Comparative Report on Internet Censorship - Concluding Report

International Focus Programme on Law and Technology

Final Report of the International Legal Research Group on Internet Censorship (eds)

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The European Law Students' Association

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FOREWORD

By Patrick Penninckx, Head of Information Society Department, Council of Europe

This report discusses one of the most important questions in open societies today: how do we strike the right balance between freedoms and protections in the online environment?

Freedom of expression is a fundamental human right, essential to the functioning of democratic societies and the human rights system. It is listed amongst the basic rights in all international and regional human rights treaties. Article 10 of the European Convention on Human Rights protects the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities, regardless of frontiers.

However, freedom of expression is not an absolute right. Not all restrictions constitute censorship. Speech may be restricted if this is prescribed by law, necessary in a democratic society and proportionate to a legitimate aim. The latter may include national security, public health or the protection of the rights of others. The COVID-19 pandemic serves as a vivid example of a public health crisis demanding decisive government action, including as far as proportionate restrictions to the exercise of rights are concerned.

Yet, what is proportionate? Determining what speech may be restricted and what not is highly complex. It has been the subject of court deliberations and public debates over centuries. The online environment makes this already difficult task even more complicated: there are added uncertainties around territorial jurisdiction, such as in the case of search engines or global social networks that are registered abroad. Illegal content may either go ignored or go viral, making it difficult to assess its actual harm. Harmful speech may travel instantaneously, with content banned in one location finding free expression elsewhere, in a different country or a different virtual space. Accountability is often elusive as users, whether individuals or legal entities, may hide behind pseudonymous accounts.

Any regulatory or other measure to curb illegal speech online must take these aspects into account. In addition, it must consider the crucial role

that intermediaries, including internet access providers, social networks and search engines, play in facilitating communication. This is all the more so as few, large entities have come to dominate the market in a manner that allows them to shape the principle modes of public communication. The power of such intermediaries as protagonists of online expression makes it imperative to assess very carefully their role and impact on freedom of expression and other human rights, as well as their corresponding duties and responsibilities.

Faced with growing pressure from governments and the public, the major social media platforms are increasingly committing to policing the online environment and removing illegal content. This in turn raises serious concerns regarding their possible overreach and the absence of judicial supervision. Are we facilitating private censorship of legal speech?

The Council of Europe has been supporting its 47 member States in the difficult task of governing and regulating the online environment for decades. Its 'Comparative Study on Filtering, Blocking and Take-down of Illegal Content on the Internet', published in 2016, revealed a broad variety of approaches across Europe, as well as important challenges. Since then, the situation has further evolved; infrastructure, scale and nature of the internet as essential tool of everyday life today confront us with new tasks.

The present report, which examines the way that more than 20 European jurisdictions have been weighing freedom of expression online against other rights, constitutes a rich source of information also for the Council of Europe. As an organisation we remain committed to supporting our member States in finding effective solutions to today's evolving questions: how can we comprehensively and effectively combat hate speech and other forms of illegal content online? How do we ensure that legal speech is protected against automated forms of content moderation? How can law enforcement cooperate more efficiently across borders in order to promote a safer internet? How do we protect our privacy in a world where algorithmic systems and AI have a growing command over our digital identities?

The COVID-19 pandemic and the diverse responses taken by governments to contain and resolve the crisis only amplify the need for solutions to these important questions.

I therefore highly welcome this important contribution to a field that requires the continued curiosity, scrutiny and intelligence of legal researchers across Europe. And I am confident that this report will serve as a reference point for future initiatives in Europe and beyond, aimed at promoting an open internet without censorship.

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Introduction

About ELSA

ELSA is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students. ELSA has 44 member countries and 69,000 students represented at across 375 faculties. The association was founded in 1981 by 5 law students from Poland, Austria, West Germany and Hungary. Since then, ELSA has aimed to unite students from all around Europe, provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. Our focus is to encourage individuals to act for the good of society in order to realise our vision: "A just world in which there is respect for human dignity and cultural diversity". You can find more information on elsa.org.

International Legal Research Groups in ELSA

Through an International Legal Research Group (ILRG) a group of law students and young lawyers carry out research on a specified topic of law with the aim to make their conclusions publicly accessible. Legal research has always been one of the main aims of ELSA. When ELSA was created as a platform for European cooperation between law students in the 1980s, sharing experience and knowledge was the main purpose of our organisation. In the 1990s, our predecessors made huge strides and built a strong association with a special focus on international exchange. In the 2000s, young students from Western to Eastern Europe were facing immense changes in their legal systems. Our members were part of major legal developments such as the EU expansion and the implementation of EU Law.

Executive summary

This report summarizes the research undertaken by ELSA National Legal research groups from 23 countries to illustrate the state of European regulation of Internet Censorship.

Chapter 1. Freedom of expression protection across Europe lays out the scope of protection of freedom of expression in the 23 reporting Member States and compares the treatment of concepts as censorship, freedom of information, freedom of the media and freedom of thought. While all jurisdictions provide a general protection of the right, the degree of specificity and level of restriction is found to vary greatly.

Chapter 2. Regulating blocking and takedown of Internet content features an in-depth analysis of regulation in each reporting European country to conclude there is a clear regulatory heterogeneity. Only 3 of 23 countries (all of them EU Member States) have specific legislation on blocking, filtering, and takedown of illegal Internet content. Other states recur to a range of regulatory instruments including Civil Codes, Criminal Codes, Intellectual Property, Gambling, Defamation, Consumer Protection or Cyber Crime Acts. The type of content susceptible of being blocked differs greatly, with some countries prioritising collective rights (e.g. public health, national security) and others favouring private rights (e.g. intellectual property, reputation).

Chapter 3. Removing Internet content delves deeper into the grounds on which internet content may be blocked or taken down. All jurisdictions allow restrictions to protect the rights of the child and copyright. Member States of the European Union share enhanced data protection through the GDPR which allows blocking, deletion, destruction, or suspension of unlawful processing of personal data. Common grounds include terrorist content, defamation, or discrimination. Some reports indicate a lack of conformity of national laws to the ECHR and ECtHR case-law due to a lack of clarity of the relevant legal framework.

Chapter 4. Self-regulation on takedown procedures concludes private action remains underregulated. Only 10 out of 23 countries have specific legislation on self-regulation. The remaining countries resort to general legislation and tend to depend on non-governmental organisations to publish codes of conduct and good practices. Some countries as Spain promote a hybrid model, with public authorities promoting adherence to privately designed codes of conduct. Mechanisms of accountability and redressal differ greatly. Some (Ireland, Germany) provide a public online complaint mechanism, whereas others (France, Serbia) require private entities to put a redressal mechanism in place and allow resort to courts if the private system fails. Judicial review is not possible in countries that rely mainly on voluntary self-regulation (Ireland, Bulgaria) and is expressly excluded in cases of self-regulation (Serbia), raising concerns about private restrictions with a lack of public scrutiny.

Chapter 5. Right to be forgotten conceptualizes the Right to be Forgotten as established by the ECJ in Google Spain and Google Inc. v. Agencia Española de Protección de Datos, subsequent European legislation (mainly the GDPR), the Charter of Fundamental Rights of the European Union and the Treaty of Functioning of the European Union. It concludes the legislative initiative of the European Union has had a great impact on both EU and non-EU countries. As a result, regulation among Member States is unusually uniform and most of the non-EU countries analysed recognize a right to be forgotten or are passing regulation to do so. Nevertheless, some have adopted a restrictive approach, substituting the right to be forgotten with some extent of a right to restriction of processing.

Chapter 6. Liability of Internet intermediaries also revolves around an EU Directive, in this case Directive 2000/31/EC ('Directive on electronic commerce'). It has been less effective in achieving uniformity than the GDPR, mainly because of implementation problems (unclear concepts transposed disparately and divergent approaches to issues open to the discretion of Member States). In the face of uncertainty, most states have chosen to introduce specific laws aiming to strengthen the duties of the

service providers effectively imposing an obligation to police content, which might result in over-removal. Judicial authority remains a key actor, responsible of proportionally balancing rights and controlling orders to disable access to information.

Chapter 7. Future regulation delves into the topics explored in the above chapters to predict future regulatory trends. It signals the potential for evolution of blocking and take-down of online content in the field of Intellectual Property Rights, with a clear prominence of ISPs as regulatory agents. It further highlights the increased importance of self-regulation of ISPs and online platforms, and the consensus among reports that private actors should face increased accountability. Given the positive impact of EU regulation in both Member States and states holding candidacy to the EU in the past, countries lacking national regulation could benefit from a supranational solution.

Chapter 8. Balancing issues – online hate speech scrutinizes the limitations to freedom of expression linked to hate speech in the 23 countries surveyed by reviewing different definitions of 'hate speech' and their applicability to the online environment, and comparing regulatory solutions. It concludes there is a trend to heighten protection against online hate speech at the cost of limiting freedom of expression. It further signals an enhanced reliance in hybrid regulatory frameworks, with increased importance of self-regulation and alternative initiatives.

Chapter 9. Balancing issues – protecting rights online suggests substantive and non-substantive improvements to national legislations. The set of suggestions summarizes commonly perceived problems throughout the report, such as but not limited to:

- increased liability of intermediaries;
- enhanced clarity and legal certainty to avoid excessive blocking and incentivize individual exercise of rights;
- revision of sanctions that may collide with the UN and ECHR recommendations not to excessively limit freedom of expression;

- reinforcing equitable access to justice, due process including timely judicial decisions, and judicial independence;
- promoting citizens' agency by raising awareness of privacy, data protection rights, and the risks of cyberspace.

Finally, **Chapter 10. Level of protection** provides graphic information on how each ELSA National Legal research group perceives freedom of expression online in their country. The given grades range from 2/5 (Albania, Turkey), to 5/5 (Netherlands, Finland, Bulgaria and Romania).

Chapter 1

Freedom of expression protection in Europe

By Allegra Wirmer

Freedom of expression represents a cornerstone of democratic societies and is enshrined in laws spanning the European continent. The freedom to hold opinions, impart and receive information, the freedom of the press, radio, television and broadcasting are all connected within free expression.

Each of the 23 legal systems under consideration in this Report codifies the freedom of expression with varying degrees of specificity and complexity, adding different nuances, safeguards and limitations. While a general protection is guaranteed in each country under the law, codifications take different approaches, for example by prioritizing certain aspects of free expression or by imposing certain restrictions on the exercise of the right.

In this Chapter, the research undertaken by ELSA National Legal Research groups is compiled and analysed from a comparative perspective, focusing on the protection of freedom of expression. Firstly, the Chapter outlines the types of legal sources for the right, at domestic and international level. Secondly, the right to free expression is conceptualized. Thirdly, the main dimensions addressed in legislation across Europe are discussed, highlighting similarities and differences which characterize the legal systems of the continent. These include censorship, the freedom of information, freedom of the media, freedom of thought and the limitations to free expression. Fourthly, attention is drawn to the main modes of enforcement which are used by governments to uphold free expression at domestic level, namely courts and specialized oversight bodies.

1. Sources of law

The legal protection and regulation of the freedom of expression results from instruments codified by the national legislator as well as from international law. These frameworks provide fundamental guarantees to citizens and at the same time draw clear limitations to this right with the aim of safeguarding national and societal interests. This subsection outlines three types of sources, namely constitutional law, other domestic statutes and laws, and international legal sources.

1.1 Constitutional law

The central source for the freedom of expression in domestic law is its foundational legal text. This refers to national constitutions, with the exception of the United Kingdom which lacks a codified constitution but protects the freedom in its Human Rights Act 1998,[1] a "constitutional statute".[2] Furthermore, France and the Czech Republic have codified fundamental human rights in *ad hoc* legal instruments with constitutional value.[3]

The right to free expression is codified in different formulations. Notwithstanding different turns of phrase, all jurisdictions under consideration emphasise the protection to be afforded to this right in light of its importance in a democratic society. Several constitutions also explicitly cite the mediums through which protected expression may occur, namely written and oral, sound, and visual forms.[4]

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1 Human Rights Act 1998, art 11.

2 Thoburn v Sunderland City Council [2002] EWHC 195 (Admin), (Divisional Court) [62].

3 Declaration of the Rights of Man and of the Citizen 1789; Charter of Fundamental Rights and Freedoms 1991.

4 Constitution of the Republic of Bulgaria 1991, art 39(1); Charter of Fundamental Rights and Freedoms 1991, art 17(1); Declaration of the Rights of Man and of the Citizen 1789, art 11; Basic Law for the Federal Republic of Germany 1949, art 5(1); Constitution of Greece 1974, art 14(1); Constitution of the Italian Republic 1948, art 21; Constitution of Portugal 1976, art 37(1); Constitution of Romania 1991, art 30(1); Constitution of the Republic of Serbia 2006, art 46; Constitution of Spain 1978, s 20(1)(a); Constitution of the Republic of Turkey 1982, art 26.

Constitutional documents may also highlight specific dimensions of the freedom of expression. For example, the freedom of information as an exceptionally relevant aspect of free expression finds explicit reference at constitutional level in Albania, Armenia, Azerbaijan, Bulgaria, Czech Republic, Finland, Germany, Hungary, Lithuania, Malta, North Macedonia, Poland, Portugal, Romania, Serbia and Spain.[5] Furthermore, the freedom of thought and/or conscience, a prerequisite for free expression, is also explicitly guaranteed in foundational legal documents of 22 jurisdictions.[6]

Constitutional provisions may additionally point out other guidelines on freedom of expression. For example, many constitutional documents directly and generally prohibit censorship. This includes Albania, Azerbaijan, Bulgaria, Czech Republic, Germany, Italy, North Macedonia, Poland, Portugal, Romania, Serbia, Spain and Turkey.[7] The broad limitations of

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5 Constitution of Albania 1998, art 23(1); Constitution of Armenia 1995, art 27(2); Constitution of Azerbaijan 1995, art 50(1); Constitution of the Republic of Bulgaria 1991, art 39(1); Charter of Fundamental Rights and Freedoms 1991, art 17(1); Constitution of Finland 2000, s 12(1); Basic Law for the Federal Republic of Germany 1949, art 5(1); Constitution of Hungary 2011, art IX(2); Constitution of the Republic of Lithuania 1992, art 25; Constitution of Malta 1964, art 41(1); Constitution of the Republic of North Macedonia 1991, art 16; Constitution of the Republic of Poland 1991, art 54(1); Constitution of Portugal 1976, art 37(1); Constitution of Romania 1991, art 31(1); Constitution of the Republic of Serbia 2006, art 46(1); Constitution of Spain 1978, art 20(1)(d); Constitution of the Republic of Turkey 1982, art 26.

6 Constitution of Albania 1998, art. 24(1); Constitution of Armenia 1995, art 26(1); Constitution of Azerbaijan 1995, art 47(1)-48(1); Constitution of the Republic of Bulgaria 1991, art 37(1); Charter of Fundamental Rights and Freedoms 1991, art 15(1); Constitution of Finland 2000, s 11; Declaration of the Rights of Man and of the Citizen 1789, art 10; Basic Law for the Federal Republic of Germany 1949, art 4(1); Constitution of Greece 1974, art 13; Constitution of Hungary 2011, art VII(1); Constitution of Ireland 1937, art 44(2); Constitution of the Republic of Lithuania 1992, art 26; Constitution of Malta 1964, art 40(1)-41(1); Constitution for the Kingdom of the Netherlands 1983, art 6(1); Constitution of the Republic of North Macedonia 1991, art 16; Constitution of the Republic of Poland 1991, art 53(1); Constitution of Portugal 1976, art 41(1); Constitution of Romania 1991, art 29(1); Constitution of the Republic of Serbia 2006, art 43-46; Constitution of Spain 1978, art 16(1); Constitution of the Republic of Turkey 1982, art 25; Human Rights Act 1998, s 13.

7 Constitution of Albania 1998, art. 22(3); Constitution of Azerbaijan 1995, art 50(II); Constitution of the Republic of Bulgaria 1991, art 40(1); Charter of Fundamental Rights and Freedoms 1991, art 17(3); Basic Law for the Federal Republic of Germany

the right are also usually outlined. This can be in direct reference to the freedom of expression, as is the case in Azerbaijan, Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Serbia, Spain and Turkey.[8] Otherwise, it can be in general provisions referring to the rights guaranteed in the constitutional instrument as a whole, as in Albania, Armenia and Poland.[9]

1.2 Other domestic law

While foundational legal documents set out the core aspects of a legal system, the legislator must formulate legal acts which comply with that basic framework and build upon its provisions, thereby creating an enforceable set of rules. Where older instruments apply, lawmakers must tailor legislation to the modern, digital world.

National civil and criminal codes often contain provisions regulating freedom of expression. Civil codes usually contain rules on liability for abuse

1949, art 5(1); Constitution of Greece 1974, art 14(2); Constitution of the Italian Republic 1948, art 21; Constitution of the Republic of North Macedonia 1991, art 16; Constitution of the Republic of Poland 1991, art 54(2); Constitution of Portugal 1976, art 37(2); Constitution of Romania 1991, art 30(2); Constitution of the Republic of Serbia 2006, art 50; Constitution of Spain 1978, art 20(2); Constitution of the Republic of Turkey 1982, art 28.

8 Constitution of Azerbaijan 1995, art 47(III); Constitution of the Republic of Bulgaria 1991, art 39(2);
Charter of Fundamental Rights and Freedoms 1991, art 17(4); Constitution of Finland 2000, s 12(1); Declaration of the Rights of Man and of the Citizen 1789, art 11; Basic Law for the Federal Republic of Germany 1949, art 5(2); Constitution of Greece 1974, art 14(1); Constitution of Hungary 2011, art VI(1)-IX(4)-(5); Constitution of Ireland 1937, art 40(6)(1)(i); Constitution of the Italian Republic 1948, art 21; Constitution of the Republic of Lithuania 1992, art 25; Constitution of Malta 1964, art 40(1)-(2)(a); Constitution for the Kingdom of the Netherlands 1983, art 7(3); Constitution of Portugal 1976, art 37(3); Constitution of Romania 1991, art 30(6)-(7); Constitution of the Republic of Serbia 2006, art 46; Constitution of Spain 1978, art 20(4); Constitution of the Republic of Turkey 1982, art 26.

9 Constitution of Albania 1998, art. 17; Constitution of Armenia 1995, art 43; Constitution of the Republic of Poland 1991, art 31(3).

of the freedom, for example when individual expression damages the reputations of legal or natural persons or the dignity of individuals, as is the case in the Armenian and Lithuanian Civil Codes.[10] Criminal codes may sanction expression in certain circumstances, such as hate speech and defamation.

Further acts and laws outside civil and criminal codes may influence the exercise of the freedom of expression. Most countries have laws regulating press and media providers which specify the application of freedom of expression to these entities. An additional important category of legislation common in Europe regulates public fruition of governmental information. Legislation setting rules for citizen access to public information exists in Armenia, Germany, Ireland, Lithuania, the Netherlands, North Macedonia, Poland, Serbia, Spain and the United Kingdom.[11]

1.3 International law

The main international instruments securing the freedom of expression as a fundamental human rights are the International Covenant on Civil and Political Rights (ICCPR),[12] and the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly known as the European Convention on Human Rights).[13] The ICCPR affirms freedom of

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10 European Law Students' Association Armenia, *National Report on Internet Censorship*, 20; Civil Code of Lithuania 2000, art 1137.

11 European Law Students' Association Albania, *National Report on Internet Censorship*, 15; European Law Students' Association Germany, *National Report on Internet Censorship*, 8; European Law Students' Association Ireland, *National Report on Internet Censorship*, 10; European Law Students' Association Lithuania, *National Report on Internet Censorship*, 7; European Law Students' Association the Netherlands, *National Report on Internet Censorship*, 15; European Law Students' Association North Macedonia, *National Report on Internet Censorship*, 7; European Law Students' Association Poland, *National Report on Internet Censorship*, 8; European Law Students' Association Serbia, *National Report on Internet Censorship*, 5; European Law Students' Association Spain, *National Report on Internet Censorship*, 12; European Law Students' Association United Kingdom, *National Report on Internet Censorship*, 6.

12 International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976).

13 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953).

expression in art. 19 and is open for accession on a global level. The ECHR states the right to freedom of expression in art. 10 with a broad formulation, which nonetheless envisions its limitation in given circumstances. It is a regional instrument, supported by a strong enforcement mechanism by way of the European Court of Human Rights.

All countries considered in this Report are parties to the ICCPR and the ECHR. European practice is particularly shaped by the Strasbourg Court, which through its rulings has defined the scope and limits of this right in different instances, and the intricacies of balancing free expression with concurring rights.[14] The Court protects, within the scope of expression, written or spoken words, pictures, images and actions aimed at expressing ideas or information.[15] Landmark judgments have determined the extent of protection for controversial forms of expression, balancing with other human rights, and the limits of rightful interference by the state.[16] State parties implement the jurisprudence of the Court in their domestic protection of expression.

2. Conceptualization of the freedom of expression

Free expression is protected in democratic societies as a valuable aspect of citizenship and personhood, worthy of respect and protection from undue interference.[17] The right usually takes forms which can be characterised through positive and negative rights and obligations conferred on individuals and the state.

Firstly, the freedom to express one's opinions entails the right of the individual to withhold opinions or information. This 'negative' freedom of expression, or right to silence, is codified explicitly in the constitutions of

14 Dirk Voorhoof and Hannes Cannie, 'Freedom of Expression and Information in a Democratic Society' (2010) 72 International Communication Gazette 407, 408.

15 *Müller and Others v. Switzerland*, application no. 10737/84, ECHR 1988; *Chorherr v. Austria*, application no. 13308/87, ECHR 1993.

16 Monica Macovei, *Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights* (Human rights handbooks, No 2).

17 Eric Barendt, *Freedom of speech* (Oxford University Press, Oxford 2005) 7.

Azerbaijan and Bulgaria.[18] However, it logically underlies any formulation of the right, as can be seen in German and Polish legal doctrine, for example.[19] Secondly, freedom of expression implies a positive and negative dimension in relation to state action. On one hand, the state must create and protect an environment which fosters citizens' ability to exercise their rights. On the other hand, the state is under a negative obligation to refrain from taking actions which could impede enjoyment of free expression. This negative dimension relates directly to censorship.

Furthermore, the scope of application of the constitutional right to freedom of expression is usually extended to anyone within the government's sphere of influence. The German concept of *Jedermanngrundrecht* represents the nature of rights which are applicable to individuals as human beings, as opposed to civil rights enjoyed by individuals in virtue of their citizenship.[20] Freedom of expression, as a basic human right, is considered in Germany to be part of the former category. This applicability is held across Europe.

3. Main dimensions addressed in European legislation

This section illustrates the facets of free expression which are most commonly subject to legal codifications and relevant to the enjoyment of this right in Europe.

3.1 Censorship

Censorship is a topic of exceptional relevance in relation to freedom of expression. As such, it is cited in thirteen of the European foundational legal texts under review.[21] It has also warranted specific legislation across jurisdictions, regardless of its enshrinement in national constitutions.

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18 Constitution of Azerbaijan 1995, art 47(2); Bulgaria art 38.

19 Oliver Jouanjan, Freedom of Expression in the Federal Republic of Germany, (Indiana Law Journal: Vol. 84, 2009), 867, 873; European Law Students' Association Poland, *National Report on Internet Censorship*, 6.

20 European Law Students' Association Germany, *National Report on Internet Censorship*, 4.

21 ibid 12.

