoms Reform Package also created the Body of European Regulators of Electronic Communications (BEREC), which comprises the 27 national regulatory authorities of the 27 EU member States and has its office in Riga, Latvia.

4. Conclusions

36. The Internet and online media have become a vital backbone for everyone in the modern information society. The public depends increasingly on ICT-based media for accessing and disseminating information and opinions. The right to freedom of expression and information is thus dependent on the proper functioning of this cyberspace. Where State authorities restrict, filter or block access to the Internet or mobile communication services, Article 10 of the Convention is clearly at stake. The European Court of Human Rights has already received applications in this respect.²⁸ The Organization for Security and Co-operation in Europe (OSCE)²⁹ and the United Nations³⁰ also focused on this issue recently.

37. However, there is a need to ensure the protection of users' freedom of expression and information on the Internet and online media against threats coming not only from public authorities, but also from private intermediaries. Indeed, with the privatisation of national telecom firms in Europe over the last two decades, the Internet and online media are mostly provided and managed by private companies. Private companies enjoy a wide margin of managing their services under the existing telecoms and Internet legislations. This was seen, for instance, in the context of the discussion about network neutrality, namely whether Internet service providers should be allowed to offer slower services to some users and provide preferential services to others.

38. Intermediaries of ICT-based media might restrict the access to, and dissemination of, information for commercial, political or other reasons without informing their users. Due to the complex corporate and technical structures of such intermediaries, their often unclear corporate localisation and their co-operation with corporate partners in other countries, users may have difficulties in ensuring court jurisdiction in such cases. Many of those intermediaries, such as Internet access or service providers and mobile phone or telecommunications companies, have a dominant position vis-à-vis individual users because they are system-relevant or exercise significant market power.

26. Article 11: (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (2) The freedom and pluralism of the media shall be respected.

27. EU Directive 2009/136/EC of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, and Regulation (EC) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. EU Directive 2009/140/EC of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services.

See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:FULL:EN:PDF>.

28. See, for example, *Jankovskis v. Lithuania* (Application No. 21575/08) and *Yildirim and Akdeniz v. Turkey* (Applications Nos. 3111/10 and 20877/10).

29. See report of the OSCE Representative on Freedom of the Media on Turkey and Internet Censorship, www.osce.org/fom/41091.

30. See report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

39. In this context, it is important to ensure that the right to freedom of expression and information under Article 10 of the Convention is restricted neither by States nor by private companies. As the Committee of Ministers reaffirmed in its Declaration on Internet governance principles of 21 September 2011: "All public and private actors should recognise and uphold human rights and fundamental freedoms in their operations and activities, as well as in the design of new technologies, services and applications."

Appendix – Extract from the Declaration on freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003

Principle 1: Content rules for the Internet

Member States should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery.

Principle 2: Self-regulation or co-regulation

Member States should encourage self-regulation or co-regulation regarding content disseminated on the Internet.

Principle 3: Absence of prior State control

Public authorities should not, through general blocking or filtering measures, deny access by the public to information and other communication on the Internet, regardless of frontiers. This does not prevent the installation of filters for the protection of minors, in particular in places accessible to them, such as schools or libraries.

Provided that the safeguards of Article 10, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms are respected, measures may be taken to enforce the removal of clearly identifiable Internet content or, alternatively, the blockage of access to it, if the competent national authorities have taken a provisional or final decision on its illegality.

Principle 4: Removal of barriers to the participation of individuals in the information society

Member States should foster and encourage access for all to Internet communication and information services on a non-discriminatory basis at an affordable price. Furthermore, the active participation of the public, for example by setting up and running individual websites, should not be subject to any licensing or other requirements having a similar effect.

Principle 5: Freedom to provide services via the Internet

The provision of services via the Internet should not be made subject to specific authorisation schemes on the sole grounds of the means of transmission used.

Member States should seek measures to promote a pluralistic offer of services via the Internet which caters to the different needs of users and social groups. Service providers should be allowed to operate in a regulatory framework which guarantees them non-discriminatory access to national and international telecommunication networks.

Principle 6: Limited liability of service providers for Internet content

Member States should not impose on service providers a general obligation to monitor content on the Internet which they give access to, transmit or store, nor that of actively seeking facts or circumstances indicating illegal activity.

Member States should ensure that service providers are not held liable for content on the Internet when their function is limited, as defined by national law, to transmitting information or providing access to the Internet.

In cases where the functions of service providers are wider and they store content emanating from other parties, member States may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information.

In all cases, the above-mentioned limitations of liability should not affect the possibility of issuing injunctions where service providers are required to terminate or prevent, to the extent possible, an infringement of the law.

Principle 7: Anonymity

In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member States should respect the will of users of the Internet not to disclose their identity. This does not prevent member States from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.