Across Europe, acts on media regulation and freedom of the press contain explicit prohibitions of censorship.[22] A problematic aspect of censorship in many countries is the lack of a clear legal definition. This may cause legal certainty to be in peril due to conflicting interpretations adopted by courts and authorities. Among the legal systems lacking a definition of censorship are Armenia, Ireland, Lithuania, North Macedonia and Turkey.[23] However, even where definitions of censorship have been adopted, they may result in shortcomings, as visible in the restrictive formulation adopted by the Spanish Constitutional Court.[24]

3.2 Freedom of information

The various dimensions of the freedom find different articulations across legal systems. Freedom of information is frequently cited alongside freedom of expression. Sixteen foundational legal documents, as mentioned before, include direct mentions of the freedom of information in their constitutions.[25]

With much of information nowadays circulating through digital channels, the mention of the internet and electronic mediums of communication

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22 European Law Students' Association Albania, *National Report on Internet Censorship*, 6; European Law Students' Association Armenia, *National Report on Internet Censorship*, 7; European Law Students' Association Lithuania, *National Report on Internet Censorship*, 8; European Law Students' Association the Netherlands, *National Report on Internet Censorship*, 15; European Law Students' Association North Macedonia, *National Report on Internet Censorship*, 8; European Law Students' Association Romania, *National Report on Internet Censorship*, 8; European Law Students' Association Serbia, *National Report on Internet Censorship*, 5.

23 European Law Students' Association Armenia, *National Report on Internet Censorship*, 6; European Law Students' Association Ireland, *National Report on Internet Censorship*, 9; European Law Students' Association Lithuania, *National Report on Internet Censorship*, 8; European Law Students' Association North Macedonia, *National Report on Internet Censorship*, 6; European Law Students' Association Turkey, *National Report on Internet Censorship*, 8.

24 Constitutional Court of Spain, *Ruling of 25th of October, 187/1999*; European Law Students' Association Spain, *National Report on Internet Censorship*, 9.

25 Ibid 9-10.

remains rare (although not completely absent)[26] in the written text of European constitutions. However, the framing of the freedom of expression is typically general enough to extend its application to new media such as the internet, and, even in absence of court judgments, countries regulate the topic to varying extents in other domestic legal texts, as mentioned earlier.

A significant aspect of freedom of information is the access to information held by national governments. It may be disclosed by default, as in Finland, or be available upon request, such as North Macedonia and Ireland.[27] Nonetheless, availability of this information may be subject to restrictions including privacy concerns and official secrecy. Both topics are frequently regulated in European legislation through specific legal instruments, with laws such as the Official Secrets Acts codified in Spain and the United Kingdom.[28]

3.3 Freedom of the media

Most constitutions explicitly enshrine free expression within media outlets as a foundational element of the state. Subsections about the press within provisions dedicated to the freedom of expression can be found for example in the Italian, German, Hungarian and Albanian constitutions,[29] while others even devote separate articles to the topic, such as the Turkish and Bulgarian constitutions.[30] The Dutch Constitution must be mentioned

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26 Constitution of Azerbaijan 1995, art 36(II); Constitution of Greece 1974, art 5A(2); Constitution of Portugal 1976, art 35.

27 European Law Students' Association Finland, *National Report on Internet Censorship*, 5; Law on free access to public information [North Macedonia] 2006; Freedom of Information Act [Ireland] 2014.

28 European Law Students' Association Spain, *National Report on Internet Censorship*, 12; European Law Students' Association United Kingdom, *National Report on Internet Censorship*, 8.

29 Constitution of the Italian Republic 1948, art 21; Basic Law for the Federal Republic of Germany 1949, art 5(1); Basic Law of Hungary 2012, art 9(2); Constitution of the Republic of Albania 1998, art 22(2).

30 Constitution of the Republic of Turkey 1982, art 28; Constitution of the Republic of Bulgaria, art 40.

here, as it places a major focus on the freedom of the press and of information, protecting freedom of the press more explicitly than freedom of expression.[31]

Censorship in media is widely prohibited by law. Furthermore, the lawmaker codifies rules applying to professionals working in media regarding what they can legally express in their publications. While free expression is reaffirmed by these laws, they also lay out its boundaries. The sensitivity of these issues requires lawmakers to construct frameworks which deal with such instances with care and thoroughness, as can be seen in France's assignment of press offences to specialised courts and Spain's regulation of contractual conscience clauses for journalists.[32]

3.4 Freedom of thought

While the freedom of thought can be considered as an obvious implication of free expression, many systems cite it deliberately to add an additional layer of protection and certainty for citizens. It is interesting to note that, among the constitutions which provide explicit protection of free thought as inherent to but separate from free expression, many were drafted after the downfall of an authoritarian regime. Political and historical legacies heavily influence the drafting of constitutions, thus the suppression of free expression in totalitarian states provides particular urgency to a solid entrenchment thereof in newly democratic nations. These dynamics are exemplified by the Greek constitution,[33] adopted after the fall of the far-right Regime of the Colonels, as well as the post-communist constitutions of Lithuania and Serbia.[34]

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31 Constitution for the Kingdom of the Netherlands 1983, art 7; European Law Students' Association the Netherlands, *National Report on Internet Censorship*, 8.

32 Law of the 29th July 1881 on freedom of the press [France]; Organic law 2/1997 [Spain].

33 Constitution of Greece 1974, art 14(1).

34 Constitution of the Republic of Lithuania 1992, art 25; Constitution of the Republic of Serbia 2006, art 46.

3.5 Limitations of the freedom

The previous discussion on the freedom of expression shows that this right is considered fundamental in the democratic order. However, the various ways the freedom is regulated indicates that states consider it necessary to impose limitations on its exercise to ensure social and legal equilibrium. The importance ascribed to free expression by authorities in law makes it reasonable that restrictions may only stem from equally important interests.

One of the most prominent limitations on free expression is the concept of hate speech. This concept aims to protect fundamental rights relating to non-discrimination. European countries that criminally sanction hate speech include Armenia, Finland, Malta, the Netherlands, Serbia, and the United Kingdom.[35] However, no commonly accepted definition of hate speech exists in Europe, and this causes legal uncertainty and a lack of consistent interpretation, endangering the protection afforded to victims.

Other legal limitations which are commonly cited in relation to freedom of expression include honour, dignity and morality. Some of these grounds have been subject to discussions in relation to their adaptability to modern times. These are heavily jurisdiction specific and depend largely on national culture and sentiments. For example, where disrespectful depictions through caricatures published in the press may represent an attack on a person's honour in many countries, French courts have explicitly spoken of comedians' right to disrespect and insolence showing a very different sensitivity in this regard.[36] Similar discrepancies in national susceptibility are visible on topics such as blasphemy, which again is not considered as

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35 Criminal Code of Armenia 2003, art 226(1); European Law Students' Association Finland, *National Report on Internet Censorship*, 7; European Law Students' Association Malta, *National Report on Internet Censorship*, 6; Criminal Code of the Netherlands 1881, arts 137(c)-(d); European Law Students' Association Serbia, *National Report on Internet Censorship*, 5; European Law Students' Association United Kingdom, *National Report on Internet Censorship*, 11.

36 *TGI Paris, 17th c., Jan. 9, 1992: Gaz. Pal.* 92-1, 182.

a valid ground of limiting free expression in France,[37] but is explicitly cited as a limit in the Irish Constitution.[38]

> Another common ground for restricting freedom of expression is a threat to state integrity, as is visible in the Irish and Romanian constitutions.[39]

Defamation, generally referring to the spread of false information to damage the reputation and character of a person, may also limit free expression.[40] Although international organisations have been pushing for decriminalisation of defamation, as has happened for example in Serbia,[41] it remains criminalised in much of Europe, for example in Finland, Portugal and Ireland.[42] It may also imply civil liability, as in Armenia and North Macedonia.[43]

The right to information is also limited by legal provisions concerning official secrets with regards to government information. While governments aim to ensure transparency by providing access to certain documents or administrative details, not all information can be made public due to conflicting interests.

Unfortunately, *de facto* freedom of expression does not always mirror *de jure* codifications. Thus, in some countries the factual realities of censorship,

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37 European Law Students' Association France, *National Report on Internet Censorship*, 7.

38 Constitution of Ireland 1937, art 40(6)(i).

39 Constitution of Ireland 1937, art 40(6)(i); Constitution of Romania 1991, art 30(7).

40 European Law Students' Association United Kingdom, *National Report on Internet Censorship*, 10.

41 European Law Students' Association Serbia, *National Report on Internet Censorship*, 6; Jelena Surculija Milojevic, 'Defamation as a "weapon" in Europe and Serbia: Legal and self-regulatory frameworks' (2018) Journal of International Media & Entertainment Law, 108.

42 European Law Students' Association Finland, *National Report on Internet Censorship*, 7; European Law Students' Association Portugal, *National Report on Internet Censorship*, 7; Defamation Act [Ireland] 2009.

43 European Law Students' Association Armenia, *National Report on Internet Censorship*, 20; European Law Students' Association North Macedonia, *National Report on Internet Censorship*, 7.

non-discrimination and freedom of the press may give rise to worrying patterns which could not be detected by the sole analysis of legal codifications.

4. Enforcement of the right

This section examines enforcement of legal codifications of freedom of expression. Firstly, enforcement in courts of law is addressed. Secondly, the practice of establishing designated and specialized bodies dealing with free expression is discussed.

4.1 Courts

Judicial bodies have a strong influence on the enforcement and configuration of free expression. Constitutional law is heavily influenced by the rulings of specialized constitutional courts and tribunals. The jurisprudence of these specialised courts has had a strong influence in the national formulation of freedom of expression and its limits, generally conveying the message that the right must be protected strenuously but not in absolute fashion; rather, competing rights must be balanced and weighed against it. For example, in Germany, freedom of expression has been largely limited to opinions, upholding that declarations of fact can be protected only where they promote the formation of opinion.[44] In the Czech Republic, the Constitutional Court receives direct complaints from citizens whose right to free expression has been restricted, which are widely respected by lower courts although not binding.[45] In Spain, the Constitutional Court stated that as long as a journalist demonstrates the truthfulness and public relevance of a piece of information, their freedom of information shall be protected and receive preferential protection in clashes with other rights, even when said information is subject to judicial secrecy.[46] These courts also often affirm the fundamental importance of

44 BVerfG - 1 BvR 1376/79.

45 European Law Students' Association Czech Republic, *National Report on Internet Censorship*, 5.

46 Constitutional Court of Spain, *Ruling of 15th of April, 54/2004*.

freedom of expression in a democratic form of government, as exemplified by an important Albanian ruling in 2004.[47]

Case law of lower courts is also influential in the regulation of freedom of expression. Major judicial decisions, especially by higher courts such as supreme or cassation courts, serve to shape the jurisprudence on human rights protection in a country and the freedom of expression is no exception in this regard. There have been many high profile cases across Europe which have refocused national attention on the importance and complexity of the topic of free speech, such as the high profile trial of far-right politician Geert Wilders in the Netherlands.[48]

4.2 Oversight by specialized bodies

To enhance the protection of freedom of expression in all its dimensions, some countries have instituted governmental entities which supervise the enforcement of relevant laws and ensure the protection of standards of free expression both by public and private actors. These are usually independent organs with mandates which address specific dimensions of the freedom of expression.

A common type of executive oversight body monitors compliance with rules on freedom of expression in the media. Examples thereof are the Bulgarian Council for Electronic Media, the Serbian Regulatory Authority for Electronic Media, the Romanian National Audiovisual Council and the Dutch Media Authority.[49]

Further examples of oversight bodies with special mandates exist across Europe. In Serbia, the Commissioner for information of public importance and personal data protection can oblige governmental bodies to

47 Constitutional Court of Albania, *Decision of 11th November of 2004, No. 16*.

48 European Law Students' Association Serbia, *National Report on Internet Censorship*, 12.

49 Radio and Television Act 1998, art 20(2) [Bulgaria]; European Law Students' Association Serbia, *National Report on Internet Censorship*, 6; European Law Students' Association Serbia, *National Report on Internet Censorship*, 7; European Law Students' Association Netherlands, *National Report on Internet Censorship*, 14.

fulfil the right to information of a person to whom it has been denied.[50] The Irish National Advisory Council for Online Safety produces reports for public fruition which address emerging issues on the internet, which include freedom of expression.[51] Some supervisory authorities can be found at the local level, such as London's Online Hate Crime Hub.[52]

Where governments have not established special bodies to promote free expression, non-governmental initiatives may advocate and promote awareness. An example is the Committee to Protect Freedom of Expression, a non-profit Armenian journalistic organization.[53]

50 European Law Students' Association Serbia, *National Report on Internet Censorship*, 5.

51 European Law Students' Association Ireland, *National Report on Internet Censorship*, 9.

52 European Law Students' Association United Kingdom, *National Report on Internet Censorship*, 11.

53 European Law Students' Association Armenia, *National Report on Internet Censorship*, 7.

Chapter 2

Regulating blocking and takedown of Internet censorship

By Maxim Cassiers

1. Introduction

This chapter is dedicated to examining the rules regulating the blocking and takedown of Internet content in the different jurisdictions examined for this report. Each of the 23 legal systems under consideration in this Concluding Report have either specific or fragmented legal rules in place concerning blocking and takedown of Internet content. In this regard, the following main considerations need to be taken into account in order to be able to dive into an in-depth analysis. Firstly, this chapter will explore the countries, such as the Netherlands or Albania, which do not have any specific legislation on the issue of blocking, filtering and takedown of illegal Internet content. Hence, such applicable legal rules are fragmented over various areas of law. Secondly, in 3 jurisdictions (for instance in Italy and Romania), the legislator has intervened in order to set up a legal framework specifically aimed at the regulation of the Internet and other digital media, including the blocking, filtering and removal of Internet content. Furthermore, throughout this chapter, will be discussed what the rationale is behind these different laws concerned. Lastly, there will be analysis of whether the country concerned has ever been party to cases related to blocking and takedown of Internet content. Therefore, the main goal in this chapter is to understand how the member states concerned regulate this sensitive issue.

Before discussing the regulation on the blocking and takedown of Internet content in the different legal systems, the difference between the taking down of and blocking access of content as censoring technique, needs to

be clarified. In the case of takedown, the Internet Service Provider (ISP) is aware of what content the issue concerns, whereas in the case of blocking, the focus is not on the content, but rather the future.[54] Site blocking can be described as 'a legal remedy by which technical methods are used to deny Internet users access to a specified online location.'[55] In addition, when content is taken down, it will be removed from the Internet, whereas when it is blocked, the illegal Internet content stays online, but Internet users are denied access.[56]

Notice and takedown (NTD) is 'a process in which companies or natural persons are ordered to make illegal Internet content unavailable for their Internet users.'[57] The NTD-procedure as a censoring technique is thus a process operated by intermediaries, such as ISPs and online hosts (any machine or application that has an IP address), in response to court orders or allegations that content is illegal.[58]

2. Findings of the ELSA National Groups: EU Countries

2.1. Countries with no specific legislation on the issue of blocking and takedown of Internet content

The various national reports state that there is a clear regulatory heterogeneity among the different jurisdictions. Only 6 (amongst others France, Italy and Romania) of the 23 countries analysed have specific legislation on the issue of blocking and takedown of Internet content. Multiple dif-

54 "Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content" (Swiss Institute of Comparative Law) < https://www.coe.int/en/web/freedom-expression/country-reports> accessed 25 July 2020.

55 ibid 16.

56 M. van der Linden-Smith and A.R. Lodder, *Jurisprudentie Internetrecht 2009-2015* (Deventer: Kluwer).

57 "Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content" (Swiss Institute of Comparative Law) < https://www.coe.int/en/web/freedom-expression/country-reports> accessed 25 July 2020.

58 European law Students' Association, The Netherlands, *National Report on Internet Censorship*.

ferent legal sources regulate the blocking and takedown of Internet content. These constitute, amongst others, the relevant Criminal Code, Copyright Acts or more specific pieces of legislation.

The Netherlands is an example of a country that does not provide for specific legislation regarding the blocking and takedown of Internet content. However, under Dutch law, a wide body of case law primarily based on Article 6:196c of the Dutch Civil Code exists.[59] Latter article lays out the liability exemption for information society service providers (ISPs) based on tort law.[60] Under Dutch law, measures for blocking and taking down of illegal Internet content are scattered over several different forms of regulation including the DCC (Article 6:162 based on tort law), Article 240b the Dutch Criminal Code (DCrC), the Dutch Copyright Act (26d) Article 126zi of the Dutch Code of Criminal Procedures (CCP).[61] These are general measures, which can be applied specifically for the blocking and taking down of Internet content. Moreover, as a result of an NTD-procedure, the administrator of a website may be ordered (by the court) to remove the illegal Internet content.[62] A similar jurisdiction without specific legislation governing the blocking and taking down of content on the Internet is Bulgaria. Next to the Criminal Code (Articles 159(2)), Copyright Act (172a-174); Gambling Act and Consumer Protection Act, there is a more specific act applicable, namely the Protection against Discrimination Act.[63] Article 4(1) of the Protection against Discrimination Act prohibits any (in)direct discrimination on the basis of, amongst others, gender, race, nationality and ethnicity.[64] In this line, the Lithuanian report points out that on the ground of Article 20-7 of the Law on Gambling,

59 Dutch Civil Code 1992, art 6:196c ; European law Students' Association, The Netherlands, *National Report on Internet Censorship*, 18-19.

60 ibid.

61 ibid.

62 NSE v. Stichting Brein NL:GH:AMS:2014:3435 [2014].

63 European law Students' Association, Bulgaria, *National Report on Internet Censorship*, 8.

64 Protection against Discrimination Act 2006, art 4.

the Game Control Authority may order for ISPs to remove access to information linked to illegal gambling.[65] Additionally, according to Article 49-1 of the Law on Consumer Protection, an order may be given to ISPs to block a website until infringements of consumer rights end.[66]

The Czech report confirms this trend of lack of specific legislation on the blocking and takedown of Internet content[67]. Firstly, if the case is related to a breach of privacy or personal right (defined in Article 82 of the Civil Code), Article 81 et seq. of the Civil Code is used.[68] Additionally, Articles 84 and 85 of the Civil Code regulate the unlawful use of one's image, and Article 86 specifically protects privacy.[69] Furthermore, not surprisingly, in the Czech legal order, Internet content can also be taken down on the basis of the Copyright Act, Criminal Code and Gambling Act.[70] It can thus be concluded that a country as Czech Republic primarily allows for the blocking and takedown of Internet content for the protection of public morals or health.[71] Opposed to countries such as for instance The Netherlands, Germany, Bulgaria and Czech Republic, which primarily allows for blocking and takedown in order to protect copyright, Finland favours the protection of national security and combating terrorism.[72] Subsequently, the Criminal Code regulates the blocking and takedown of terrorist Internet content.[73] Similarly, in Hungary, the Criminal Code includes provisions prescribing which websites can be blocked for hosting unlawful

65 Gambling Act of the Republic of Lithuania 2001 art 20-7 ; European law Students' Association, Lithuania, *National Report on Internet Censorship.*

66 Republic of Lithuania Law on Consumer Protection 1994 , art 49-1 ; European law Students' Association, Lithuania, *National Report on Internet Censorship.*

67 European law Students' Association, The Czech Republic, *National Report on Internet Censorship.*

68 Czech Civil Code, arts 81 and 82.

69 ibid arts 84, 85 and 86.

70 European law Students' Association, The Czech Republic, *National Report on Internet Censorship.*

71 "Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content" (Swiss Institute of Comparative Law) < https://www.coe.int/en/web/freedom-expression/country-reports> accessed 25 July 2020.

72 European law Students' Association, Finland, *National Report on Internet Censorship.*

73 Finnish Criminal Code 1889.

content.[74] In Germany, the legislator enacted some more specific laws.[75] Article 7 subsection 4 of the Telemedia Act sets the obligation on the provider to block content if it violates copyrights to prevent repeats of this violation.[76] Hence, this article regulates the blocking and taking down of Internet content, if a state authority or court orders it. Furthermore, according to Article 3 of the Network Enforcement Act, "the monitoring of unlawful contents is delegated to social media providers by setting the obligation to establish an own complaint mechanism for the users."[77] Maltese law, for example, does not provide for the blocking and takedown of Internet content.[78]However, the Data Protection Act (Chapter 440 of the Laws of Malta) enables the blocking or removal of infringing by the Data Protection Commissioner.[79]

In the South-European countries, as for instance in Spain, the recent Royal-Decree Law 14/2019 includes reasons through which the Government can temporarily withdraw physical and electronic access.[80] Moreover, this possibility is also foreseen in the Telecommunications Act of 2014.[81] Additionally it has to be mentioned that, in Portugal, there are no provisions providing for the takedown or blocking of Internet content.[82] Pursuant to Article 37(2) of the Portuguese Constitution, the takedown of blocking can only be justified where the content is illegal.[83]

74 European law Students' Association, Hungary, *National Report on Internet Censorship.*
75 European law Students' Association, Germany, *National Report on Internet Censorship*, 10.
76 Telemedia Act 2007, art 7.
77 Network Enforcement Act 2017, art 4.
78 European law Students' Association, Malta, *National Report on Internet Censorship.*
79 Data Protection Act 2018, art 34.
80 European law Students' Association, Spain, *National Report on Internet Censorship*, 14.
81 Telecommunications Act 2014 ; European law Students' Association, Spain, *National Report on Internet Censorship*, 14.
82 European law Students' Association, Portugal, *National Report on Internet Censorship.*
83 Constitution of the Portuguese Republic 1976, art 37.

The Irish report stated that currently the blocking and/or takedown of illegal online content is not legislated under Irish law, but rather by ISPs' self-regulation.[84]

2.2. Countries with specific legislation on the issue of blocking and takedown of Internet content

The French report stated that the 'procedure for notifying illegal content on the Internet' is a provision of the law on confidence in the digital economy known as the LCEN law.[85] The aim is to obtain the removal of any illegal content appearing on a website or the blocking of the website by the host, before any intervention by the judicial authority.[86] Furthermore, Article 4 of the Loppsi 2 Law (Law on Orientation and Programming for the Performance of Internal Security), provides for the framework for a blocking system for sites that disseminate child sexual abuse images.[87] Accordingly, in Finland (a country with no specific legislation regarding this issue), Article 3 of the Act on Preventive Measures for Spreading Child Pornography states that "intermediaries have a right to set specific measures to prevent the distribution of child abuse material."[88] Hence, these legal systems favour the protection of public morals or health in determining the grounds and conditions upon which action to block or takedown Internet content can be executed.[89]

Another example of a legal system with specific legislation is Italy. The Italian report stated that Article 15 of Decree 70/2003 provides, in the first paragraph, that "in the provision of an information society service, consisting in the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored

84 European law Students' Association, Ireland, *National Report on Internet Censorship*.
85 Law on confidence in the digital economy 2004.
86 European law Students' Association, France, *National Report on Internet Censorship*.
87 ibid 14.
88 The Act on preventive measures for spreading child pornography 2006, art 3.
89 "Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content" (Swiss Institute of Comparative Law) < https://www.coe.int/en/web/freedom-expression/country-reports> accessed 25 July 2020.

at the request of a recipient of the service, provided that the service provider has not actual knowledge that the activity or information is unlawful, as soon as it becomes aware notifies the competent authorities."[90] To all types of ISPs, the administrative and judicial authorities can ask to delete certain content.

Similarly, Romania has in place specific legislation targeting blocking and taking down of content on the Internet. One of the most important pieces of Romanian legislation on the topic of the protection of personal data is represented by the Law no. 190/2018 regarding the measures for the implementation of the GDPR.[91] It emphasises the Internet users' rights regarding the takedown of inadequate, incorrect or in any other way undesired Intent content centring around them.

3. Findings of the ELSA National Groups: non-EU Countries

Another jurisdiction without specific legislation governing the blocking and taking down of content on the Internet is Albania. National laws regulating the blocking and takedown are the Criminal Code, Civil Code of the Republic of Albania, and the Law "In Protection of personal data". The Criminal Code contains provisions, such as Articles 74a and 84a that penalise certain types of criminal offences performed through the Internet. However, the relevant provisions of Criminal Code do not provide for legal regulations regarding the blocking of illegal Internet content.[92]Furthermore, there are also some government policies in play such as the Cyber Defence Strategy 2015-2020, which addresses the plan of action for the protection from cyber attacks in the field of military defence,

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90 Legislative Decree 70/2003; European law Students' Association, Italy, *National Report on Internet Censorship*.

91 European law Students' Association, Romania, *National Report on Internet Censorship*, 10.

92 Albanian Criminal Code 1995, arts 74a and 84a ; Albanian Study on Blocking, Filtering and Take-Down of Illegal Internet Content" (Swiss Institute of Comparative Law) < https://wilmap.law.stanford.edu/entries/albania-study-blocking-filtering-and-take-down-illegal-internet-content> accessed 25 July 2020.

and the Crosscutting Strategy Albania's digital agenda 2015.[93] In the line of Albania, the conclusion of the Armenian report is also that this country has no specific legislation on the issue of blocking and takedown of Internet content.[94] Nevertheless, paragraph 3 of Article 4 of the Law on Mass Media is the only national law, which directly regulates the issue of censorship of media content.[95] Paragraph 3 of Article 3 of the Law on Mass Media refers to Internet content as well and consequently prohibits Internet censorship in Armenia. However, it does not explicitly address the issues of blocking and takedown of media content. Similarly, the North-Macedonian report noted that there is no specific legal framework in place regulating the blocking and takedown of Internet content.[96] However, an exception exists where, through the Law on Civil Liability for Insult and Defamation, Section 3 of Article 13, parties are entitled to seek an apology or public withdrawal regarding defamatory content.[97]In Serbia, there are only three important legislative acts that prescribe the taking down of Internet content, namely the Law of Electronic Commerce, Advertising Law and the Law on Personal Data Protection; while blocking of the content is not regulated by the State. According to Article 20 Paragraph 5, 6 and 7 of the Law of Electronic Commerce, the service provider has the obligation to take down the inadequate content at the request of the competent state authority or third party.[98] Similarly, in Turkey there are also more specific laws in place regulating the blocking and takedown of Internet content. Internet regulation is primarily authorised under the Electronic Communications Law (ECL) and the Law on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed through such Broad-

93 Albanian Study on Blocking, Filtering and Take-Down of Illegal Internet Content" (Swiss Institute of Comparative Law) < https://wilmap.law.stanford.edu/entries/albania-study-blocking-filtering-and-take-down-illegal-internet-content > accessed 25 July 2020.

94 European law Students' Association, Armenia, *National Report on Internet Censorship.*

95 ibid.

96 European law Students' Association, North-Macedonia, *National Report on Internet Censorship.*

97 ibid ; Law on Civil Liability for Insult and Defamation 2012, art 13.

98 Law on Electronic Commerce 2019, art 20.

casts (Internet Law) and carried out by the Information and Communication Technologies Authority (ICTA).[99] The Internet Law regulates the access restriction procedure for specific crimes, and the further details for combating such crimes, particularly in cases of emergency (Article 8 and Article 8/A) as well as the notice and take down procedures, the removal of content and blocking access to such content, where such content violates personal rights (Article 9 and 9/A). In 2015, the Internet Law was amended again, and Article 8(A) was introduced, which provided for another access-blocking procedure with the title 'Removal of content and/or blocking of access in circumstances where delay would entail risk'.[100] Hence, there are four different access-blocking procedures active according to the Internet Law, namely Article 8, Article 8A, Article 9 and Article 9A.[101] In the rulings *Ahmet Yildrim v.* Turkey and *Wikipedia Foundation, INC. v. Turkey*, the ECtHR has ruled that blanket website blocking violates the right to freedom of expression (Art. 10 ECHR)

In contrast, the United Kingdom leaves the issue of blocking and takedown of Internet content by the better efficiency of the voluntary regulation left up to the private sector.[102] In some areas, legislation has been introduced to complement the ISPs self-regulation. For example, Section 3 of the Terrorism Act 2006 permits the removal of content inciting terrorism from the public domain. However, in the UK, the ISPs cooperate with some private 'watchdogs', which also have mechanisms in place to block illegal Internet content.[103] The Internet Watch Foundation (IWF) aims to eliminate child sexual abuse imagery online by identifying, accessing and removing illegal imagery. Unlike the IWS, the Counter Terrorism Internet Unit (CTIRU), works with a specific focus on the UK based materials. Furthermore, under Section 3 of the Terrorism Act, the police are

99 European law Students' Association, Turkey, *National Report on Internet Censorship*, 11.
100 ibid 11-12.
101 ibid 14.
102 European law Students' Association, United Kingdom, *National Report on Internet Censorship*, 12.
103 ibid 13.

granted the power to exercise takedown notices.[104] There is no legislative provision under criminal law, which requires potentially criminally offensive material to be blocked. Injunctions require the ISP to block a third party's material from their domain and it is often used in the areas of copyright (Section 97A of the Copyright, Design and Patents Act), privacy law as well as defamation (Defamation Act).[105] It can be concluded that the United Kingdom, the laws on the blocking and takedown of Internet content are more focused on protection of national security and combatting terrorism, opposed to the other discussed jurisdictions. Another example of a country favouring the protection of public safety is Azerbaijan. Laws regulating this issue can be found in the Law on Mass Media, Law on Telecommunications, Law on Accession to the Charter and the Convention of the International Telecommunication Union, as well as the Law on Information, Informatisation, and parts of the Criminal and Civil Code.[106]

4. Conclusion

Only 3 of the 24 countries analysed have specific legislation on the blocking and takedown of illegal Internet content. Of the 16 EU countries included in this research, only France, Italy and Romania have specific legislation. The remaining Member States approach this issue in a scattered way. In these jurisdictions, legislation on the blocking and takedown of Internet content can be found in Civil Codes, Criminal Codes and Acts regarding Intellectual Property, Gambling, Defamation, Consumer Protection and Cyber Crime.

Moreover, it became clear that the rationale behind these different laws regarding the blocking and takedown varies between the investigated countries. Countries such as Czech Republic, Lithuania and Finland primarily allow for the blocking and takedown of Internet content for the

104 Terrorism Act 2006, s 3.

105 Copyright, Designs and Patents Act 1988, art 97A ; Defamation Act 2013.

106 European law Students' Association, Azerbaijan, *National Report on Internet Censorship*, 11.

protection of public morals or health. Others, for instance The Netherlands, Bulgaria and Germany favour the protection of intellectual property rights. Furthermore, Finland, France and the UK laws' primarily aim to protect the national security and terrorism. Lastly, defamation and other rights related to the protection of reputation are often treated as criminal or civil matters. This is the case, for instance, in North-Macedonia.

Chapter 3

Removing Internet content

By Conor Courtney

1. Introduction

Before discussing the categories of content which may generally be blocked, filtered, or taken down, it is illustrative to examine the legal systems operating within the reports. Distinctions between civil and criminal law treatment exists in every jurisdiction, and differences manifest themselves in how the laws prosecute and operate. The response of civil law to unlawful content is through civil liability, which generally includes the right to be compensated, in order to be put in the position where the injured party would have been if the damage had not occurred. On the other hand, criminal law often involves sanctions, which result in penalties of imprisonment or fines, varying according to the case in question.

On top of this, this content faces administrative regulation, tortious claims (in Ireland), and non-legal regulation in the forms of soft law or 'notice and takedown' processes.[107] The Irish approach relies on 'soft-law' mechanisms.[108] In this approach, the police issue a 'Memorandum of Understanding', which is voluntarily entered into with UPC (an ISP), to block restricted content.[109] Further, a number of ISPs in Ireland are members of

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107 Martin Sychold, *'Comparative Study on Blocking, Filtering and Take-Down of Illegal Internet Content'* (Swiss Institute of Comparative Law, Lausanne, 2016); European law Students' Association, Ireland, *National Report on Internet Censorship;* European law Students' Association, Poland, *National Report on Internet Censorship.*

108 European law Students' Association, Ireland, *National Report on Internet Censorship.*

109 'An Garda Síochána Sign MOU with UPC on the Restriction of Child Sexual Abuse Material Online' <https://www.garda.ie/en/About-Us/Our-Departments/Office-of-Corporate-Communications/Press-Releases/2014/November/An-Garda-Siochana-Sign-MOU-with-UPC-on-the-Restriction-of-Child-Sexual-Abuse-Material-

the Internet Service Providers Association of Ireland ("ISPAI"), a not-for-profit trade association, which operates to self-regulate illegal and harmful use of the internet in a manner which has been overseen by the Government since 1998.[110] Similarly, the United Kingdom relies on both a legal approach and a corresponding voluntary approach.[111] Here, many large websites and ISPs allow users to report defamation content, the removal of which can then be sought from the ISP in question.[112] Further, sites with content promoting pornography, self-harm, or violence, which is a non-exhaustive list, is generally filtered voluntarily by ISPs within the UK.[113] These sites are blocked from users on an opt-out service, where adults are entitled to seek to have this ban lifted from their use of the internet.[114]

Filtering of content has also been reported in the Hungarian report, although without the opt-in approach. The Hungarian report notes that media and broadcast content may be removed or taken down if it impacts the mental, spiritual, moral or physical development of minors, such as extreme violence or pornography.[115] This entitlement is derived under Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to

Online.html> accessed 20 July 2020; European law Students' Association, Ireland, *National Report on Internet Censorship*.

110 Internet Service Providers' Association of Ireland, 'The Voice of Online Industry in Ireland' <https://www.ispai.ie/> accessed 20 July 2020; European law Students' Association, Ireland, *National Report on Internet Censorship*.

111 European law Students' Association, United Kingdom, *National Report on Internet Censorship*.

112 ibid.

113 Jasper Jackson, 'ISPs that restrict porn or block ads could be breaking EU guidelines', (The Guardian, 31st August 2016). <https://www.theguardian.com/media/2016/aug/31/isps-porn-block-ads-eu-guidelines-sky-bt-talktalk-o2> Accessed 20 July 2020; European law Students' Association, United Kingdom, *National Report on Internet Censorship*.

114 Jasper Jackson, 'ISPs that restrict porn or block ads could be breaking EU guidelines', (The Guardian, 31st August 2016). <https://www.theguardian.com/media/2016/aug/31/isps-porn-block-ads-eu-guidelines-sky-bt-talktalk-o2> Accessed 20 July 2020.

115 European law Students' Association, Hungary, *National Report on Internet Censorship*.

Media Content.[116] Similar to a 'watershed' approach, this content may be made available to general audiences if it can be ensured that minors will not generally be able to access the content. These restrictions may involve the time of the broadcast, or may require age verification tools.[117] However, all of the reports made reference to more in depth processes, where internet content may be blocked, filtered, or taken down.

2. Grounds under which internet content may be blocked, filtered, taken down, or removed.

Legislative Grounds: The reports indicated that there are common grounds under which content may be removed. Two grounds which were present under all of the reports are Child Pornography and Copyright grounds. 12 of the 23 reports also identified defamation as a common ground under which content may be removed or blocked. Similarly, acts relating to terrorism or incitement to hatred or violence towards a particular group was identified as a common ground, and was directly reported on by 8 of the reports. Another common ground for the taking down of internet content was the ground of data protection.

In EU Member States, the rights to removal or correction of personal data is governed by the General Data Protection Regulations.[118] Furthermore, non-EU reports also have provisions for removing or altering content based on data grounds. In Albania, this is governed by Article 617 of the Albanian Civil Code, in Armenia by the Law of the Republic of Armenia on Protection of Personal Data, and in Azerbaijan by the law of the Parliament on "Mass media" of 7 December 1999, the chapter of Law of the Republic of Azerbaijan 'On Personal Data'.[119]

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116 Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content.

117 European law Students' Association, Hungary, *National Report on Internet Censorship.*

118 General Data Protection Regulations 2018.

119 European law Students' Association, Albania, *National Report on Internet Censorship;* European law Students' Association, Armenia, *National Report on Internet Censorship;* Article 14, Civil Code of the Republic of Armenia; European law Students' Association, Azerbaijan, *National Report on Internet Censorship.*

The reports also highlighted uncommon grounds, which were present in select countries' content removal legislation. These include:

State of Emergency: The Turkey report notes that Turkish Emergency Law Article 11 paragraph 1-f grants to the state of emergency's regional governor the authority to, "control, record or prohibit speech, text, picture, film, record, audio and videotapes and all kinds of broadcasts made by sound".[120] An important question which thus arises is whether it may be possible for, "the state emergency's regional governor to access-block the internet in the jurisdiction?".[121] Despite the fact that there is no direct reference to the "internet" within the Turkish Emergency Law, there is reference to, "all kinds of broadcasts made by sound".[122] This indicates that there is potential scope for this to operate in relation to the taking down or blocking internet content.

Gambling: The Hungary report noted that the Gaming Supervisory Authority has powers to order information published by way of an electronic communications network inaccessible temporarily, where it finds that the publication or disclosure of such would constitute an illegal gambling operator.[123] The temporary blocking of the information applies for a period up to 365 days. The internet service provider in each case is empowered to seek a remedy from the competent Hungarian court, in accordance with the Hungarian administration litigation rules.[124]

Psychoactive Substances: The Romanian report discusses Romania Law no. 194/2011, which seeks to combat operations with products likely to have psychoactive effects.[125] The Ministry for Communications and for the Informational Society is entitled to require internet service providers to block the access to such sites' content, provided that there is a risk of

120 European law Students' Association, Turkey, *National Report on Internet Censorship;* Turkish Emergency Law n. 2935 1983 [Olağanüstü Hal Kanunu] [Turkish].

121 European law Students' Association, Turkey, *National Report on Internet Censorship.*

122 ibid.

123 European law Students' Association, Hungary, *National Report on Internet Censorship.*

124 ibid.

125 European law Students' Association, Romania, *National Report on Internet Censorship.*

transactions involving psychoactive substances being made through electronic means.[126]

Criminal Investigation: On 1 February 2019, the Czech Republic introduced a provision regarding online content whereby the police of the Czech Republic has powers concerning the preservation of evidence.[127] If necessary for a criminal investigation, the police of the Czech Republic, under section 7b of the Czech Criminal Penal Code, are empowered to order that any person preserve online data from any change, and to deny access to the data for a period up to 90 days.[128] This restriction on access can be ordered without the consent of a prosecutor, if the matter is of great urgency. Although not strictly involving the removal of content, this approach is important with regards to how it will interact with blocking provisions.

3. Countries which reported no specific legislation for blocking or removing content

In contrast to the four specific forms of content blocking and removal listed above, it is useful to consider four countries whose reports indicated that they do not have any substantial legislative grounds under which legal or illegal content may be removed or blocked.

Maltese law, for example, does not provide for the blocking, filtering, or removal of internet content.[129] An exception to this position, discussed above, does exist under the Data Protection Act (Chapter 440 of the Laws of Malta), which enables the blocking or removal of infringing by the Data Protection Commissioner.[130]

126 ibid.

127 European law Students' Association, Czech Republic, *National Report on Internet Censorship*.

128 ibid.

129 European law Students' Association, Malta, *National Report on Internet Censorship*.

130 ibid.

Similarly, the report on North Macedonia noted that the country does not have any specific legal framework regarding blocking, filtering and takedown of legal or illegal internet content, so there are no grounds on which internet content can be blocked/filtered or taken down.[131] However, an exception exists where, through the Law on Civil Liability for Insult and Defamation, Section 3 in Article 13, parties are entitled to seek an apology or public withdrawal regarding defamatory content.[132]

Poland also does not have any such legislation. Under this system, however, Article 14 Section 1 of the Act on Electronically Supplied Services, provides that a 'notice and takedown' procedure may be used to deny access to certain online.[133] An internet service provider who has received an official notification about unlawful content may choose to block such content. When content is blocked in this way, the affected party can apply to the civil court to appeal.

Finally, the Portugal report also indicated that there are no provisions which enable the removal or blocking of legal content.[134] Under Article 37, number 2 of the Constitution of the Portuguese Republic, removal or blocking of content may only be justified where the content is illegal.[135]

4. Safeguards

Whether discussing common grounds, or more specific forms of content removal, it is crucial to examine whether there are any safeguards in place and the extent, if any, to which these safeguards ensure a balance between censorship and the freedom of expression.

The reports indicated that safeguards exist under common legal instruments, including Article 10, number 1, of the European Convention on

131 European law Students' Association, North Macedonia, *National Report on Internet Censorship.*
132 ibid.
133 European law Students' Association, Poland, *National Report on Internet Censorship.*
134 European law Students' Association, Portugal, *National Report on Internet Censorship.*
135 ibid.

Human Rights (ECHR), and article 11 of the Charter of Fundamental Rights of the European Union, the first of which directly applies to all 23 of the countries which have been reported on.[136]

The Portugal report, as an example, which referenced both of the above instruments, alongside their own regional protections under Article 37 of the Constitution of the Portuguese Republic, held that these legal frameworks regulate both freedom of expression and its censorship, but nevertheless, do not ensure the desired balance.[137] This is due in large part to the fact that the distinguishing line between the two remains unclear, due to limited legislation and case law to look to.

Similarly, the North Macedonian report notes that the country does not have safeguards to ensure a balance between censoring and freedom of expression.[138] However, it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and this has direct application on their legislation, and its provisions can be applied to case law.

Speaking of case law, multiple reports discuss the effect of case law on their safeguarding mechanisms. Two key safeguarding requirements have been borne from the case law of the European Court of Human Rights (ECtHR). The first, derived from the case of *Ahmet Yildirim v Turkey,* establishes the need for a clear legal basis while deciding any blocking measures, in order to prevent abuses.[139] The second, gleamed from the case of *Cengiz and Others v Turkey*, emphasised the necessary quality of the law, as the legal system must delimitate its framework in respect to the blocking measures.[140]

136 European Convention on Human Rights; Charter of Fundamental Rights of the European Union.

137 European law Students' Association, Portugal, *National Report on Internet Censorship.*

138 European law Students' Association, North Macedonia, *National Report on Internet Censorship.*

139 *Ahmet Yildirim v. Turkey* App no 3111/10 (ECtHR, 18 December 2012).

140 *Cengiz and Others v. Turkey* App no 48226/10 and 14027/11 (ECtHR, 01 December 2015).

Furthermore, case law has been instrumental in the development of the legal right to be forgotten, which can be seen as a safeguard between freedom of the press and freedom of expression, against personal rights to privacy. The Italian report discusses the removal of content published by an online newspaper in this context.[141] The article in question discussed the individual's arrest, but was not initially updated to include his subsequent acquittal. As reporting on an arrest is neither unlawful nor illegal, this right to be forgotten can clearly be invoked in situations where content may be factual, but is ultimately 'treated differently'. This stands as an example of the balancing exercise which exists in relation to freedom of expression. Here, the news site had the authority to publish the content, which was factual at the time, and had a right to store the content for documentation purposes.[142] However, the individual in question had an equally valid right to his current social and personal identity. Ultimately, balancing both of these rights deemed that updating the content of the article was appropriate. This safeguarding or balancing technique is nuanced, given that the individual at the centre of the case may have received a different judgement if they were a celebrity or public figure. Both the Hungarian and Italian reports discuss the balancing safeguard that is the distinction between members of the general public and those who have positions of authority.[143] This distinction has been rationalised as diminishing the rights of the public figure, so as to ensure freedom of expression relating to the free debate of public affairs. The Italian report identified that, under this position, where the reproduction of an image is justified by fame, public office, justice, science, education, cultural aims, exposure linked to public facts, events or ceremonies, and public interest, then personal privacy may not outweigh freedom of expression/the press.[144]

141 European law Students' Association, Italy, *National Report on Internet Censorship; Diritto* 24 Il Sole 24 ore <http://www.diritto24.ilsole24ore.com/civile/civile/primiPiani/2013/07/internet-e-diritto-alloblio-una-recente-sentenza-del-tribunale-di-milano.php> accessed 20 July 2020.

142 European law Students' Association, Italy, *National Report on Internet Censorship.*

143 Ibid*;* Italian Civil Code, the art. 10; European law Students' Association, Hungary, *National Report on Internet Censorship.*

144 European law Students' Association, Italy, *National Report on Internet Censorship.*

Legal instruments and case law have been discussed in the context of safeguarding rights. However, a major lacuna in safeguarding the freedom of expression can be seen in regions which rely on soft law approaches. Where soft law is relied upon for content blocking, such as the UK and Ireland, the lacking legal frameworks result in an equally absent system for safeguarding. An illustrative example of this comes from the Polish report's discussion on their 'notice and takedown' procedure.[145] Under this system, an internet service provider is not obliged to check the data they receive, store or transmit. However, once the ISP receives a reliable notification that certain data is illegal, they are obliged to block the data under the 'notice and takedown' procedure. The law, however, does not define what is meant by 'reliable'. Furthermore, the internet service provider cannot be held liable for the removal of content which they believed was reliably reported. In a case where content has been blocked or taken down from the internet, a person or an entity suffering from harm as a result of such action can bring a lawsuit through a civil court. Taking into consideration the complexity and protraction of court proceedings, it may be questionable whether the review constitutes an appropriate remedy, and overall effective protection of freedom of expression online.[146] This approach may, further, be contrary to the requirement of a legal basis for any blocking measure set out by the ECtHR Chamber judgment in the case of Ahmet Yildirim v Turkey.[147] Here, as noted above, the Court established that a content restriction is only compatible with the European Convention on Human Rights if a strict legal framework is in place regulating the scope of the ban, and ensuring appropriate forms of judicial review to prevent possible abuses. The Polish approach does guarantee judicial review, however, this is only a subsequent review, and if a measure in question is arbitrary, the judicial review of the blocked access may not be sufficient to prevent abuses.[148] This might be contrasted with the Polish law on blocking of terrorist content online, through a motion to the Court of

145 European law Students' Association, Poland, *National Report on Internet Censorship.*
146 ibid.
147 *Ahmet Yildirim v. Turkey* App no 3111/10 (ECtHR, 18 December 2012).
148 European law Students' Association, Poland, *National Report on Internet Censorship.*

the Head of the Internal Security Agency.[149] This system appears to be consistent with requirements under ECtHR, given that it provides a strict legal framework regulating the scope of a content ban, and the guarantee of a judicial review process. Here, the safeguards are bolstered by an underlying legal framework for terrorist content, which is not present for voluntary ISP blocking.

Finally, one report indicated an example of a blocking provision which is not amenable to safeguarding, as it represents a blanket ban on the content in question. Here, the Azerbaijan report discussed how, under their country's stance, all Armenian internet sites have been blocked.[150] Here, it is not the content, but the source of the content, that is blocked, undermining the potential for effective safeguarding, or appropriate systems of judicial review.

As a concluding remark on the grounds under which a country may be empowered to block or remove content, it is useful to recognise that these powers and rights act in real life situations, and are not merely hypothetical concepts. As such, they may be affected by political and social changes. These changes may develop slowly, or may adapt rapidly. A useful viewpoint into this was offered by the Armenian report, in their discussion of whether their response to Covid-19 may affect their stance regarding compliance with ECtHR rulings on blocking and takedown procedures.[151] Taking into consideration the situation, concerning the quick spread of the corona virus (Covid-19) and its possible consequences, the Republic of Armenia declared a state of emergency on 16 March 2020. As a result of that action, some limitations were placed on the population, including restrictions on the freedom of expression, to limit the spreading information that causes panic or creates real danger of panic among the population. Journalists and editors criticised this decision, stating that there was no

[149] Ibid*;* Article 32c of the Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency [ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu].

[150] European law Students' Association, Azerbaijan, *National Report on Internet Censorship.*

[151] European law Students' Association, Armenia, *National Report on Internet Censorship.*

precise definition of which messages may or may not cause panic. The limitation on the freedom of expression were in force until 13 April, 2020. The Law on Legal Regime of the State of Emergency complies with the requirements of ECtHR about the measures of restrictions on the freedom of expression, as the law sets strong guarantees against arbitrariness, such as the principle of proportionality and relevancy of measures, the requirement of rational link between the measure and the legitimate aim sought.[152] However, similar 'states of emergency' censorship methods may easily undermine freedom of expression and safeguards, if left unchecked.

[152] Decision of the Government of the Republic of Armenia on Declaring a State of Emergency in the Republic of Armenia, N 298-Ա; European law Students' Association, Armenia, *National Report on Internet Censorship*.

Chapter 4

Self-regulation on takedown procedures

By Eithne Kavanagh

The extent to which blocking and taking down internet content is self-regulated by the private sector across the various countries is truly mixed. There is a combination of self-regulation legislated for, no legislation or governance and a mixture of both. There is in general no strict consistency between the jurisdictions and the reasons behind the decisions vary also. This chapter will discuss the different approaches taken in each country to self-regulation in the private sector. It will detail the safeguards that have been put in place to ensure the protection of the freedom of expression online where self-regulation takes place. It will give examples of the different models that are applied in self-regulation and address the different grievance or redressal mechanisms that are available, while discussing if they are sufficient. In conclusion then the author will give an overall sense of how the differing countries feel towards self-regulation in their country.

The Council of Europe Commissioner for Human Rights voiced concerns that self-regulation blocking systems may breach the rule of law, where restrictions by private entities to online information is without any public scrutiny.[153] The case of Delfi v Estonia[154] voiced concerns that responding to offensive posts may not be enough the reason being a post may be deleted but not all copies are deleted following that and the numbers the posts is accessible to is vast. The case made the point that 'a single person is not able to control the huge volume of internet content in order to find

[153] Council of Europe, Consultative Committee of the Convention for the Protection of Individuals with Regards to Automatic Processing of Personal Data, *Information on the recent developments at national level in the data protection field,* T-PD (2014) 04 Mos.

[154] Delfi v Esthonia App no 64569/09 (ECHR, 16 June 2015).

out if an offensive comment has been made against him or her. This is a job that the owners of the website need to do'.[155] Of the 24 National Reports, only 11 say there is specific legislation aimed at self-regulation in the private sector. Those countries are Armenia,[156] Azerbaijan,[157] Finland,[158] France,[159] Germany,[160] Italy,[161] Netherlands,[162] Poland,[163] Romania,[164] Serbia[165] and Turkey[166]. The remaining countries apply general legislation to scenarios when they present themselves, with the day-to-day self-regulation left solely on the shoulders of the private entity. Countries such as Ireland, Greece and the Czech Republic have proposed legislation working through their legislative systems but are not yet in force. The proposals in all 3 countries come as a direct response from the EU Directive (EU) 2019/790 on copyright in the Digital Single Market. The directive has received some backlash in the Czech Republic even with some political parties asking the Czech Prime Minister to refer the matter to the Court of Justice of the European Union, over concerns the directive gives too much power to large companies to self-regulate and therefore risking inappropriate internet censorship[167]. The Greek National Report lists a number of proposals such as 'a) the use of filters which immediately take down internet content that contains offensive words, b) marking of websites with content that violates the law and binding this marking with the search engines, c) supervision of the posts that are being made on the internet

155 Greece National Report, pp 29.
156 The Law on Mass Media of the Republic of Armenia, Article 4 (3).
157 The Law of the Republic of Azerbaijan On Access to Information, <http://www.eqanun.az/alpidata/framework/data/11/c_f_11142.htm> accessed 28 July 2020.
158 Criminal Code of Finland, s 25(7), s 24(9) and s 11(10).
159 Article L.111-7 of the French Consumer Code.
160 Network Enforcement Act 2017.
161 Self-Regulation Code for the Internet Services.
162 Notice-and-Take-Down Code of Conduct (NL).
163 Act of 18 July 2002 on Rendering Electronic Services.
164 New Civil Code.
165 Law on Electronic Commerce (Official Gazette of Republic of Serbia no. 41/2009, 95/2013, 52/2019).
166 No. 5651 Regulations of Internet Contents and Fighting Against Crimes Committed via Internet Contents.
167 Czech National Report, pp 18.

and taking down the offensive internet content immediately or after notice, and d) adoption of internet code of conduct and adoption of mechanisms of alternative dispute

Resolutions'.[168] In Ireland, the Online Safety and Media Regulation Bill is making its way through the legislative process. One feature is that it will create an Online Safety Commissioner to ensure consistent application of the new guidelines in a bid to give more weight to the code of practice.[169]

There are varying attitudes seen through the countries also with some believing it is the government's responsibility to govern the area, such as in the Spanish National Report[170] where it is suggested they must act positively to protect the fundamental freedoms, while also stating the State should have a constrained promotional role. Others such as the MTE in Hungry believe the any regulation of the internet should be done with smallest state intervention possible. The Czech Republic Report also notes the history with the country has with extreme censorship and restrictions on their rights.[171] They also note that they cannot forget their former communist past and be wary of influences from Russia and new emerging issues announced by counter-intelligence BIS of the growing impact of China and the influence of fake news.[172] While some believe increased monitorisation of online content is to be welcomed some say it 'is a dishonourable overstep'.[173] Countries that do not have specific legislation such as the self-regulation Code for the Internet Services[174] in Italy, often depend on non-government organisations to create codes of ethics and practices. They also rely on private companies and NGO's to moderate and filter content prior to publishing and monitor content after it is pub-

168 Greece National Report, pp 28-29.
169 Ireland National Report, pp 24-25.
170 Spanish National Report, pp 2732.
171 Czech Republic National Report, pp 14-15.
172 Czech Republic National Report, pp16.
173 UK National Report pp 34.
174 Codice di Autoregolamentazione per I Servizi Interbet, Art 2.

lished. An example of this is the IAB Poland Internet Employers Association,[175] who are the fourth largest Polish internet portal and advertising agency, who have published a Code of Practice of Internet Projects[176] and Code of Good Practice on detailed rules for the protection of minors in on-demand audio-visual media services.[177] The safeguards that have been put in place to ensure protection of the freedom of expression where self-regulation is applied are on a broad spectrum. One such safeguard is in Spain where the Code of Conduct is required to be published and accessible online, and public authorities promote the conduct and encourage adherence. In Armenia, the legislation expressly prohibits censorship and prescribes the mechanism for the takedown of illegal content, this regulation is aimed at the self-regulation by mass media[178]. In the Republic of Serbia, the 'Declaration on respect of internet freedom in political communication' document seeks to safeguard freedom of expression. It states that it is illegal to forcefully remove and block access to internet content and gives guidelines on how to regulate content and it encourages the public to report violations, with these violations being forwarded to the appropriate government bodies for investigation. All countries show concern over getting the balance right between upholding freedom of expression while also protecting other rights.

There is no consistency in models that are applied throughout the different countries. Only 6[179] countries have expressed models that they apply which include the right to repost after notice and take down for example, but all countries have different approach's within their models. The Albanian National Report notes the complexities that can arise for example, where a court has ordered an infringing article to be taken down and the online portal does so but they do not the power or ability to remove the

175 Interactive Advertising Bureau <https://www.iab.com> accessed 1 July 2020.

176 Interactive Advertising Bureau, 'Standards, Guidelines & Best Practices', <https://www.iab.com/guidelines/> accessed 1 July 2020.

177 ibid.

178 The Law on Mass Media of the Republic of Armenia, Article 4 (3).

179 Armenia, Azerbaijan, Finland, France, Germany, Netherlands.

article from other websites which copied the piece.[180] The Netherlands have detailed legislation in the Notice-and-Take-Down Code of Conduct (NL), one aspect its specifies that if the content provider is unwilling to make themselves known to the notifier, the intermediary can decide to provide the notifier with the content providers name and details or remove the content themselves. However, it does not provide for redressal if it is a case that it was wrongfully taken down.[181] While the majority of National Reports state there is no definitive model that is applied some rely on codes of practices and models created by NGO's, normally some form of journalist or media ethics commission.

Some criticism has been made in the French National Report as to the lack of procedure available to users if their content was taken down incorrectly by private entities.[182] The Serbian 'Guidelines for implementation on Journalists Code of Ethics on the online environment'[183] have developed a system whereby notice is given to the content provider of why material was not approved in a pre-moderation or why it was removed after publication.

An interesting position that came to light is the stark difference countries take with regard to the onus of liability on the publisher, with some not allowing any liability to be borne by them, [184]with others applying all liability on the publisher. The United Kingdom's Report discusses the concept of publisher's liability, whereby they say it has sparked much polarised debate over freedom of speech, especially in consideration on content that is not per se illegal. They mention how this may have a worrying chilling effect on the freedom of expression as intermediaries might censor perfectly legitimate speech.[185] Another common concern that was found was

180 Albania National Report, pp 31.
181 Netherlands National Report, pp 43.
182 French National Report, pp 20.
183 Press Council, 'Serbian Journalists' Code of Ethics <http://www.savetzastampu.rs/english/serbian-journalists-code-of-ethics> accessed 1 July 2020.
184 Rendering Electronic Services, Art 14, 2002.
185 United Kingdom National Report, pp 34.

the need for clearer definitions of certain terms, for example unlawful content. In Poland for example there is no definition of unlawful content, they do however state that it should be viewed in a broad way indicating the data is unlawful when viewed as contrary to law or principles of social coexistence.[186]

The grievance redressal mechanisms are also varied across the countries assessed. Some have none outside of the formal legal system, others have thorough systems established by the private entity with others using a hybrid system. The French Court of Justice for example ruled Twitter France had the responsibility of the finding authors of anti-Semitic messages 'within the framework of its French site'.[187] Within France also if the private entities' redressal systems fails to satisfy the complainant, they have the possibility of turning to the courts for assistance. It does not appear to be a prerequisite to seek redress through the private internal systems, however it is noted that there is a lack of transparency at this stage, but a new project is underway to improve this. [188] As of July 2020, a new initiative in France is attempting to reinforce these mechanisms by creating a duty of care owed by private companies towards users that have been victims of illicit content, while also encouraging transparency throughout the public and private systems.[189] The Network Enforcement Action Germany provides a complaints mechanism for unlawful content.[190] In Ireland, there is a national reporting system through a website www.hotline.ie which streams the content directly to police. In Italy, any complaints received by the Italian Internet Provider Association (AIIP) must be forwarded to the judicial authority when it becomes aware of the existence of illicit nature.[191] The providers also have 'to inform the users about their right to suspend and block the dissemination of illegal content' in the application of the

186 Poland National Report, pp 27.
187 TGI de Paris, 24 Janvier 2013, Twitter c/ UEJF.
188 France National Report, pp21.
189 France National Report, pp20.
190 Network Enforcement Act, 2017.
191 Italy National Report, pp 18.

notices of the judicial authority.[192] In Poland, the Civil Code also allows for compensation for damages resulting from non-performance or improper performance of their obligations.[193] However, Serbia states they have no grievance redressal mechanisms when self-regulation has been applied in the area of web hosting. The majority of national reports state that full reliance on private entities to decide on infringements is not desirable as there may lead to arbitrary decision making and breeches of freedom of expression.[194]

In conclusion, there appears to be a general consensus that there is a risk to freedom of expression on the internet, but countries are struggling to get the balance right. The Spanish National Report discusses the balancing of the right to the protection of personal data, with the deprivation of fundamental rights as one that is so important it can limit a person's development and may ultimately damage the democratic principles.[195] They go on to discuss that they believe the self-regulated notice and take down procedures that are in place may not offer sufficient protection, in particular from a due process perspective. of This is an evolving space while some countries are relying on older legislation and code of conduct, others are producing more dynamic and focused laws that both protect freedom of expression while also monitoring illicit activity. An emerging issue pushing the area forward is the need to capture illegal behaviour especially aiming at child abuse images.

192 Italy National Report, pp18.
193 Civil Code, Art 472, 1964.
194 Christopher T. Marsden, *Internet Co-Regulation,* Cambridge University Press, (2011), 123.
195 Spain National Report, pp 30.

Chapter 5

The right to be forgotten

By Flavia Giglio

1. Introduction

The right to be forgotten originates from the 2014 momentous judgement *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD)*[196] of the Court of Justice of the European Union (CGEU).[197] The momentous decision paved the way for the legislative recognition of the right to be forgotten in the European Union legal framework, with the adoption of the General Data Protection Regulation (GDPR)[198].

In the present chapter, the state of the right to be forgotten across European countries is presented by highlighting differences and similarities amongst the national legal frameworks. After a brief analysis of the right as enshrined in the GDPR, an overview of the state of the law is provided, respectively, with regard to EU Member States and non-EU countries.

2. The GDPR

Applicable as of 25 May 2018, the GDPR harmonised the data protection laws across Europe, considerably influencing not only the EU Member States but also other European countries. The right to be forgotten, or right to erasure, is enshrined in Article 17 of the GDPR. It is defined as

196 Case C-131/12, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD)* [2014] ECLI:EU:C:2014:317 (*Google Spain*).

197 European Law Students' Association Spain, *National Report on Internet Censorship*.

198 Regulation (EU) 2016/679 of the Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR).

"the right to obtain from the controller the erasure of personal data concerning him or her without undue delay", where specific grounds apply. The first two grounds justifying the right to erasure are the exhaustion of necessity of such personal data to the purposes of the processing and the withdrawal of the consent on which a processing is based, with no other legal ground persists. The right to obtain the erasure also comes in place when the personal data have been unlawfully processed, when the erasure is imposed by a legal obligation of the controller under Union or Member State law and when the personal data are collected in relation to the offer of information society services directed to a child.[199] The erasure of personal data may also be based on the right to object. Under certain circumstances, the data subject may object to the processing of personal data on grounds relating to his or her particular situation, even in the case where the processing is based on a public interest.[200]

The direct applicability of the GDPR in the domestic legislations of the EU Member States pursuant to the EU Treaties led to a strong harmonisation in the area of data protection.[201] However, numerous EU Member States adopted implementing acts in order to specify and adapt the contents of the GDPR to the domestic context, retaining a certain level of discretion. The discrepancies of approach among the EU Member States is illustrative of a varied landscape of aptitudes and perceptions of the right to be forgotten.

3. The right to be forgotten in the EU Member States

3.1. The right to erasure and the right to *"dereferencing"*

The GDPR defines the "processing of personal data" as "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alternation, re-

199 GDPR, art. 17.
200 GDPR, art. 21.
201 TFEU, art. 288.

trieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction". Such an all-encompassing definition refers to a large spectrum of activities which could be bound by the obligations set up for the natural of legal persons acting in the capacity of "controllers" and determining the purposes and means of the processing of personal data.[202] As a result, the obligation to erase personal data may extent not only to providers recording or publishing data, but also to providers of search engines services. The distinction between the right to erasure, intended as the right to obtain the removal of personal data from the source of publication, and a so-called "right to dereferencing", namely the right to obtain the deletion or deindexing of links associated with keywords allowing the identification of the data subjects, may be useful to frame the branches of the right to be forgotten in its case-by-case peculiarities.

The French data protection legislation shuns the conceptual unification, as the right to erasure is based on both the GDPR[203] and French Data Protection Act[204], while the right to dereferencing is directly derived from the case law of the CJEU in the *Google Spain* decision. The dualistic approach of the French legislator sheds light on the issue of the territorial scope of the search engines' obligation to dereferencing. In a crucial decision of 2019, the CJEU dealt with a dispute between the French National Commission for Data Protection (CNIL) and Google Inc and decided that, while the dereferencing should not be executed on a global scale, it must exceed the national borders and involve every extension corresponding to a European domain name. In a series of recent decisions of the French Council of State (*Conseil d'État*), a categorisation of the personal data according to a hierarchy based on their sensitivity was created in order to establish how strong has to be the public interest in the information to override the right to obtain the dereferencing, in light of the principle of proportionality.[205]

202 GDPR, art. 4.

203 *Idem.*

204 Data Protection Act 6 January 1978 (FR), art. 51.

205 European Law Students' Association France, *National Report on Internet Censorship.*

The crucial role of the providers of search engine services has also been recognised in the recent judgements of the Spanish Constitutional Court. The decisions set criteria to strike a balance between conflicting interests in applying the right to be forgotten, identifying two manifestations of the right which should be driven by the same principles: on one hand, the obligation to erase some information, and, on the other hand, the prohibition of indexing results of a certain search. The public relevance of the information, how recent it is and the role of the data subject in public life are recurring key factors of the Spanish legal reasoning.[206]

Likewise, the Dutch case law is indicative of a strong influence from the *Google Spain* case, as the same reasoning is identifiable in recent judgements of national courts, which, regardless of the final decision, emphasise the important role of the search engines in ensuring the freedom of expression and right to information to be protected in the society.[207]

A similar trend emerges in the case law of the Hellenic Authority for Data Protection, as it ruled that the question whether the individual plays a role in public life should be considered in deciding whether to impose a removal of specific links to a search engine provider; however, unless the public role of the individual requires otherwise, the right to such removal overrides the economic interest of the search engine provider and the interest of the general public in the information.[208]

The case law of Ireland comes to deal with the right to dereferencing in a judgement of the Irish High Court in 2018.[209] The decision shows a higher restraint in recognising the right to obtain a delisting of results from a search engine provider, as the search engine provider was considered to

206 European Law Students' Association Spain, *National Report on Internet Censorship*.

207 European Law Students' Association Netherlands, *National Report on Internet Censorship*.

208 European Law Students' Association Greece, *National Report on Internet Censorship*.

209 *Savage v Data Protection Commissioner and Google Ireland* (2018) IEHC 122.

have a lesser role in shaping the information disseminated on the Internet than the original source of publication.[210]

The Romanian case law, on the other hand, still shows little familiarity with the new concept of the right to be forgotten, and therefore the judgements are still not numerous in elaborating and recognizing a right to dereferencing.[211]

In general, legal systems where the right to be forgotten is a totally new concept imported from the GDPR show a less clear judicial strand defining the specificities of the right to dereferencing as a configuration of the right to be forgotten.

3.2. Restrictive approaches in the national legislations

The challenging balance between protection of private life and fundamental rights such as the freedom of expression and the right to information represents the crucial legal issue to be addressed in the application of the right to be forgotten. The possibility for the EU Member States to restrict by way of a legislative measures the rights and obligations to which controllers or processors are subject is provided in the GDPR, which lists some grounds justifying the restriction.[212] As a consequence, different legislative approaches to the implementation have been taken. Amongst the EU Member States, a trend for a restrictive transposition of the conditions under which the right may be enforced emerges from the analysis of the National Reports.

A first group of EU Member States adopts a restrictive approach to the right to be forgotten by replacing it with a right to restriction of processing under certain circumstances. The restriction of processing means "the marking of stored personal data with the aim of limiting their processing

210 European Law Students' Association Ireland, *National Report on Internet Censorship*.
211 European Law Students' Association Romania, *National Report on Internet Censorship*.
212 GDPR, art. 23.

in the future",[213] and the GDPR gives the right to restriction of processing when the accuracy of the personal data is contested, for the period necessary for the controller to verify the accuracy; the right to obtain the restriction is also an alternative option to the right to erasure, where the processing is unlawful or no longer needed for the purposes of the processing, but the data subject prefers to opt for the restriction; finally, the right may be exercised pending the verification of whether the legitimate grounds of the controller override those of the data subject in the context of the right to object, pursuant to Article 12(1) of the GDPR.[214]

In Germany, the right to be forgotten has been replaced with the right to restriction of processing, where personal data are processed automatically and may only be deleted by means of a disproportionate effort of the controller. Also, it is suspended if the erasure of data would conflict with retention periods set by statute or contract.[215] The restriction of the right to be forgotten has been justified with a vague reference to the grounds justifying it under the GDPR[216]: it is not specified which one of the legitimate interests safeguarded by the provision provides a basis for the German legislative choice. The necessity to safeguard important objectives of general public interest of the Union or of the Member State could constitute the only plausible reason to avoid a disproportionally big effort of the controllers,[217] but the wording of the German provisions would require further specification.[218]

Similar to the German case, Greece transposed the right to erasure into the national law, but the provision replaces the right to be forgotten with the right to restriction of processing where the deletion is not possible due to the particular nature of the storage process or it is possible only by a

213 GDPR, art. 4.
214 GDPR, art. 18.
215 Federal Data Protection Act (*Bundesdatenschutzgesetz – BDSG*) (2018) (DE), Section 35.
216 GDPR, art. 23.
217 GDPR, art. 1(e).
218 European Law Students' Association Germany, *National Report on Internet Censorship*.

disproportionate amount of effort, under the condition that the data subject's interest in the deletion is not considered significant.[219] Also, the right to restriction takes the place of the right to erasure where the latter would be justified in light of the unlawfulness of the processing, but the controller has reason to believe that the deletion would be detrimental to legitimate interests of the data subject. Where legitimate interests of the data subject are not threatened by the possible deletion of data, however, the unlawful processing of data restores the right to be forgotten even in case of a disproportionate effort of the controller, as the controller unlawfully processing data does not benefit of the protection from such an effort.[220]

A different law-making approach which may be interpreted as restrictive of the right to be forgotten may be detected in Finland, where, as a result of a well-established publicity principle in the Finnish constitutional framework, exceptions to the right to be forgotten have been provided in the mentioned law in order to guarantee the freedom of expression.[221] An exclusion of the right to erasure is provided where the processing of personal data is performed solely for journalistic purposes.[222] However, some decisions of the CJEU and of the European Court of Human Rights (ECtHR) about Finnish cases circumscribe the extension of the meaning of "journalistic purposes", previously interpreted as including the dissemination of documents already made public by national bodies. The supranational case law specified that a meaningful contribution to a debate of public interest is a key element in according the journalistic exception to the right to be forgotten.[223] Therefore, the right to access to public documents based on a general transparency of public bodies does not justifies, *per se*,

219 Law No. 4624/2019 (GR), art. 34.

220 European Law Students' Association Greece, *National Report on Internet Censorship.*

221 *Perustuslaki* 11.6.1999/731 (FI), chapter 2, section 10.

222 *Tietosuojalaki* 5.12.2018/1050, Section 27.

223 Case C-73/07, *Satakunnan Markkinapörssi and Satamedia*, ECLI:EU:C:2008:727, Grand Chamber judgement on 16 December 2008; ECtHR, *Case Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. no. 931/13, Grand Chamber judgement on 27 June 2017.

the journalistic dissemination of these documents by means of publication.[224]

A restrictive implementation of the right to be forgotten may also be found in the Portuguese law, which gives to the right to delete a generally exceptional nature, as it is recognized to the data subject only when it's the only way to guarantee the right to be forgotten.[225] As judgments on the right to be forgotten are still rare in Portuguese courts, however, the exact characterisation of the right to be forgotten is still to be clarified.[226]

It also deserves to be mentioned the case of the Bulgarian legislation. After the recent adoption of a national law implementing the GDPR and the right to erasure,[227] the publication of an opinion of the Bulgarian Commission for Personal Data Protection established assessment criteria for the processing of personal data for journalistic purposes. Amongst the criteria, the impact of the disclosure of personal data on the data subject's privacy, the public interest in the information and the level of sensitivity of data are mentioned.[228] The criteria were codified under national law in 2019, but nine months later the provisions were object of a very telling declaration of unconstitutionality.[229]

On a procedural level, Poland may be ascribed in the restrictive trend too. While a law was adopted with the aim of implementing the GDPR provisions in the domestic law, the right to be forgotten has not been included in it, and therefore the direct application of the Regulation remains the exclusive legal basis to exercise the right.[230] The President of the Office

224 European Law Students' Association Finland, *National Report on Internet Censorship.*
225 Law n. 58/2019 of 8 August 2019 (PT), art. 25.
226 European Law Students' Association Portugal, *National Report on Internet Censorship.*
227 Personal Data Protection Act (BG), art. 56.
228 Commission for Personal Data Protection, *Opinion on the application of the right to be forgotten in the context of personal data processing for journalistic purposes* (2019) (BG), <https://www.cpdp.bg/index.php?p=element_view&aid=2183>
229 European Law Students' Association Bulgaria, *National Report on Internet Censorship.*
230 Act of 10 May 2018 on the Protection of Personal Data Dz.U. 2018 poz. 1000 (PL)

for Personal Data Protection is the Polish entity designated with the competence in matters of personal data protections; as regards the procedure to request the erasure of personal data, in case of negative response from the controller, the individual may submit a complain directly to the President of the Office, with the initiation of an administrative procedure. However, such proceedings are single-instance: there is no possibility of appeal to a higher authority in case of an unfavourable decision.[231]

The restrictive trend in the law-making of some of the EU Member States should be distinguished from the different situation of others where the GDPR introduces for the first time the right to be forgotten and remains the only legal basis to exercise the right.

Prior to GDPR, Ireland recognised the right of the data subject to request the cessation or non-commencement of the processing of any personal data regarding the applicant, under the condition that such processing was causing or likely to cause damage or distress to the individual or another person.[232] The introduction of the GDPR in the legislative framework considerably broadened the scope of the data protection legislation. The first judgment of the Irish High Court concerning the "right to be delinked or delisted" was decided in 2019, and the indexing by Google of results regarding a candidate for local elections was considered as an "expression of opinion" that could not be restricted.[233]

A similar legislative situation may be found in Malta, where the right to be forgotten was first and exclusively introduced by the GDPR.[234]

Likewise, the right to be forgotten was a legislative novelty in Romania, where, prior to the adoption of the GDPR, only a generic protection of privacy, without any mention of a right to erasure, was recognised.[235]

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231 European Law Students' Association Poland, *National Report on Internet Censorship*.
232 Data Protection (Amendment) Act 2003 (IRL), section 8.
233 European Law Students' Association Ireland, *National Report on Internet Censorship*.
234 European Law Students' Association Malta, *National Report on Internet Censorship*.
235 European Law Students' Association Romania, *National Report on Internet Censorship*.

Similarly, Czech Republic does not apply any specific legislation to the right to be forgotten, and therefore its exclusive guarantee is represented by the direct effect of the GDPR. Previous laws only considered the right to publish a reply when a disclosure of information by means of press, television and radio broadcasting affected the dignity or reputation of the individual.[236]

In Lithuania the right to erasure was introduced in the national law as a consequence of the adoption of the GDPR, and a specific case on the right to be forgotten has not been dealt with yet in the national courts.[237]

While Hungary introduced the concept of erasure prior to the adoption of the GDPR, defining it as the making of data unrecognisable in such a way that is no longer possible to recover it, the legislation did not change after the entry into force of the Regulation[238], and the rigorous technical definition of erasure could raise some doubts about the effective extension of application of the right to be forgotten.[239]

3.3. Jurisprudence on the right to be forgotten

A restrictive or limited national legislation on the right to be forgotten is sometimes compensated by its judicial implementation in the national courts. A low interest of certain national legislators is sometimes outweighed by a certain jurisprudential activism of courts and supervisory authorities in defining the right. In many EU Member States, the existence of the concept of the right to be forgotten prior to the adoption of the GDPR and the subsequent familiarity of the legal system with it resulted in the proactive role of the judicial bodies in its practical affirmation.

236 European Law Students' Association Czech Republic, *National Report on Internet Censorship.*

237 European Law Students' Association Lithuania, *National Report on Internet Censorship.*

238 Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information (HU).

239 European Law Students' Association Hungary, *National Report on Internet Censorship.*

The Netherlands implemented the GDPR with a policy-neutral approach aimed at maintaining the pre-existing legislation as similar as possible to the Regulation.[240] The right to be forgotten has not been explicitly transposed into the Dutch domestic law, but echoes of the *Google Spain* judgement resonate in the case law. Prior to the *Google Spain* decision, the Dutch courts dealt with the right to erasure, anticipating some views and principles expressed in 2014 by the CJEU. In fact, the right of individuals to not be confronted with past criminal convictions when the information is outdated came in place in specific circumstances. In the aftermath of the *Google Spain* ruling, the national courts addressed the quest for a balance between right to privacy and freedom of expression in line with the legal principles established by the Court of Justice, such as the consideration of the public interest inherent in the information and the degree of the impact of the disclosure of personal data on the private life of the data subject.[241]

While Italy does not have specific legislation on the right to be forgotten, the discussion of the Italian doctrine around the nature of the right is long-lasting. A first mention of the right to be forgotten in the national legislation dates back to a law of 1996[242], subsequently abrogated with the introduction of the Code of Privacy.[243] A rich jurisprudence of the Italian courts and the crucial role played by the Italian Data Protection Authority contributed in outlining the characteristics of the right to be forgotten. The Data Protection Authority provided a Code of Conduct for journalists, aimed at regulating the publishing and processing of personal data. In consideration of the Code of Conduct, the Italian Supreme Court developed a jurisprudential line based on a flexible case-by-case approach.[244]

240 Act on the Protection of Personal Data (*Wet bescherming persoonsgegevens*) (*WBP)* (NL)

241 European Law Students' Association Netherlands, *National Report on Internet Censorship.*

242 Law 675/1996 (IT).

243 Legislative Decree n. 196/2003 (IT).

244 European Law Students' Association Italy, *National Report on Internet Censorship.*

In France, the Council of State (*Conseil d'État*) developed three categories of personal data, defining the appropriate extent of protection of the right to dereferencing depending on their level of sensitivity; it also outlined criteria to be considered in determining whether a request of delisting should be satisfied.[245]

While, similarly to France, the Bulgarian Commission for Personal Data Protection also showed an attention in defining the application of the right to be forgotten in the journalistic context, establishing some assessment criteria for a proportionate limitation of the right in similar cases, the codification of such criteria was invalidated by the Bulgarian Constitutional Court as it was in contrast with the constitutional right to information[246]: two opposing decisional trends are expressed in the same legal context.[247]

In Greece, a restrictive implementation of the GDPR is compensated by the decisions of Hellenic Authority for Data Protection, defining how the right to be forgotten may override the right to information of the public, under certain circumstances.[248]

In the face of a lack of any legislative recognition of the right to be forgotten other than the GDPR, the Maltese courts took it upon themselves, although with heterogenous results, to handle the controversies as regards the personal data published on the public online courts' database, made public since 2000.[249]

Finally, the case of the Finnish jurisprudence evidences a key role of the supranational legislation and judicial bodies in shaping the national legal framework with regard to the right to be forgotten: the Data Protection Ombudsman bases its decisions on the principles provided by the WP29

245 European Law Students' Association France, *National Report on Internet Censorship.*
246 Court Decision n. 8 of 15 November 2019, Constitutional Case 4/2019.
247 European Law Students' Association Bulgaria, *National Report on Internet Censorship.*
248 European Law Students' Association Greece, *National Report on Internet Censorship.*
249 European Law Students' Association Malta, *National Report on Internet Censorship.*

guidelines[250], and a preliminary ruling by the CJEU and the ECtHR in a Finnish case[251] was crucial in reviewing the notion of journalistic purpose as a limitation of the right to be forgotten in the context of the general transparency and publicity of the Finnish taxation system.[252]

4. The right to be forgotten in non-EU countries

The legislative innovation of the GDPR and of the *Google Spain* judgment demonstrates its significant clout beyond the membership of the European Union, as evidenced by the National Reports' analysis of the right to be forgotten in non-EU countries. It is noteworthy that one of the novelties distinguishing the GDPR from non-EU legislations is its extra-territorial effect, as it applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of where the processing takes place. It also applies to the data of EU citizens where the controller or processor is not established in the Union, if the activities are related to the offering of goods or services or to the monitoring of their behaviour taking place in the Union territory.[253]

The cases of Albania and North Macedonia are interesting, due to the recent Council conclusions on enlargement and stabilisation and association process and the decision to open accession negotiations with the two countries.[254]

250 European Law Students' Association Finland, *National Report on Internet Censorship*.

251 European Data Protection Board. *GDPR: Guidelines, Recommendations, Best Practices*, <https://edpb.europa.eu/our-work-tools/general-guidance/gdpr-guidelines-recommendations-best-practices_en>

252 Case C-73/07, *Satakunnan Markkinapörssi and Satamedia*, ECLI:EU:C:2008:727, Grand Chamber judgement on 16 December 2008; ECtHR, *Case Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App. no. 931/13, Grand Chamber judgement on 27 June 2017.

253 GDPR, art. 3.

254 General Affairs Council of the European Union, Council Conclusions on Enlargement and Stabilisation and Association Process – The Republic of North Macedonia and the Republic of Albania, 25 March 2020 [2020].

The current Albanian legal framework provides the data subjects with the right to request for their data to be blocked, readjusted or removed when such data are not accurate, true, comprehensive or the processing or collection of personal data has not occurred pursuant to the law. However, the Stabilisation and Association Agreement between Albania and EU and the Personal Data Protection Commissioner's latest data protection strategy set the goal of the approximation of Albanian legislation to the EU law;[255] accordingly, the Regulation is foreseen to be transposed by the end of 2020.[256]

In North Macedonia, a new draft law is being developed, with a view to approximate the domestic legislation to the GDPR. Currently, the data subjects have the right to request the controller to stop processing their personal data, where the processing results to be illegal, outside the purpose for which consent has been given, or it may result in harmful consequences for the individual. Citizens also have the right to request an amendment or deleting of personal data, where they are incomplete, incorrect or not up-to-date, or where the processing is not lawful.[257] Due to the limited territorial effect of the domestic legislation, as regards data processed by international websites and platforms, the individuals may either address the request directly to the website or search engine or ask the Directorate of Personal Data Protection to proceed in the name of the citizen. Furthermore, the Ministry of Internal Affairs may be informed of the request, as long as the information is confidential, sensitive or may harm national security.[258]

255 Information and Data Protection Commissioner, *Strategy 2018-2020: Protection of Personal Data*, p. 18, <https://www.idp.al/wpcontent/uploads/2018/02/Strategjia_per_te_Drejten_e_Informimit_dhe_Mbrojtjen_e_te_Dhenave_Personale.pdf>.

256 European Law Students' Association Albania, *National Report on Internet Censorship*.

257 Law on Personal Data Protection (Official Gazette of the Republic of Macedonia No. 7/2005, 103/2008, 124/2008, 124/2010, 135/2011, 43/2014, 153/2015, 99/2016 and 64/2018).

258 European Law Students' Association North Macedonia, *National Report on Internet Censorship*.

As a result of international obligations between EU and Serbia, the Serbian legislation has also been object of harmonization with the EU one. A new law was adopted with the aim of transposing the provisions of the GDPR.[259] The right to be forgotten is expressly provided under the Serbian law; however, attention has been paid by the Commissioner for Free Access to information of Public Importance and Personal Data Protection to the still rare applications of the right to be forgotten in the country and to the need for further developments of the legislation.[260]

Amongst other neighbourhood countries of the European Union, unlike the *Google Spain* judgement, the legislations encounter some limits in recognising the right to erasure of information outdated or otherwise irrelevant, albeit lawfully processed.

The Armenian law gives data subjects the right to request the blocking or removal of their personal data, where the data are incomplete, outdated or not anymore necessary for the purpose of the processing, or where they have been unlawfully obtained.[261] However, as outlined in a report of the Armenian Lawyers' Association, the legislation is incomplete, in that it does not provide the individuals with the right to erasure where personal data are lawfully processed, and yet the processing may create a direct threat to the data subject's right. Also, no guarantees pertaining the right to be forgotten are accorded in relation to information on final convictions for not serious crime and offenses, where such information is obsolete.[262]

Azerbaijan recognises a right to request the deleting of personal data.[263] Nevertheless, the right is not further specified in its grounds of application, and therefore it should be interpreted in light of the general requirements for the lawfulness of processing of data: analogous to the GDPR,

259 Law on Data Protection n. 87/2018 (*Zakon o zaštiti podataka o ličnosti "Sl. Glasnik RS" br. 87/2018*) (SRB).
260 European Law Students' Association Serbia, *National Report on Internet Censorship*.
261 Law of the Republic of Armenia on the Protection of Personal Data, art. 1.
262 European Law Students' Association Armenia, *National Report on Internet Censorship*.
263 Law of the Republic of Azerbaijan 'On Personal Data', Art. 2.

the Azerbaijani law establishes rigorous rules with regard to the written consent to the individual prior to the processing, its period of validity and the specification of the purpose of collection. However, the legislation does not mention the possibility of erasure where the information, while lawfully processed, becomes outdated or does not respond anymore to the initial informational need of the public.[264]

As regards Turkey, the individuals are provided with the right to appeal to a court in order to request the deletion of personal data.[265] The Turkish approach has been clarified in the judgements of the Supreme Court: the compliance of the processing with a specified and valid scope, and under consent of the data subject, is the main requirement for a lawful processing; as a consequence, the right to erasure may be exercised where these legal requirements are not met.[266] The right to request the erasure is also accorded when the individual opposes to the processing of personal data for reasons related to his particular situation, in case where the processing is carried out with the purpose of protecting vital interests of the subject or pursuing a public interest. The Turkish legal framework encompasses a number of exceptions to the right to be forgotten, which pertain to the freedom of expression and the safeguard of public interests; moreover, it contains a provision aimed at preventing the abuse of fundamental rights and freedoms: it responds to the need to address the Turkish legislator in regulating the area of data protection.[267] Therefore, numerous principles of the GDPR also resonate in the Turkish domestic law.[268]

A final mention should be dedicated to the United Kingdom, where a law was adopted with a view to implementing the GDPR standards.[269] After implementation of Brexit, it will be the only legal basis governing data

264 European Law Students' Association Azerbaijan, *National Report on Internet Censorship*.
265 Law n. 6698 (Personal Data Protection Law) (*Kişisel Verilerin Korunması Kanunu*) 2016 (TR).
266 Case n. 2014/4-56, Supreme Court Assembly of Civil Chambers (2015).
267 Constitution of the Turkish Republic (*Türkiye Cumhuriyeti Anayasası)* 1982.
268 European Law Students' Association Turkey, *National Report on Internet Censorship*.
269 Data Protection Act 2018 (UK).

protection. While the case law of the CJEU will not be binding anymore for the UK, recent decisions of national courts on the right to be forgotten adopted a similar approach and principles to the ones enshrined in the *Google Spain* judgment. Therefore, it is plausible that similar standards with regard to data protection will remain in place when the Brexit procedure will be completed.[270]

[270] European Law Students' Association United Kingdom, *National Report on Internet Censorship*.

Chapter 6

Liability of Internet intermediaries

By Valeria Argento

The massive development of the Internet has presented many difficult challenges for the liability regime.

Most creative expression today takes place over communications networks owned by private companies, the so called 'internet intermediaries', and whether and when internet intermediaries are liable for their users' online activities is one of the key factors that affects innovation and free speech.[271]

The term 'intermediary' or 'service provider' has no consistent meaning across borders and each of these terms has often received some legislative definition in provisions creating safe harbours (or immunity) from liability.[272]

For instance, in the context of the EU Directive 2000/31/EC – which creates an harmonised scheme of immunity - a service provider is a person providing an information society service, meaning 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. [273]

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271 G Frosio, 'The World Intermediary Liability Map (WILMap): Mapping Intermediary Liability Online' (Internet, Politics, and Policy (IPP) academic conference series, Oxford, 2016).

272 Graeme B Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer 2017) 4.

273 European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

Internet intermediaries are rarely directly engaged in infringing activities, but they are often involved as indirect infringer. As a result, when dealing with internet intermediaries secondary liability becomes relevant i.e. liability resulting from illegal users' behaviour.

Legal regulations imposing sanctions on certain users' communications (e.g. hate speech, IP violations, defamation, prohibited pornography, etc.) aim for a difficult balance with the Right to freedom of expression.

In principle, the risk of a regulatory fine or any kind of liability for the provider could be converted to a threat of removal of the content, a system of 'removal in case of doubt'.

This Chapter on liability of internet intermediaries lays out the tension between intermediary liability and fundamental rights, such as freedom of expression, within the legislative framework in and outside the European Union.

Policy makers are still in search of a balanced and proportional online intermediaries' regulation that might address the miscellaneous interests of all stakeholders involved, with special emphasis on users' rights.[274]

1. Blocking and taking down measures within the European Union legislative framework

Across the member states of the European Union, both the blocking and removal of online material are frequently treated in a similar way.

Indeed, national legislations of EU member states regarding the liability of Internet intermediaries are mainly based on the implementation of the EU Directive 2000/31/EC ('Directive on electronic commerce').

[274] G Frosio, 'Intermediary Liability and Fundamental Rights' (2019) Centre for International Intellectual Property Studies (CEIPI) Research Paper 06/2019 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3411633 > accessed 26 July 2020.

The Directive applies horizontally to any kind of illegal or infringing content.

Internet Service providers (ISPs) do not have an obligation to actively monitor or moderate content on their platform or to look for facts or circumstances revealing illicit activities — as required by Article 15 of the e-Commerce Directive.[275]

This concept is stated in every EU member state's national law implementing the Directive concerned.[276]

According to the e-commerce Directive, safe harbour provisions for internet services providers have been harmonised on the EU level and their liability is privileged depending on the kind of service provided.[277]

Three types of ISPs can be identified and benefit from a liability exemption under certain conditions. In the case of mere conduit services, the condition for liability exemption is a passive role of the service provider towards the data transmitted: the provider cannot decide to whom the data should be transmitted as well what happens to the data; potential storage

[275] The prohibition of monitoring obligations at Recital 47 refers solely to monitoring of a general nature. It does not concern monitoring obligations in a specific case; nor does it affect orders issued by national authorities in line with national legislation.

[276] See Article 14, par 1 of the Presidential Decree No 131/2003 on 'Adaptation to Directive 2000/31/EC of the European Parliament and the Council concerning Certain Legal Aspects of the Information Society Services, especially Electronic Commerce, in the Internal Market'; Section 5-6 Act No 480/2004 coll; Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique; Article 17 of the Legislative Decree 70/2003; Decreto-Lei n.º 7-2004 de 7 de Janeiro, Lei do Comércio Electrónico; Section 7 Subsection 1 Telemedia Act (Telemediengesetz – TMG).

[277] For example, Section 6:196c Dutch Civil Code (DCC); Article 13 Ley 34/2002 de Servicios de la Sociedad de la Información y del Comercio Electrónic (LSSI); Article 9.I Loi pour la confiance dans l'économie numérique; Section 7,8,9 Telemedia Act (Telemediengesetz – TMG); Bulgarian Electronic Commerce Act 2006, Article 13-18.

is permitted for the sole purpose for carrying out the transmission for no period longer than is reasonably necessary.[278]

In the case of caching services, the condition for liability exemption is, again, a passive nature: the provider may not modify the content of the data and should use technologies techniques commonly used; upon obtaining knowledge, the provider is obliged to disable immediately access to any information stored if it has been removed from the network at the initial source of the transmission or the access to it has been disabled, or a court or an administrative authority has ordered such disablement.[279]

The most common internet services are based on a hosting model, 'hosting services' provide storage of information to a recipient of the communications network service.

Under Article 14 of the e-commerce Directive hosting providers can benefit from the liability exemption when they do not have knowledge of the illegal nature of the data stored or related activities and, once they are notified that, they have made access to that data impossible.[280]

Yet, while the mere conduit and caching safe harbours seem to be simply-stated and well-understood, the requirements of the hosting immunity are ambiguous: what constitutes actual knowledge? What facts or circumstances will make infringement apparent to a diligent operator?[281]

The main issue is to determine whether it can be affirmed that service providers had 'effective awareness', European and national case-law stressed hosting providers either need to have positive knowledge of the

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278 Art 12 of the European Parliament and Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

279 ibid, Art 13.

280 ibid, Art 14.

281 Christina Angelopoulos, *European Intermediary Liability in Copyright. A Tort-Based Analysis* (Wolters Kluwer 2016).

unlawful content or the presence of facts and circumstances that indicated obvious unlawfulness.[282]

These are high standards of knowledge that a host provider has to have before it is obliged to act.

A case of more permissive regulation is the Polish legislation, which has implemented Art. 14 by stating that a host provider is not obliged to check the data it transmits, stores or makes available – it may be held liable only if it has positive knowledge of the illegal nature of the stored data. This clearly determined that immunity from liability for those entities is not dependent on the maintenance of due diligence on their part as it comes to monitoring of data being stored or transmitted.[283]

Therefore, unless the conditions above are fulfilled internet intermediaries shall not be held responsible for any unlawful activity, storage of information and as a result, they are not required to block and take down content. If the intermediary, upon receiving the notification or after becoming aware of the illegal material circulating, fails to block the content or take it down, it will incur criminal or civil liability.

There is a fourth exception of exoneration of liability for suppliers who provide information search tools and links to other web pages, regulated by Article 15 of the Romanian law. This exception is not provided by the

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282 The European Court of Human Rights upheld a strict application of knowledge regarding illegal content in *Delfi AS v. Estonia*. An even broad application of the concept could impose an indirect duty for websites to monitor all third-party content, which would effectively contradict Art. 15 of the e-commerce Directive. This issue has been emphasised with the new EU Directive on Copyright in the Digital Single Market. See also European law Students' Association Germany, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 41.

283 European law Students' Association Poland, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 41.

e-commerce Directive, it is particular to the Romanian legislation. According to this article, the provider of links and search tools that also facilitates the access to information offered by other providers, are not held responsible for that particular information, if any condition mentioned by the article is fulfilled.[284]

Internet content is usually blocked or filtered on the legal grounds of protection of national security (e.g. terrorism); prevention of disorder or crime (e.g. child pornography); protection of health or morals; protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights).

While the Directive requires hosting providers to remove the unlawful content even in the absence of a specific order by a competent authority, national legislation can require providers to inform the competent public authority and remove the content only after the issue of a specific order by the authority. Italian Legislative Decree 70/2003, implementing the e-commerce Directive, requires to remove the content only after the competent authority issues a specific order.[285]

Indeed, the e-Commerce Directive leaves the establishment of obligations for intermediaries to inform public authorities of illegal activities or information hosted at the discretion of member states.

The legal provisions under the Directive do not affect the possibility of the judicial authority of requesting the service provider to cease or prevent

[284] Law No. 365/2002 on e-commerce.

[285] Bertolini, Franceschelli and Pollicino, 'Analysis of ISP Regulation Under Italian Law' in Graeme B Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer 2017), 151; cf European law Students' Association Romania, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 32.

the breach, and also may not affect the possibility of establishing procedures limiting or interrupting access to information i.e. the privileged status of the internet intermediaries does not include injunction reliefs.[286]

Nevertheless, specific notification procedures could be stated by the national legislation enabling internet users to report the existence of illicit content. The Greek and the French legislation adopted this kind of approach.[287]

Administrative authorities are often competent to monitor and notify the providers with specific procedures; legal provisions sometimes address even the specific obligation of service providers to cooperate with administrative - and judicial – authorities.[288]

According to the Spanish regulation, there is a duty of collaboration for service providers when a competent body decides to take down or stop the provision of a service.[289]

The French legislation established a double obligation, aiming at the collaboration of internet intermediaries, to promptly inform the public authorities of every illicit activity that have been reported to them and to take

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286 See European law Students' Association Germany, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 41; European law Students' Association Greece, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020)42-44.

287 Article 14, par 2 of the Presidential Decree No 131/2003; Article 6.I.5º of the Loi pour la confiance dans l'économie numérique.

288 European law Students' Association Italy, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 24; European law Students' Association France, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 35.

289 Ley 34/2002 de Servicios de la Sociedad de la Información y del Comercio Electrónico (LSSI), art 11.

all the appropriate measures to fight against those illicit activities and to make public the means they devote to it.[290]

Intermediaries can be subject to the obligation of blocking or taking down unlawful content by means of a court order e.g. in criminal law matters or in civil law cases where a court order or an injunction may be issued for the termination or prevention of an infringement. A similar obligation exists, among others, under the Dutch law where a court order or an injunction may be issued for the termination or prevention of an infringement, which can either be blocking or removing the content.[291]

The blocking of illicit content can be requested by an administrative authority. Although, the existence of the administrative blocking mechanisms can be questionable in terms of the guarantee of individual liberties given that no judge intervenes.[292]

It has to be underlined that the liability risk to the host might lead to over-removal: this tendency is best addressed by notice and takedown procedures provided for by law.

The exemptions laid down in the e-Commerce Directive effectively require intermediaries to police online content, if they wish to maintain their immunity regarding third party content. And, when the decision whether the content is illegal and therefore subject to removal is up to the intermediary, the criminal and civil responsibility could be transferred to providers as private actors. This shift of competence undermining the judicial competence of the State (especially in criminal law) was observed in the *Google Spain* case.[293]

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290 Article 6.I.7º of the Loi pour la confiance dans l'économie numérique.

291 Article 6:196c(5) DCC.

292 European law Students' Association France, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 36.

293 Victor Claussen, 'Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation' (2018) 3 MediaLaws <http://www.medialaws.eu/rivista/fighting-hate-speech-and-fake-news-

1.1. The sectoral approach

Considering that over the years, the leading online intermediaries have acquired huge financial and technological resources for identifying and filtering out illegal content, it has been questioned whether the general exemption from secondary liability is still appropriate. Indeed, the national legal framework generally introduces specific laws aiming to strengthen the duties of the service providers in view of delimiting their immunity under the certain genus of the law; thus, the standards and procedures for establishing specific liability have been created by national sector-specific provisions, moving away from the traditional 'horizontal' approach of the EU's safe harbour regime.[294]

For instance, in 2017 the German legislator drafted the Network Enforcement Act (NetzDG) regarding hate speech and fake news online, as a result of lacking effectiveness in social media mechanism against illegal content. This Act aims to fight hate crime, punishable fake news and other unlawful content in social networks more effectively and to enforce their deletion.[295]

The Act concerned establishes a legal obligation for the social network to report their processes that counteract illegal content online and a mechanism to ensure the reporting and takedown procedure. Fines are imposed in case of violations of the reporting duties or procedures.[296]

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the-network-enforcement-act-netzdg-in-germany-in-the-context-of-european-legislation/>accessed 3 July 2020.

294 See European law Students' Association Greece, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 44.

295 The NetzDG applies to telemedia providers who operate social networks with the intention of making a profit i.e. platforms on the Internet that enable users to exchange, share or make any content available with other users. Its scope is narrowed down to social networks with more than two million registered users in Germany.

296 Bundesrat-Drucksache 135/17, p 18.

Regarding IP violations, some EU member states impose an obligation on the hosting service provider to provide notification and takedown procedure that applies only to copyrighted material, requiring the right-holder to contact the content provider to block access to the material infringing upon the copyright.[297]

According to the Finnish legislation, for example, the request must first be presented to the content provider and if it cannot be identified or if it does not remove or block access to material in question, the request may be submitted to the hosting provider. The notice has form and content requirements. Upon receipt of the notice, the provider must remove the content and inform the content provider of the removal.[298]

Lithuanian legislators changed the Law on Copyright and Related Rights, according to which the Lithuanian Radio and Television Commission will be able to decide, under an accelerated procedure, to block access to websites in the event of an infringement of copyright or related rights.[299]

Another example of national sector-specific liability is the UK legal system, which has a specific legal approach on some specific issues such as terrorist contents or defamation. Regarding copyright infringement, the Copyright, Designs and Patents Act 1988 authorises the Supreme Court to take such measures – in particular blocking injunctions - against an intermediary with 'real knowledge' that the content in question violates copyright law.[300]

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297 For example, European law Students' Association Lithuania, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 40; European law Students' Association Finland, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020)50-51.

298 Laki sähköisen viestinnän palveluista (917/2014), 189 § 2 mom.

299 Balčiūnienė, R "Kaip veiks neleistino turinio blokavimas internete", Verslo žinios, 1 April 2019, https://www.vz.lt/rinkodara/2019/04/01/kaip-veiks-neleistino-turinio-blokavimasinternete.

300 European law Students' Association United Kingdom, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 45.

In Italy the Administrative Authority for Communications Guarantees (AGCOM) issued a 'Regulation on copyright on the electronic communication networks and implementing measures pursuant to legislative Decree 70/2003', allowing the administrative enforcement of online copyright infringement. The Administrative court questioned the constitutionality of the entire notice and take down procedure.[301]

At the European Union level, with the approval of the new Directive on Copyright in the Digital Single Market, the role and responsibilities of online intermediaries and platforms have been reshaped within a sectoral approach - although the new Directive has not been implemented yet.[302]

While the Directive 2000/31/EC applies horizontally to any kind of illegal or infringing content, the Directive 2019/790/EC applies to copyright infringement.[303]

Article 17 of the new Directive expressly excludes the provider of online services from the exemption of liability provided by Article 14 of the e-Commerce Directive in case of violation of the obligation to obtain prior licensing agreements with rightsholders.

The new Directive does not expressly impose an obligation of preventive control, but only a general obligation to obtain a license from the rightsholder in order to share revenues obtained from the uploading of content by users.

Internet intermediaries may be held liable for infringements on the right to data protection of third parties, conducted by their users through their

301 Bertolini, Franceschelli and Pollicino, 'Analysis of ISP Regulation Under Italian Law' in Graeme B Dinwoodie (ed), *Secondary Liability of Internet Service Providers (*Springer 2017), 167.

302 European Parliament and Council Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.

303 See G Frosio, 'From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe' (2017) Journal of Intellectual Property Law and Practice 12(7) 565-575.

networks. In that case, another legal regime within the European Union framework must be apply: the GDPR, according to which internet intermediaries may be obliged in several circumstances to block or take down personal data.[304]

In fact, Article 17(2) GDPR states that the data subject has the right to request the erasure of personal data concerning them without undue delay from the controller and that the controller has the obligation to erase personal data without undue delay. The article also outlines specific circumstances under which the Right to be Forgotten is applicable.[305]

Under the GDPR, data regulated entities are generally classified as either controllers or processors; distinct legal obligations flow from that classification. Controller means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; while data processor only processes the personal data on behalf of the data controller. Because controllers are the decision-makers, they have more obligations under the law – including compliance with erasure or 'Right to Be Forgotten' requirements: the controller is responsible for, and must be able to demonstrate, compliance with the Data Protection Principles; it is also responsible for implementing appropriate technical and organisational measures to ensure and to demonstrate that its processing activities are compliant with the requirements of the GDPR e.g. block or take down procedures.[306]

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304 See European law Students' Association Ireland, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 33; European law Students' Association Greece, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 44-45.

305 European Parliament and Council Regulation of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1.

306 Daphne Keller, 'Intermediary liability and user content under Europe's new data protection law' (*The center for Internet society,* 8 October 2015) <http://cyberlaw.stanford.edu/blog/2015/10/intermediary-liability-and-user-content-under-europe%E2%80%99s-new-data-protection-law>accessed 26 July 2020.

The CJEU's determination that Google acted as a controller in operating web search was a key holding of *Costeja*.[307]

Free expression rights under the GDPR are directly addressed in Article 80, which relies on Member State law to define and enforce the free expression rights guaranteed by the European Charter.[308]

1.2. Self-regulation by private actors

Under Article 15 of the e-commerce Directive, EU Member States are not allowed to introduce obligations that would require intermediary service providers to systematically monitor the information they store or transmit, but this does not mean that service providers cannot take up such activities on their own initiative.

Private sector can adopt and implement codes of conduct on the internet, self-regulated or voluntary notice and takedown procedures.

One country which adopts this approach is the United Kingdom. The removal and blocking of online content in the UK are largely achieved through private regulation either by way of the application of internet intermediary terms of use policies, or voluntary cooperation of the internet service provider with the police and other authorities.[309]

Providers can adopt guidelines for their users, moderation processes, and reporting tools – this has led to a situation where illegal content is noticed and taken down by the service provider when users report it. This ap-

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307 ibid.

308 Daphne Keller, 'Free expression gaps in the general data protection regulation' (*The centre for Internet society,* 30 November 2015) <http://cyberlaw.stanford.edu/blog/2015/11/free-expression-gaps-general-data-protection-regulation > accessed 26 July 2020.

309 European law Students' Association United Kingdom, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 47.

proach puts the spotlight on a context in which the provider is not primarily a wrongdoer but is included as regulatory force in the legal process.[310]

It must be stressed that there are issues inherent in the private law enforcement approach as well. In particular, the only actions that an Internet intermediary can ever take are superficial – as it cannot prosecute anyone. Also, Internet intermediaries are private companies whose priority is to make profits, not to protect freedom of expression. As in the case of legal enforcement and safe harbours, they will however err on the side of caution, as the risks created by deleting perfectly legal content are generally lower than the risks created by leaving legal content online.[311]

2. Outside the European Union legislative framework

Regarding non-EU member countries, specific national laws regulate the liability of internet intermediaries. National provisions mainly employ a lack of liability.

The Armenian legislation is based on a lack of responsibility for intermediaries, which are not obliged to control and edit the information flow; on the contrary, any censorship is prohibited by virtue of law. Thus, internet intermediaries cannot be liable for the illegal content published on the Internet; the only exception established is when the intermediary itself allows spread of information with criminal nature and dangerous for the society. This usually requires a final and binding court decision confirming the fact of the crime and intermediary's awareness and allowance of the crime.[312]

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310 ibid.

311 A Hulin and M Stone (eds), *The Online Media Self-Regulation Guidebook*, OCSE Representative on Freedom of the Media (2013) 52.

312 European law Students' Association Armenia, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 58-59.

According to the national law of North Macedonia, the term internet intermediaries' is not defined, nor are there explicit legal provisions that regulate the responsibility of internet intermediaries.

When there is no regulation on the matter, national provisions are guided by the maxim 'what applies offline also applies online'.

The Law on Civil Responsibility for Insult and Defamation, adopted in 2012, can be considered as a legal act that is closest to regulating online liability, according which internet services do not have any legal obligation to control the users' contents nor have any responsibility.[313]

Under the Serbian legal system, there is no liability for blocking and taking down contents. But the majority of the internet intermediaries' general business conditions are regulating the illicit behaviour of the internet users, claiming that the user is liable to internet intermediaries for material and non-material damage caused by himself.[314]

On the other hand, the liability of the internet intermediaries in Azerbaijan is based on the obligation to implement measures for blocking and taking down content. According to the law 'on information, informatization and information security', in case of 'prohibited for dissemination' on the website a procedure of notice and takedown is provided. If this information threatens the state and public interest, the site will be shut down even without a court order and then will apply to the courts.[315]

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313 European law Students' Association North Macedonia, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 36-39.

314 European law Students' Association Serbia, National Report on Internet Censorship in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 43.

315 European law Students' Association United Azerbaijan, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 34.

Under the Albanian legislation, internet intermediaries can be generally distinguished by the service provided and they cannot be liable for the illegal content published on the Internet when certain conditions are met. If the ISPs exceed their role as simple broadcasters then they will not fall under the protection provided by the law.[316]

Finally, it should be underlined a far-reaching interference of the Turkish government in the regulation of internet intermediaries, according to which the main obligation of access, content, and hosting providers is to furnish the Presidency of Telecommunications any information as it may demand without the need of a court decision.

Hosting providers are subjected to a notice-based liability framework and they have no general obligation to monitor the information stored, nor do they have a general obligation to actively seek facts or circumstances indicating illegal activity; although, they have to take down illegal or infringing content once served with notice through the Presidency of Telecommunications or court order. Upon governmental request, the Presidency of Telecommunication and Communication will be able to take urgent measures to block access to websites or remove online content.[317]

316 Law No 10128 'On electronic trade'.

317 European law Students' Association Turkey, *National Report on Internet Censorship* in European Law Students' Association and Council of Europe, Internet Censorship (Forthcoming 2020) 52-55.

Chapter 7

Future regulation

By Samar Abbas Nawaz

As the internet is permeating in various sectors of society, it is also making individuals vulnerable to novel threats to their freedoms and rights, calling for adequate regulations. In terms of its usage and effects, the internet is already a matter of regulation in different forms. As Lessig perceives, the term 'regulation' in cyberspace comprises of law, market, social norms and architecture (technology).[318] However, the focus of this chapter is on the future legislative developments and the 'self-regulation'. The latter is imposed by players like Internet Service Providers (ISPs) and online platforms through their internal policies. Given the rather novel nature of the internet, the relevance of self-regulation by such actors, as a means of regulation ought not be ignored. Indeed, it was the predominant form of regulation before states caught up with their national legislative frameworks for safeguarding the rights of individuals. The elements covered in this chapter are: (a) the blocking and take down of online content, (b) liability of internet intermediaries, and (c) the right to be forgotten.

At the outset, it is difficult to predict future regulations in these fields owing to dynamic nature of internet technology and quite recent legislations, which would entail judicial precedents and illumination of issues in the coming future. Nonetheless, the national reports indicate somewhat diverse future trends due to multiple factors including the political setup and status of states viz membership of the European Union (EU) or their aims to join the same. Such states tend to follow the developments in EU laws. Serbia is the only exception in this regard, as it lacks legislative attention

[318] Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' [1999] 6 Harvard Law Review 501, 507.

in respect of any of the three elements under discussion.[319] The following sections only highlight foreseeable regulatory developments in 23 European states in the future, based on the governmental programmes, proposed bills, and future regulatory trends in EU law and nationally.

1. Blocking and take down of Online Content:

The law governing the take down or blocking of online content comes into play for the protection of individuals' rights online or removal of content which is unlawful. This field predominantly attracts the enforcement of Intellectual Property Rights (IPR) and freedom of expression online. In this regard, ISPs play arguably 'quasi-judicial' role, as Uta Kohl remarks.[320] Importantly, this field is likely to invite novel challenges of balancing competing rights such as, freedom of expression, surveillance and copyrights protection.

In the EU, this element is mostly covered in Directive (EU) 2019/790 (Copyrights Directive), and Directive 2000/31/EC (E-commerce Directive). Implementation of the former is yet to be done in many EU states which would bear effect on future regulation there. In that Directive, Article 17 requires some online service providers to take maximum efforts for prevention of online infringements. This can be seen to invite filtering mechanisms in the future which may undermine notice and take-down procedure while encouraging monitoring and filtering obligation which runs against Article 15 of the E-Commerce Directive.[321] Similarly, the discretion given to states for content removal procedure under E-Commerce Directive has given rise to fragmented legislations about the suitable time for removal, form of notification and ascertainment of infringing content. The unification on these points is expected at EU level.[322] These kinds of

[319] European Law Students' Association Serbia, *National Report on Internet Censorship,* 45.

[320] Uta Kohl, 'The rise and rise of online intermediaries in the governance of the Internet and beyond – connectivity intermediaries' [2012] International Review of Law, Computers & Technology, 26:2-3, 185-210, 191.

[321] European Law Students' Association Italy, *National Report on Internet Censorship*, 27.

[322] European Law Students' Association Hungary, *National Report on Internet Censorship*, 34.

developments in EU legislation would shape future regulation in EU states to a significant degree.

Possible future growth of self-regulation is also indicated in different states such as, Germany, UK and the Netherlands.[323] This may be so, as ISPs would take action to avoid liability under prevailing EU laws. Pertinently mentioning, some states share varied approaches in this regard. For instance, the Netherlands allows the platforms to self-regulate the content on their site through their private means.[324] Whereas, Spain opposes the self-regulation as evident by the statement of its ambassador to the EU, Juan Aristegui about the failure of ISPs in curbing disinformation.[325] Spain also aims to minimize ISPs' dominance for fair competition and safeguarding public interests, with more intense supervision by public authorities over them.[326] Another interesting development is observable in Italy, where legislators would be deciding the remit of the independent Guarantor Authority for the Communications (AGCOM), as the Council of State has declared AGCOM's power illegal, whereby latter would sanction ISPs for non-compliance of content removal order by administrative Authority.[327] This may have an undermining effect on AGCOM's role as the reason behind lesser actions by AGCOM is argued to be due to less awareness of the right holders about the law and not the inefficiency of the authority.[328]

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323 European Law Students' Association UK, *National Report on Internet Censorship,* 57; European Law Students' Association Netherlands, *National Report on Internet Censorship,* 62; European Law Students' Association Germany, *National Report on Internet Censorship* 60.

324 European Law Students' Association Netherlands, *National Report on Internet Censorship,* 61.

325 Europapress, 'Spain considers self-regulation of social networks insufficient to tackle disinformation' Brussels (23 May 2019) https://www.europapress.es/sociedad/noticia-espana-ve-insuficiente-autorregulacion-redes-sociales-atajar-desinformacion-20190523142920.html

326 European Law Students' Association Spain, *National Report on Internet Censorship* Page 62.

327 Cons. St., sez. VI, 15 luglio 2019, n. provvedimento 201904993.

328 European Law Students' Association Italy, *National Report on Internet Censorship,* 28.

Political factors are also crucial for future regulatory developments in various countries. For instance, in Lithuania, current liberal government is expected to amend the law on public information, Protection of Minors against Detrimental Effects of Public Information, to prevent discrimination against Lesbian, Gay, Bisexual and Transgender (LGBT) community.[329] Whereas, Azerbaijan has recently amended removal procedure with inclusion of broader circumstances, while the responsible Ministry of Transport, Communication, & High Technologies (MTCHT) holds considerable shares in a handful of ISPs.[330] Whereas, Spain's current government aims to strengthen fundamental rights online through implementation of Title X of the Organic Law of Data Protection and Guarantee of Digital Rights, which indicates more intense public intervention in take down procedure.[331]

2. Liability of Internet Intermediaries

The internet intermediaries generally include Internet Service Providers (ISPs), online service providers and social media platforms. The crucial role of ISPs in online censorship renders them to be somehow in charge of balancing public interests and human rights and deciding elimination of inappropriate content online.[332] There is an indication of wider liability of the intermediaries, generally. While few states don't plan to make any legislative efforts, including Armenia, Serbia and North Macedonia.

In context of EU law, Article 17 of the Copyrights Directive deprives the intermediaries from the operational liability exemption regime, under Article 15 of the E-Commerce Directive, which is likely to enhance the scope of liability upon transposition by states.

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329 European Law Students' Association Lithuania, *National Report on Internet Censorship* Pg. 42.

330 Freedom House, *Report on the Net 2018 in Azerbaijan* <https://freedomhouse.org/report/freedom-net/2018/azerbaijan> last accessed 20 February 2020.

331 European Law Students' Association Spain, *National Report on Internet Censorship,* 66.

332 European Law Students' Association Netherlands, *National Report on Internet Censorship,* 62.

In Germany, additionally, the Network Enforcement Act and its drafts, indicate more obligations of private operators in the future, with expansion of their self-regulation, where state would be reported by the private providers. Operator's obligation to state critical information on specific users would also follow.[333] Liability for third-party's content would principally be imputed to platform operators in the near future. Hence, an increased role of intermediaries in law enforcement on the internet can be expected. The role would develop commensurately with the artificial intelligence sector, where satisfactory distinctiveness between content, access and host providers under Section 7 of Telemedia Act could become questionable in the future.

Another interesting development is discernible in Finland, as it aims to enact a law titled *'Maalittaminen'*, or in other words, 'targeting' which criminalises an entity knowingly providing a platform for the purpose of harassing, threatening or dogpiling of public servants, which may affect the ability of such servant to perform duties. In this way, it may include the forums which allow anonymous posting by users or which openly encourage the targeting. In the future, it may raise the question of liability of imageboards like 4chan.org or ylihauta.org if someone circulates an image from those sites to other platforms like Facebook where targeting would take place.

3. Right to be forgotten

This right entitles individuals to erase their personal data. This right finds its roots from the right to restrict further processing of one's personal data and prevention of stigmatization as a consequence of their past activities. In the EU, the Regulation (EU) 2016/679 (GDPR) guarantees this right under certain circumstances prescribed in Article 17. It is not an absolute right as it is limited by the freedom of expression. Since this law has been implemented by many states not long ago, the future development of this right is not easy to predict. Another common feature amongst some states

[333] European Law Students' Association Germany, *National Report on Internet Censorship,* 61.

is reliance upon the national data protection agency for guidance, pursuant to transposition of GDPR. With ongoing developments at EU level, such as, the CJEU judgment on deindexing of search engines would be vital to ascertain regulatory course in the future.[334]

In Portugal, however, appropriate transposition is yet to be made, as its National Committee for Data Protection reported in 2019 inability to implement the GDPR. The Committee also precluded application of nine provisions pertaining to fines from the national law implementing GDPR, on the premise that they are 'manifestly incompatible with Union law'.[335] Italian Privacy Authority is transposing the European law appropriately into national law. Especially, on deindexing of search engines and restricting right to be forgotten. This is in view of Case C-507/17 Google Inc. v CNIL, where CJEU allowed Google to limit the right to be forgotten for searches made within the EU.

In Germany, the existing legislation based on the opening clauses of GDPR has weakened the rights prescribed therein due to vagueness in Section 35 of the Federal Data Protection Act (BDSG). Though, revision would be appropriate in said provision to ensure compliance with GDPR. However, it seems unlikely viewing 2019 amendments, where no consideration was given to it.[336]

Per CJEU, right to erasure of one's personal data doesn't 'pre-suppose prejudice' towards the data subject. This right overrides the economic interest of the operator and that of the general public in finding that information, unless such public interest is 'preponderant'. Per ECHR, the 'informational self-determination' deserves judicial protection. Any deviation

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334 Case C-507/17 *Google Inc. v Commission nationale de l'informatique et des libertés* [2019] CJEU.

335 Comissão Nacional de Protecção de Dados (CNPD), *CNPD delibera desaplicar algumas normas por violação do direito da União* (Portugal, 23 September 2019) <https://www.cnpd.pt/home/decisoes/Delib/DEL_2019_494.pdf>

336 European Law Students' Association Germany, *National Report on Internet Censorship,* 62.

from freedom of expression covers the 'discretionary area' known as 'national margin of appreciation' of state. It is in view of such precedents that regulations would develop in the future.

In Turkey, the data protection board regularly publishes secondary legislation, guidance and principles concerning data protection law. Governmental role in Azerbaijan after 2016 is improved in defining information situations in the coming five years. Azerbaijan can be argued to be at the verge of 'transmission to digital and electronic world', which will expectedly enhance the protection of this right.

The Spanish data protection agency, AEPD, has recently come up with guidance on erasure of data resulting from AI process titled as 'Adaptation of treatments of Data that introduce AI to GDPR'. With investments in blockchain technology, issues of applicability of data protection legislation are also emerging. Solution that the government is considering is limitation of right in distributed ledger systems to allow non-accessibility of data which is to be forgotten. or editable blockchain (no immutability) which is currently impossible. The permissible degree of freedom of expression will also have an impact on the applicability of Right to be Forgotten in the future. The Google Spain case is also a cornerstone for future development in the Netherlands also. Right of Erasure is seen as an imperative right, superior to any other interests including commercial interests. Dutch courts have been seeking to strike a balance between public and private interests in allowing Right to Erasure, somehow even more than the CJEU.

4. Conclusion

In a nutshell, the future regulatory developments in the 23 European states show some commonality as well as variations, which is also true for the EU states. The role of ISPs and online platforms would remain important and the permissible extent of their self-regulation would influence the future in three fields discussed in this chapter. For EU states, it remains to be seen how they would transpose the Copyrights Directive and enforce

GDPR while balancing the competing rights. Some of the non-EU states holding candidacy of the EU would also try to follow the same trend whereas, the states which don't hold candidacy of EU seem to require serious legislative attention.

Chapter 8

Balancing issues – online hate speech

By Beth Chalcraft

1. Introduction

The rise of online communication had necessitated a balance between allowing Freedom of Expression and protecting against hate speech. This chapter will explore firstly, the extent to which this balance has been achieved in the 24 countries examined, and secondly, the National Report's recommendations for maximising both of these rights. In order to do this, it will firstly examine trends in the countries' definitions of 'hate speech' and the applicability of such definitions to the online environment. Secondly, it will examine countries' criminal law, civil law, self-regulation methods and alternative initiatives. It will be concluded that whilst Freedom of Expression is commonly protected at the constitutional level and by other legislation, there is a trend towards heightening protection against online hate speech through a combination of laws, self-regulation by internet service providers ('ISPs') and alternative initiatives. As such, in the majority of countries, a balance whereby both rights are maximised has not been achieved as these protections have come at the cost of limiting Freedom of Expression.

2. Defining 'hate speech'

It is important to first consider how 'hate speech' is defined in order to assess the balancing exercise. As the Polish National Report points out, 'without a clear definition of [hate speech], identifying instances of it in practice might prove difficult'.[337]

[337] European Law Students' Association Poland, *National Report on Internet Censorship* 49.

There is a general trend of legislation providing a comprehensive list of personal characteristics which are protected from hate speech online. For example, Article 82(A)1 of the Maltese Criminal Code defines 'hate speech' as the stirring up of violence or hatred based on 'gender, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion'.[338] The Maltese Criminal Court of Appeal directly addressed the issue of Freedom of Expression in relation to Article 82(A)1 in The Police v Norman Lowell.[339] Judge Quintano held that the Right of Freedom of Expression is impinged upon when a statement becomes harmful to other people.[340] As such, even though the legislative definition may not explicitly reference Freedom of Expression, case law clarifies that the balancing act still underpins the interpretation of the legislation. Examples of other jurisdictions which contain a similarly extensive list like the Maltese Criminal Code include the Lithuanian Criminal Code Article 170,[341] the Armenian Criminal Code Article 226[342] and the Czech Republic Criminal Code Articles 355 and 356.[343] Interestingly, in the Czech Republic, the Supreme Court confirmed that hate speech does not have to be directed towards a particular individual based on one of these characteristics; referring to a group in general on the basis of a shared characteristic is sufficient to constitute hate speech.[344] As such, prohibiting hate speech in relation to specific characteristics indicates that there are strict limitations on Freedom of Expression.

Some countries' legislation contains additional, more specific characteristics and thus Freedom of Expression is limited to a greater extent. For

338 European Law Students' Association Malta, *National Report on Internet Censorship* 20.

339 [2013] Criminal Court of Appeal, 98/2011; European Law Students' Association Malta, *National Report on Internet Censorship* 20-21.

340 ibid.

341 European Law Students' Association Lithuania, *National Report on Internet Censorship* 43.

342 European Law Students' Association Armenia, *National Report on Internet Censorship* 64.

343 European Law Students' Association Czech Republic, *National Report on Internet Censorship* 23.

344 *Otto Chaloupka v the Supreme Court of the Czech Republic* (June 16th 2015, file number I ÚS 3018/14); European Law Students' Association Czech Republic, *National Report on Internet Censorship* 24.

example, 'physical, mental or intellectual disability' is included in the Dutch Criminal Code Article 137c,[345] and 'membership of the travelling community' is included in the Irish Prohibition of Incitement to Hatred Act 1989 s1(1).[346] This approach is welcomed by the Polish National Report, as they suggest that the Polish Criminal Code should be extended to include sex, sexual orientation, gender identity and disability as characteristics protected from hate speech online.[347] However, despite this, the Irish National Report highlights the difficulty in achieving a balance between Freedom of Expression and the right to be protected from hate speech online, as 'hate speech may be a moving target. For example, some statements may be considered humorous in some contexts but hatred in others'.[348]

In countries where case law has developed the definition of 'hate speech', freedom of expression appears to be more curbed than in countries where it has exclusively been developed by legislators. For example, in Spain, the Constitutional Court held that hate speech extends to burning portraits of the Kings of Spain.[349] Whilst these convictions were later quashed, the Spanish National Report points out that this attempt to extend the definition of 'hate speech' beyond characteristics specified in legislation may deter people from exercising their Right to Freedom of Expression in relation to criticising the monarchy, both online and offline.[350] Therefore, the Spanish National Report recognised that the widening of the scope of hate speech can shift the balance between Freedom of Expression and protection from online hate speech; such protections can result in an 'institutionalisation of Freedom of Expression'.[351]

345 European Law Students' Association the Netherlands, *National Report on Internet Censorship* 68.

346 European Law Students' Association Ireland, *National Report on Internet Censorship* 43.

347 European Law Students' Association Poland, *National Report on Internet Censorship* 51.

348 European Law Students' Association Ireland, *National Report on Internet Censorship* 43.

349 Judgment of the Constitutional Court No 177/2015 (22nd July 2015); European Law Students' Association Spain, *National Report on Internet Censorship* 76.

350 ibid.

351 ibid 68.

However, there are a minority of countries that do not have a singular legislative definition of 'hate speech'. For example, in Finland, there is no legislative definition, but the Finnish Police University College define a 'hate crime' as a crime 'motivated by prejudice or hostility towards the victim's real or perceived' characteristic.[352] As such, the Finnish National Report states that a balance is achieved in the absence of a legislative definition by taking a context and fact specific approach for each alleged instance of online hate speech by weighing up the conflicting interests.[353]

3. Constitutional protections

Whilst the aforementioned trends may point towards strict limitations on Freedom of Expression across Europe, this right is constitutionally protected in the majority of countries. Countries' constitutions most commonly state this protection in a general way. For example, Article 47 of the Constitution of Azerbaijan states that '[e]veryone may enjoy freedom of thought and speech'.[354] More unusually, the Constitution of the Kingdom of the Netherlands goes into more depth, specifying that freedom of expression constitutes (1) Freedom of the Press, (2) Freedom of the media and (3) Freedom of Expression by other means.[355] Enshrining this right in Constitutions highlights that across Europe, freedom of expression is regarded as a fundamental right. This reflects the approach of international law, as freedom of expression is protected under the European Convention on Human Rights (ECHR) Article 10.

352 European Law Students' Association Finland, *National Report on Internet Censorship* 60 citing Jenita Rauta, 'Poliisin tietoon tullut viharikollisuus Suomessa 2018' (Poliisiammattikorkeakoulun raportteja, 2019) 5.

353 European Law Students' Association Finland, *National Report on Internet Censorship* 62 citing Riku Neuvonen, *Vihapuhe Suomessa* (Edita Publishing Oy 2015) 28-29.

354 European Law Students' Association Azerbaijan, *National Report on Internet Censorship* 48.

355 European Law Students' Association the Netherlands, *National Report on Internet Censorship* 65.

4. Criminal and civil law

A growing trend that is emerging is that several countries' Criminal Codes specifically make reference to the dissemination of hate speech on the internet and impose higher penalties for such offences. Article 510(3) of the Spanish Penal Code 2017 states that hate speech is 'aggravated' when it is disseminated on the internet, and that the penalty for such conduct will be higher than non-aggravated hate speech.[356] The Spanish Constitutional Court developed this reasoning, holding that harm suffered as a consequence of online content is intensified due to the lack of control over the spreading of the content, the permanency of the content and the higher number of potential recipients.[357] In line with the stricter approach of the Spanish Courts, the High National Court has ordered the removal of tweets[358] and songs[359] praising terrorist groups. Similarly, the North Macedonian Criminal Code 2017 Article 394(d) specifies that it is a crime to spread hate speech 'via a computer system',[360] the Greek Criminal Code Article 183 uses the words 'via the Internet'[361] and the Bulgarian Criminal Code Article 162 uses the words via 'electronic information systems'.[362] In Malta, the Media and Defamation Act 2018 replaced the Press Act, as this Act only provided for hate speech disseminated via 'written material'.[363] This highlights that both case law and legislation are adapting to take into account the increasing prevalence of hate speech online and the use of the internet as a tool for the mass dissemination of hate speech. The Czech

356 European Law Students' Association Spain, *National Report on Internet Censorship* 73.

357 Judgment of the Constitutional Court 4/2017 (18th January 2017, FJ 2); European Law Students' Association Spain, *National Report on Internet Censorship* 73.

358 Judgement of the High National Court (Criminal Chamber, Section 1) No 4/2018 (10th July 2018); European Law Students' Association Spain, *National Report on Internet Censorship* 70.

359 Judgement of the High National Court (Criminal Chamber, Section 1) No 6/2018 (18th September 2018); European Law Students' Association Spain, *National Report on Internet Censorship* 70.

360 European Law Students' Association North Macedonia, *National Report on Internet Censorship* 47.

361 European Law Students' Association Greece, *National Report on Internet Censorship* 66.

362 European Law Students' Association Bulgaria, *National Report on Internet Censorship* 55.

363 European Law Students' Association Malta, *National Report on Internet Censorship* 21.

Republic National Report praise this approach, recognising that case law is best placed to deal with novel situations that cannot be explicitly referenced in legislation.[364]

Indirect approaches have also been taken to provide greater protection against hate speech specifically in online environments. For example, the Finnish Government have accepted a Bill to amend Chapter 11 Section 10 of the Finnish Criminal Code which will include the words 'make available to the public' for the offence of ethnic agitation.[365] This will come into force on January 1st 2021. As per Article 148(1) of Azerbaijan's Criminal Code, higher penalties are imposed in Azerbaijan for spreading hate speech via fake profiles and accounts than for disseminating hate speech from a personal account.[366] Interestingly, there is a separate offence in Azerbaijan under Article 323 of the Criminal Code for a hate speech offence targeted at the President.[367] This is also subject to the fake profile and account provision. The penalty for an offence under Article 323 is higher than that under Article 148(1) – under Article 323, the maximum sentence of imprisonment is 5.5 years, whereas corrective labour for 1 year is the maximum penalty for an offence under Article 148(1). The maximum fine under Article 323 is AZN 1500-2500, whereas it is AZN 1000-1500 for an offence under Article 148(1).[368]

Spanish legislation follows a similar approach. Under the Criminal Code Articles 510 and 578, the first element required to establish a hate speech offence is that the content must be public.[369] This is a wide requirement as the issuer of the content does not need to be the author, meaning that public sharing on social media (for example, retweeting on Twitter) would

364 European Law Students' Association Czech Republic, *National Report on Internet Censorship* 27.

365 European Law Students' Association Finland, *National Report on Internet Censorship* 63.

366 European Law Students' Association Azerbaijan, *National Report on Internet Censorship* 49.

367 ibid.

368 ibid.

369 European Law Students' Association Spain, *National Report on Internet Censorship* 71.

be sufficient to establish criminal liability.[370] In order for a message to be deemed private, the issuer must know every person in the group he is sending it to.[371]

However, certain countries provide more limited protections against online hate speech. For example, Finland does not criminalise denying genocide.[372] This is in direct contrast with a number of EU countries where this is a crime. In particular, in relation to the dissemination of hate speech online, Article 397 of the Armenian Criminal Code criminalises denying or justifying genocide via computer systems.[373] As such, the Finnish National Report recommends that this should be a criminal offence in Finland.[374] Another example of more limited protections against hate speech is in Serbia. Whilst the Serbian Regulative Body for Electronic Media has the power to impose sanctions on perpetrators of hate speech, in practice only a warning is usually issued.[375] A similar issue is present in the Netherlands. In the case of Geert Wilders, although the defendant was found guilty of disseminating hate speech under Article 137c and 137d, he was not fined.[376] This is indicative of the general trend in the Netherlands according to the Dutch National Report; there is an overreliance on criminal law to sanction this conduct because so few cases are prosecuted.[377] As such, the Report concludes that a balance cannot be achieved through relying on the criminal law alone to sanction such conduct.[378]

370 ibid 72.

371 ibid 72-72 citing Jaime Goyena Huerta, 'Some criminal matters on hate speech' (2018) 49 Aranzadi Journal on Law and Criminal Procedure 79.

372 European Law Students' Association Finland, *National Report on Internet Censorship* 70 citing Kimmo Nuotio, 'Vihapuheen rikosoikeudellinen sääntely' in Riku Neuvonen (ed), *Vihapuhe Suomessa* (Edita Publishing oy 2015) 160.

373 European Law Students' Association Armenia *National Report on Internet Censorship* 63.

374 European Law Students' Association Finland, *National Report on Internet Censorship* 70.

375 European Law Students' Association Serbia, *National Report on Internet Censorship* 50.

376 Rechtbank Den Haag, 9th December 2016, ECLI NL RBDHA 2016 15014; European Law Students' Association the Netherlands, *National Report on Internet Censorship* 69.

377 ibid 73.

378 ibid.

The civil law approach varies significantly across Europe. In Bulgaria, the civil law offers an alternative means of redress, as the Law of Obligations and Contracts Article 45 stipulates that (1) '[e]very person is obligated to redress the damage he has faultily caused to another person' and (2) '[i]n all cases of tort fault is presumed until otherwise proved'.[379] However, this is a general provision and thus it is not directly applicable to online hate speech. Romania takes a different stance, favouring freedom of expression over protection from hate speech in the context of tortious redress; the Romanian Civil Code Article 253 states that measures of protection from online hate speech can be taken by the judiciary when a tort is imminent except when such an interference is caused by the exercise of freedom of expression.[380] This exception is based on the idea that any such measure enforced by the judiciary would be a form of censorship and thus not allowed. The Romanian National Report criticises this exception, recommending that it should be removed for vulnerable people, including people with disabilities and minors.[381]

5. Self-regulation

A common recommendation is that some form of self-regulation should be established for ISPs due to the shortcomings of relying solely on criminal and civil laws. The Portuguese National Report recommends that ISPs establish filters to automatically block hate speech, and that they should be liable for the presence of hate speech on their platforms.[382] This is the approach taken for copyright in Portugal.[383] Similarly, the Polish National Report recommends that web administrators should monitor content to detect hate speech and have an obligation to counteract it.[384] In relation to the reporting procedure, the German National Report recommends that

379 European Law Students' Association Bulgaria, *National Report on Internet Censorship* 54.
380 European Law Students' Association Romania, *National Report on Internet Censorship* 38.
381 ibid.
382 European Law Students' Association Portugal, *National Report on Internet Censorship* 26-27.
383 ibid.
384 European Law Students' Association Poland, *National Report on Internet Censorship* 51.

this process should be simplified by making it possible to directly report content rather than having a more generalised reporting procedure.[385] These recommendations seek to balance Freedom of Expression and protection from online hate speech by providing greater protection to online users.

However, there are concerns about the lack of transparency of ISP self-regulation. The UK National Report points out that the UK, ISPs have more power in removing content than other UK entities.[386] Similarly, in Bulgaria, hate speech is usually controlled by broadbands, email providers, search engines and website moderators; they have discretion in deciding whether to block or filter content.[387] The criteria for removing content is unclear due to the lack of legal guidelines regulating these powers.[388] As such, this can lead to the illegitimate removal of content, thereby unduly curbing Freedom of Expression. In Armenia, a similar problem exists – ISPs cannot sufficiently evaluate whether content should be removed, and as such, the Armenian National Report recommends that an independent court makes this decision.[389] This is supported by the Italian National Report, which recommends independent adjudication for determining whether to remove content online.[390] Similarly, in Germany, the Network Enforcement Act can lead to over-blocking, as ISPs are required to remove 'manifestly unlawful content' within 24 hours.[391] This highlights the necessity of the *Freiwillige Selbstkontrolle Multimedia-Anbieter e.V.,* an independent body regulating and overseeing the self-regulation of ISPs.[392] A similar regulatory body is recommended in Ireland; the Irish Law Reform

385 European Law Students' Association Germany, *National Report on Internet Censorship* 64.

386 European Law Students' Association United Kingdom, *National Report on Internet Censorship* 58-59.

387 European Law Students' Association Bulgaria, *National Report on Internet Censorship* 54.

388 ibid.

389 European Law Students' Association Armenia, *National Report on Internet Censorship* 66.

390 European Law Students' Association Italy, *National Report on Internet Censorship* 33.

391 European Law Students' Association Germany, *National Report on Internet Censorship* 63-64.

392 ibid 65.

Commission recommend that a monitoring and oversight body is implemented by the Government to regulate 'notice and take down' procedures.[393]

The North Macedonian National Report suggests that ISPs themselves must increase transparency by (1) establishing a clear user guide for websites and social media sites and (2) informing perpetrators as to why their posts have been removed.[394] Similarly, the German National Report recommend that ISPs should have an obligation to restore content wrongly removed and such cases should be reported.[395]

6. Alternative initiatives

4 countries – Romania, the Netherlands, Finland and Italy – have implemented alternative initiatives to combat online hate speech. In Romania, the National Council for Combatting Discrimination is an administrative body designed to 'prevent, investigate, monitor and sanction discrimination'.[396] In the Netherlands, online users can report hate speech to the Hotline for the Discrimination on the Internet (MiND).[397] MiND is responsible for assessing the criminality of the speech and sending a removal request to the website on which the speech was published.[398] In Finland, the Ministry of Justice launched Facts Against Hate, a project focused on 'hate crime reporting, local cooperation practices, hate crime monitoring and transnational and EU-level cooperation'.[399] The common trend between these initiatives is that they aim to provide greater protection against hate speech. However, the Italian initiative provides for a more adequate

393 European Law Students' Association Ireland, *National Report on Internet Censorship* 46.
394 European Law Students' Association North Macedonia, *National Report on Internet Censorship* 56.
395 European Law Students' Association Germany, *National Report on Internet Censorship* 64-65.
396 European Law Students' Association Romania, *National Report on Internet Censorship* 41.
397 European Law Students' Association the Netherlands, *National Report on Internet Censorship* 71.
398 ibid.
399 European Law Students' Association Finland, *National Report on Internet Censorship* 69.

balance between protection from hate speech and Freedom of Expression. In 2014, Italy's Special Parliamentary Committee created a policy document titled 'Declaration of the Rights on the Internet'.[400] Article 13 of the Declaration contained an explicit reference to the balancing act; although the Declaration states that 'no limitations on freedom of expression are accepted', it also states that 'the protection of people's dignity must be protected from abuses related to behaviors such as incitement to hatred, discrimination and violence'.[401]

A commonality between Romania and Italy is that their approaches are deemed insufficient at tackling online hate speech. The Romanian National Report states that because the maximum penalty the National Council for Combatting Discrimination can impose is only a fine, the body has a limited impact on addressing the prevalence of online hate speech through sanctions.[402] Similarly, the Italian National Report points out the limited impact of the Declaration due to the fact that it is not legally binding on ISPs.[403] As such, these issues highlight the fact that whilst these initiatives seek to address the balance by regulating instances of online hate speech alongside the criminal law and civil law, in practice they are can be ineffective at protecting users from hate speech.

7. Has a balance been achieved?

This chapter has explored the extent to which a balance has been achieved in the 24 countries examined between allowing Freedom of Expression online and protecting against hate speech. It has compared and contrasted the legislative definitions of hate speech, constitutional protections of both rights, the intervention of both the criminal law and the civil law, self-regulation by ISPs and alternative initiatives aimed at combatting online hate speech. It is concluded that whilst there are certain legislative and constitutional protections for Freedom of Expression, this right is

400 European Law Students' Association Italy, *National Report on Internet Censorship* 31.
401 ibid.
402 European Law Students' Association Romania, *National Report on Internet Censorship* 43.
403 European Law Students' Association Italy, *National Report on Internet Censorship* 31.

significantly curbed. This is mainly due to heightened protections for online users against hate speech through, for example, higher criminal sanctions for hate speech disseminated via the internet, unregulated take-down procedures by ISPs and alternative mechanisms aimed at protecting users online. The greatest limitations on Freedom of Expression appear to be in the political context. For example, this is evident in the higher criminal sanctions for disseminating hate speech again the President in Azerbaijan, and the Spanish Constitutional Court's decision that the burning of portraits of the Kings of Spain constituted hate speech.

Despite this, the National Report's recommendations are mixed. For example, many National Reports recognise that there is a lack of transparency in ISPs self-regulating content, meaning Freedom of Expression is curbed. As such, they recommend independent adjudication by courts on taking down content, and regulation of ISPs' take-down procedure by independent bodies. However, National Reports also recognise that alternative initiatives aimed at protecting online users against hate speech can be largely ineffective, and that some countries' definitions of 'hate speech' leaves many personal characteristics unprotected. Therefore, it is concluded that whilst there are limitations on both the right to Freedom of Expression and the right to be protected against online hate speech, the majority of countries do not have an adequate balance due to the fact that Freedom of Expression is limited by a combination of legal and non-legal methods.

Chapter 9

Balancing issues – protecting rights online

By Berk Hasan

1. Introduction

This chapter is dedicated to examining the practices of the countries assessed by the report in the context of striking an adequate balance between the Freedom of Expression online and other Rights. The chapter then draws conclusions about possible improvements thereon. However, before getting into the subject there are three issues to be mentioned.

First, in order to answer the question of whether a specific country 'has reached' an adequate balance between Freedom of Expression online and the protection of other Rights, the examination of ECtHR jurisprudence is vital in addition to the scrutiny of national case-law and legislation. Nevertheless, it is advisable to bear in mind that, as explained by the Commissioner for Human Rights of the Council of Europe '[r]ecent case-law of the ECtHR is not an appropriate indicator of the current situation regarding freedom of expression […], given the time it takes for infringements to be challenged before domestic courts, including the Constitutional Court, before bringing a case to Strasbourg.'[404] Therefore, in this chapter, more weight will be given to the domestic laws and practice.

Secondly, when analysing the issue of balance between protecting the Freedom of Expression online and other Rights, it may be beneficial to

[404] Commissioner for Human Rights of the Council of Europe, *Memorandum on freedom of expression and media freedom in Turkey (CommDH(2017)5)* (Council of Europe 2017) para 14.

draw a distinction between 'limitations due to "public" reasons'[405] and cases where one's own Freedom of Expression is in conflict with the Rights of another individual. The difference between these two is, while the former primarily concerns the interests of the State as a whole, the latter is not directly related to the interests of the State but of the individual whose Rights are at stake. This distinction is helpful when examining national legislation and court decisions since it is completely possible that a country has a relatively exemplary – albeit not excellent – practice when balancing one's Freedom of Expression online with the Rights of other individuals, whereas the balance reached in the same country practice may be controversial when public reasons are in question, or – even though less likely – vice-versa.[406]

Finally, instead of cataloguing in detail which country balances which right in a reasonable manner, the main goal in this chapter is to understand how to *maximize the possibility* to strike an adequate balance and this will be done in a comparative approach by pointing out to what may be deemed good practices; the issues that prove problematic according to the National Reports and possible improvements thereon.

2. Limitations to Freedom of Expression Online

Before addressing the problems and advises on improvements, some general remarks will be made separately for limitations due to public reasons

405 Dominika Bychawska-Siniarska, Protecting the Right to Freedom of Expression Under the European Convention on Human Rights: A handbook for legal practitioners, (Council of Europe 2017) 47ff.

406 For instance, Turkey may constitute an apt illustration for such contrast since even though it can be stated, according to the Turkish National Report, that the country has reached an adequate balance between allowing one's Freedom of Expression online and protecting Rights of the others, considering the Memoranda of the Commissioner for Human Rights of the Council of Europe, the issue is clearly open to discussion as for some cases where Freedom of Expression was subject to limitations due to public reasons. See, European Law Students' Association Turkey, 70ff; Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey (CommDH(2017)5) (Council of Europe 2017).

and cases where one's Freedom of Expression intersects with the Rights of another individual.

2.1. Limitations to Freedom of Expression Online Due to Public Reasons

As explained in the previous chapters, states have provisions which provide for restrictions to the Freedom of Expression based on public reasons such as national security, health and public order. Common amongst the countries, these kinds of limitations are foreseen by Art. 10 ECHR which is applicable in all examined jurisdictions. However, although the general public reasons that are enumerated in national legislations are similar, notably there are 'sub-categories' which lead to significant differences in practice between the states examined. While there are common issues which states outlaw, there are also variations as to some restriction grounds particularly in the context of public order. Limitation to access to pornographic content, for instance, constitutes an issue of difference between the countries. While some countries, such as Turkey, deem pornographic content detrimental to public order and block online pornography, there are others, such as the Netherlands, where pornography is covered by Freedom of Expression in so far as it stays within lawful boundaries.[407] This example is a simple illustration of how the sought-after balance may differ, even in the same context, depending on the legislators' policies and societal attitudes. On the other hand, there are other sub-categories that constitute common points of sensitivity amongst the states. In this regard, it may be stated that online activities concerning topics universally deemed to be illegal such as child pornography and terrorism constitute the end point of the spectrum of balance where other rights prevail against the Freedom of Expression.

However, balancing rights is an issue where the crux of controversy is in principle dissipated amongst the shades of grey instead of the extreme points. In the context of restricting Freedom of Expression online due to

[407] Mustafa Akgül and Melih Kırlıdoğ, 'Internet censorship in Turkey' (2015) 4(2) Internet Policy Review 1, 12; European Law Students' Association the Netherlands, 106.

public reasons, this greyness mainly consists of limitation grounds that are political and National Reports show that the question of balance in this area can be quite connected with national political situations. For instance, in Spain, urgent measures are taken for reasons of public security in the area of digital administration and telecommunications with Royal Decree-Law 14/2019 which modified Article 155 of the Law 40/2015 concerning data transfers between Public Administrations. While protecting individuals from public disorder and misinformation, the original and the modification of Article 155 has been subject to criticism on the ground that it constitutes 'implicit state oppression on the Catalan movement of independence as a response to the overwhelming manifestation of Tsunami Democracy and other pro-independence groups, regarding its mobilization online and discussions of a nation-state aspiration in the digital forums.'[408] Accordingly, it has been stated that the balance between the Freedom of Expression online and the other Rights 'has been conditioned on the political crisis that has taken place in Spain for the past three years between the Central Government and the Regional Government of Catalonia.'[409] Turkey constitutes another example country where political situation has played a significant role in the context of balancing Freedom of Expression online and restrictions based on public reasons. In Turkey, the state of emergency enacted in the wake of the 2016 coup attempt allowed the President to issue decrees that were used to block websites and shut down communication networks without judicial oversight.[410] Decree No. 671 of 2016 empowered the government to take 'any necessary measure' for the purpose of, *inter alia*, national security and public order.[411] Having more than 240 thousand inaccessible websites as of December 2018 (a significant increase from 40 thousand in 2013),[412] in Turkey, limitations due to public reasons have made their presence felt more particularly after

408 European Law Students' Association Spain, 89.

409 ibid.

410 European Law Students' Association Turkey, 87.

411 The decree still remains on the books even though the state of the emergency is no longer in effect. ibid.

412 Yaman Akdeniz and Ozan Güven, 'Engelli Web 2018' (July 2019) <https://ifade.org.tr/reports/EngelliWeb_2018_Eng.pdf> accessed 1 July 2020.

the failed military coup attempt in 2016.[413] The increase in the censored content has mainly been the result of blocking of news sites and articles that criticise the government.[414] These developments are indicators of how political problems may endanger the balance by dislocating the line of the spectrum in detriment of Freedom of Expression online for the sake of public reasons.

2.2. Limitations to Freedom of Expression Online Due to Rights of Other Individuals

The second part of the limitations covers situations where one's Freedom of Expression intersects with the Rights of another individual. So far, domestic courts of different countries have dealt with a vast number of cases where they had to strike a balance between the Freedom of Expression online and other Rights, such as, honour and dignity, reputation, protection of personal data and Right to be Forgotten. In this regard, similar to the case with many other human rights, country reports demonstrate that states have taken a parallel legislative approach which may be characterised with the famous quote: '[…] your right to swing your arm leaves off where my right not to have my nose struck begins.'[415]

Nevertheless, even though the *ratio legis* is clear, each individual case may present unprecedented problems or complex challenges when conflicting rights are at stake. Thus, as a common ground across national laws, the task of striking a balance between Freedom of Expression and other Rights is primarily left to judges on a case-by-case basis. Indeed, the Constitutional Court of Bulgaria, in its Advisory Opinion on the Provisions of Articles 39 - 41 of the Bulgarian Constitution relating to Freedom of Expression, claimed that it would not be appropriate to prevent the judiciary bodies of the country from working out their case-specific solutions by

413 European Law Students' Association Turkey, 88.

414 ibid, 84.

415 John Bird Finch and Charles Arnold McCully (ed), *The People Versus The Liquor Traffic: Speeches of John B. Finch, Edited by Charles Arnold McCully* (24th (Revised) edn, Funk & Wagnalls) 127–128.

setting predefined guidelines.[416] On the other hand, one may question whether there are rights that are *prima facie* favoured over the Freedom of Expression online in country practices.

In the context of prioritisation of rights, it should be mentioned that in addition to the universal outlawing of child pornography, childhood and information of the child are subjects under particular protection against online expression. For instance, in order to protect children from harmful information, Article 388-2 of the Azerbaijani Code of Administrative Offences takes precautions as to disseminating a specific category of content which may be inappropriate for kids.[417] In Spain, Section 7 paragraph 2 of Law 7/2010 of 31 March 2010 states that 'it is forbidden the emission of audio-visual content that can harm the physical, mental or moral developments of minors and in particular programs that include pornographic scenes or violence. The conditional access must enable parental control'.[418] As established in the Spanish Organic Law 1/1996 of 15 January 1996, if any of the above-mentioned provisions that constitute safeguards for the protection of minors enter into conflict with freedom of information or expression, the Rights of the child prevail.[419] In Italy, with the procedure that has been introduced with Law n. 71 of 29 May 2017, it became possible to file a request of removal either directly to the webmaster, to the host provider or to the Authority for the Protection of Personal Data for any content related to cyberbullying of minors.[420]

416 European Law Students' Association Bulgaria, 60.

417 European Law Students' Association Azerbaijan, 54.

418 European Law Students' Association Spain, 86.

419 ibid.

420 European Law Students' Association Italy, 41 citing Paolo Pittaro, 'La legge sul cyberbullismo' 8-9 Famiglia e diritto (2017) 819, 819; Roberto Bocchini, 'Le nuove disposizioni a tutela dei minori per la prevenzione ed il contrasto del fenomeno del cyberbullismo' 41(2) Nuove leggi civili commentate (2018) 340, 340; See also, for the relevant Lithuanian Legislation European Law Students' Association Lithuania, 13–15, 25–28.

However, in contrast to the protection of children, a subject on which states are of one mind, there are also issues which divide the national legislators of the states assessed, such as sanctions that are imposed for defamation.[421] For instance, in Bulgaria, France, Germany, Italy, the Netherlands, Portugal and Turkey, when defamation and/or insult are committed against a public official, a harsher punishment is provided compared to that in the case where the same act is committed against a private person. Nevertheless, differently than other aforementioned countries, imprisonment is not a possible sanction in Bulgaria and France as only increased fines are imposed for such type of insult.[422] While some countries such as Azerbaijan, Germany, Greece, Italy, Malta, Poland, Portugal and Turkey have special laws prohibiting insult/defamation of republican Heads of State; in France, the criminal defamation law protecting the French President was repealed following the decision of the ECtHR in *Eon vs France*.[423] Nevertheless, as mentioned above, French Law imposes increased fines for such type of insult similarly to Lithuanian Law which provides administrative penalties.[424]

3. Maximising the Possibility to Strike an Adequate Balance

In this section, focus will be laid on the improvements that may be considered to maximize the ability to reach an adequate balance.

421 It should be kept in mind that terminology may be misleading in comparative study in this context since no standard usage exists for the English-language terms 'defamation', 'insult', 'libel', etc. in translations of domestic legislation and word choice can be different even within single languages.
OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017) 9.

422 ibid, 13.

423 ibid, 16; Eon v. France App. No. 26118/10 (ECtHR, 14 March 2013).

424 OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017) 16–17.

3.1. Possible Improvements to National Legislations Concerning Substantive Law

First of all, in balancing Freedom of Expression online with other Rights, anonymity should be an issue of enormous significance given the fact that it places a certain burden on States to trace down people that are responsible for violations. One way that is found by states for overcoming anonymity is introducing the liability of network providers. In addition to a recent draft law[425] in Italy that introduced the liability of network providers which had the role to control websites and web platforms, the German legislator has also recognized the difficulties intrinsic in the anonymity of the first person responsible and introduced the Network Enforcement Act (NetzDG) on April 2017 whereby deletion by private individuals has been introduced for certain illegal content.[426] In this regard, the Irish National Report suggests that instead of placing the onus on the service provider or the social media group to take down information, the police should be provided with clear guidelines which allow them to investigate complaints.[427] It must be stressed that the issue of anonymity is of utmost importance especially in cases where online expression affects the protection of children. In this context, Greece National Report underlines that to pierce the veil of anonymity, states have to set a sufficient legal framework which provides safeguards that 'must at least include ex post moderation of content flagged as inappropriate for young users'[428] and that more severe liabilities should be imposed on internet servers and intermediaries in

425 N. 2688, 'Disposizioni per prevenire la manipolazione dell'informazione online, garantire la trasparenza sul web e incentivare l'alfabetizzazione mediatica' 2017 <www.senato.it/service/PDF/PDFServer/BGT/01006504.pdf> accessed 1 July 2020; See also European Law Students' Association Italy, 36.

426 See, for a discussion concerning the constitutionality of content deletion by private individuals and its possible effect on the balance, European Law Students' Association Germany, 55-56.

427 European Law Students' Association Ireland, 51 citing Eva Nagle, 'To Every Cow Its Calf, to Every Book Its Copy: Copyright and Illegal Downloading after EMI (Ireland) Ltd and Ors v. Eircom Ltd [2010] IEHC 108' 24 International Review of Law Computers & Technology (2010) 309, 309.

428 European Law Students' Association Greece, 77 citing Wolfgang Benedek and Matthias C. Kettemann, *Freedom of Expression and the Internet* (Council of Europe 2014) 93.

matters related to the protection of children.[429] The case of *K.U. v. Finland*,[430] where personal details of a 12-year-old were anonymously published on a dating website, is an example of how the privacy of the child can be infringed by being put in danger of sex predators if a state lacks sufficient legislation for notice-and-takedown of information.[431] In the absence of effective ways to overcome anonymity and to notice-and-takedown information in matters that are detrimental to the childhood, the sought-after balance is out of reach as the international standard of best interests of the child cannot be fulfilled.

Concerning the balance between Freedom of Expression online and other Rights, another topic that is addressed by many country reports is legal clarity and certainty. These are particularly important since lack of legal certainty may cause individuals not to exercise their Freedom of Expression online to the fullest lawful extent due to fear of potential liabilities. It may also lead to unnecessary blocking of content by national authorities or by internet service providers. Such uncertainty among private individuals and legal persons could in practice lead to self-censorship and a *de facto* imbalanced enjoyment of the Freedom of Expression due to public uncertainty of how the balance between contesting rights is struck.[432] The Armenian National Report argued that the existing balance between Freedom of Expression online and the other rights could be improved by implementing a more specific set of rules.[433] In Spain, the aforementioned

429 European Law Students' Association Greece, 77.

430 K.U. v Finland App. No. 2872/02 (ECtHR, 2 March 2009).

431 In the case, there was a violation of Article 8 ECHR since at the material time no framework was provided by the Finnish legislation for reconciling the confidentiality with the prevention of crime and the protection of the rights and freedoms of others. K.U. v Finland App. No. 2872/02 (ECtHR, 2 March 2009) para 49–50.

432 The problematic nature of vague and/or overbroad laws and imprecise terms/concepts in the area of Freedom of Expression has also been addressed by ECHR in *Leroy v. France* (App. No. 36109/03, 2 October 2008.) Tarlach McGonagle, *Freedom of Expression: Still a Precondition for Democracy Conference Report* (Council of Europe Conference, 13-14 October 2015 Strasbourg) <https://rm.coe.int/16805aa8be> accessed 24 July 2020.

433 European Law Students' Association Armenia, 72–73.

Royal Decree-Law 14/2019 of October 31, has given the Central Government the right to assume direct management or to intervene in networks and electronic communications services in exceptional cases.[434] However, because of not outlining the specific cases and leaving the definition of exceptionality at the hands of the executive, the Spanish National Report stated that the relevant provisions of the law were ambiguous and became subject to criticism.[435] Moreover, as stated above, the task of striking a balance between Freedom of Expression and other Rights is primarily left to national judges on a case-by-case basis. The French National Report, for instance, states that with the application of the 'proportionality rule', French judges possess 'a large marge of the appreciation and a huge liberty [sic]' in deciding whether content in question shall be removed or not.[436] It can be argued that in such cases, not only the legislation itself but also an established case-law becomes very important for reaching a fair balance between the Freedom of Expression and other Rights as this gives the ability to individuals to at least envisage the legal consequences of their online expressions if a judicial process is ever initiated against them. An interesting example concerning the effect of case-law on balancing the Freedom of Expression online was in North Macedonia where out of 4 Appellate areas Gostivar, Bitola and Shtip did not have any problems in deciding on the liability of portals with '.mk' domains by treating them as traditional media in the civil proceedings.[437] Appellate area of Skopje, on the other hand, found in their decisions that internet portals could not be held liable for the content on their web sites same as traditional media.[438] As such practice was in force until 2019, the North Macedonian National Report states that '[t]he balance between the freedom of expression vis-à-vis the right to private life – reputation has been a severe problem in the past 5 years' and that 'there was no unified balance between the freedom

434 European Law Students' Association Spain, 89–90.
435 ibid, 90.
436 European Law Students' Association Spain, 42–43.
437 European Law Students' Association North Macedonia, 60.
438 ibid, 60–61.

of expression and the right to private life (right to reputation) when it comes to the internet portals.'[439]

Related to the balance between the Freedom of Expression online and the Rights of other individuals, another crucial issue is the preventative function of sanctions. This is of utmost importance for encouraging individuals to seek justice in cases of violation as well as for discouraging those who intentionally seek to use Freedom of Expression in a manner that violates the Rights of others. In this regard, the Czech National Report states that improvements to encourage the preventive function of law should be made as it has become economically advantageous to publish slander and defame since the amount of monetary satisfaction granted is overall insufficient.[440] On the other hand, the preventative function of sanctions constitutes a specially delicate issue in balancing the Freedom of Expression online particularly in cases of defamation. In addition to the UN Human Rights Committee who particularly condemned sanctioning acts of defamation with imprisonment, Council of Europe has been promoting the decriminalisation of defamation and proportionality of defamation laws.[441] The rationale for this is that 'criminal convictions inherently have a chilling effect on freedom of expression' and that – although depending on the particularities of each case – generally 'even "moderate" fines or suspended prison sentences are disproportionate interferences

439 ibid.

440 Nevertheless, it is mentioned that recent judgment of *Havlová v. Bauer Media* where 4 million Czech Crowns (≈155,143 EUR as of 20 August 2019, the date of the decision of Prague High Court) were awarded may be indicating a change as this amount significantly exceeds the amounts that courts usually award in similar cases. European Law Students' Association Czech Republic, 28; 'Čtyři miliony pro Havlovou. Dostane odškodné za nepravdivou zprávu bulváru o milenci' (*Rozhlas*, 21 August 2019) <https://www.irozhlas.cz/zivotni-styl/spolecnost/dagmar-havlova-pestry-svet-bauer-media-pokuta-odskodne_1908201413_ako> accessed 23 July 2020.

441 Council of Europe Committee of Ministers, Declaration on freedom of political debate in the media (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies); General comment No. 34, U.N. Human Rights Committee, 102nd session, published 12 September 2011, para 47.

and therefore contribute to or amount to violations of the right to Freedom of Expression."[442] Even though the matter acquires even more relevance in cybersphere, 'where commenting underneath someone's else personal content has become a matter of one click',[443] today, many countries have legal provisions that criminalize the act of defamation.[444] In this regard, the provisions of the Dutch Criminal Code criminalising all forms of defamation have been criticised by the Dutch National Report.[445] Additionally, according to the principles of ECtHR, any domestic legislation that protects politicians and high-ranking officials by special or higher penalties against defamation or insult, specifically by the press, would be incompatible with Article 10 ECHR.[446] The aforementioned legislations which sanction defamation more severely if the victim is a public official are therefore criticised with constituting a 'clear breach of international standards' and special national laws that specifically protect the reputation and honour of the heads of states are claimed to be in 'obvious contradiction with the democratic pillars of public scrutiny and accountability'."[447] It has been argued, for instance, that Article 184 of the Portuguese Criminal Code which raises the minimum and maximum punishments by one-half when defamation or insult is committed against a wide range of public figures in virtue of their function results in a violation of Freedom of Expression.[448]

442 Tarlach McGonagle and Onur Andreotti (ed) *Freedom of Expression and Defamation* (Council of Europe 2016) 8.

443 European Law Students' Association the Netherlands, 103.

444 OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017) 6.

445 European Law Students' Association the Netherlands, 104.

446 Otegi Mondragon v. Spain App. No. 2034/07 (ECtHR 15 March 2011); Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the European Convention on Human Rights: A handbook for legal practitioners*, (Council of Europe 2017) 65.

447 OSCE, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (2017) 5–6 and 13.

448 European Law Students' Association Portugal, 29.

3.2. Possible Improvements Concerning Non-Substantive Law and Non-Legal Matters

The issues already addressed in this chapter related to types of legal controversies that could mainly be handled with legislative or judicial action. However, as there are many other factors that are relevant in balancing the Freedom of Expression online with other Rights, even a well-made legislation *per se* may not necessarily guarantee a fair balance.

For instance, the Irish Defamation Act of 2009 which protects the Right to a good name has been subject to criticism since the costs associated with defamation proceedings are not covered by civil legal aid. As the Act arguably merely helps those who can afford the protection, it has been stated that the prohibitive expense involved with an action of this nature may demotivate or even deter the less affluent from initiating legal procedure to restore their good name.[449] According to the Irish National Report, this causes an imbalance between Freedom of Expression and protection of a good name by leaving those whose Rights are infringed on their own against financial constraints.[450] This example demonstrates the way administrative burdens placed on the enjoyment and defence of individual rights (such as the cost of proceedings) can disturb the intended balance struck by the legislators.

Another very important determinant is the ability of the national judicial systems to deliver decisions in a timely manner. Given the fact that the collision between Freedom of Expression online and other rights has an undeniable potential to result in cases where 'even an immediate decision is too late', the Czech National Report noted that improvements should be made in order to expedite the judicial process in such cases.[451]

449 European Law Students' Association Ireland, 48 citing Sarah Frazier, 'Liberty of Expression in Ireland and the Need for a Constitutional Law of Defamation' (1999) 32 Vanderbilt Journal of Transnational Law 391.

450 European Law Students' Association Ireland, 48.

451 European Law Students' Association Czech Republic, 28.

Moreover, the independence and the impartiality of decision makers is extremely important for securing an adequate balance, particularly in cases where individuals are charged with accusations of defaming the Head of State or other public figures. In such cases, an independent and impartial judiciary is essential to the balanced enjoyment of the right to free expression since even the perception of the lack of independence in the administration of justice may dissuade individuals from expressing themselves freely on the internet in a lawful manner. The statements of the Commissioner for Human Rights of the Council of Europe for Turkey is notable in this regard as '[t]he Commissioner and his predecessor had observed in previous reports that prosecutors and courts in Turkey often […] see their primary role as protecting the interests of the state, as opposed to upholding the human rights of individuals.' [452] Similar statements have been made for Azerbaijan, where although some meaningful reforms, particularly related to the selection of judges, have been undertaken in recent years, 'the judiciary does not appear to have played an impartial role in the trial of journalists, but instead sided with the government against its critics.[453]

4. Conclusion

After explaining, on one side, the common points of sensitivity and on the other, how the struck balance may differ depending on the legislators' policies, societal attitudes and national political situations, this chapter reaches to the conclusion that reaching an adequate balance between the Freedom of Expression online and other Rights is an issue that calls not only for amelioration of substantive law, but also for improvements with regard to

[452] Commissioner for Human Rights of the Council of Europe, Memorandum on freedom of expression and media freedom in Turkey (CommDH(2017)5) (Council of Europe 2017) para 8; See, for the previous report, Commissioner for Human Rights of the Council of Europe, Freedom of expression and media freedom in Turkey (Report by Thomas Hammarberg) (CommDH(2011)25) (Council of Europe 2011).

[453] International Bar Association's Human Rights Institute (IBAHRI), *Azerbaijan: Freedom of Expression on Trial* (International Bar Association 2014) 8; 'the judiciary is beholden to the executive' Amnesty International, *The Spring That Never Blossomed: Freedoms Supressed in Azerbaijan* (Amnesty International 2011) 8; Human Rights Watch, *The Vanishing Space for Freedom of Expression in Azerbaijan* (Human Rights Watch 2010) 10.

procedural issues as well as non-legal matters. As to possible improvements concerning substantive law, anonymity should be an issue of enormous significance given the fact that it places a certain burden on States to trace down people that are responsible for violations. Particularly for reaching an adequate balance in cases where online expressions affect the protection of children, states must set a sufficient legal framework to overcome anonymity and to notice-and-takedown information. Another topic that is addressed by many country reports is legal clarity and certainty as uncertainty about how the balance between contesting rights is struck may lead to a *de facto* imbalanced enjoyment of the Freedom of Expression. Given that the task of striking a balance between Freedom of Expression and other Rights is primarily left to judges on a case-by-case basis, not only the legislation itself but also an established case-law becomes very important for legal certainty and a balanced enjoyment of Freedom of Expression online. Furthermore, it is stated that the chilling effect of criminalising defamation and inappropriateness of national laws that protect politicians and high-ranking officials by special or higher penalties against defamation or insult also present obstacles to the sought-after balance. As for the possible improvements concerning non-substantive law, administrative burdens such as the cost or the slowness of the proceedings can disturb the intended balance struck by the legislators. Moreover, the independence and the impartiality of decision makers are also extremely important for securing an adequate balance, especially in cases where individuals are charged with accusations of defaming the Head of State or other public figures.

Chapter 10

Level of protection

By Perttu Ojala

Based on the reports submitted by the national groups of The European Law Students' Association (ELSA), the access to freedom of expression online varies considerably between different European countries. For example, ELSA Bulgaria ranks the freedom of expression online in Bulgaria as 5/5 in contrast to ELSA Turkey's rating of 2/5 for Turkey.

The highest grades of 5/5 were given to the Netherlands, Finland, Bulgaria and Romania. Lithuania was granted the grade of 4,5/5. The most common grade of 4/5 was received by Poland, Serbia, Portugal, Italy, Greece, Armenia and Germany. North Macedonia, Ireland and the United Kingdom were given the grade of 3/5. The grade of 2,5/5 was granted to Spain. The second lowest grade of 2/5 were given to Albania and Turkey. No country received the grade of 1/5 whereas the ELSA divisions of Azerbaijan, Hungary, France, the Czech Republic and Malta did not rank their countries with a grade.

Article 10 of the European Convention on Human Rights guarantees everyone the right to freedom of expression. This includes the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, it may be subject to restrictions that are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This means that to protect other fundamental and human rights, freedom of expression must sometimes be restricted. Or as ELSA Bulgaria phrases:

> 'Human rights must be regulated by censorship to the extent that it creates a safe environment for users but not at the cost of their freedom.'[454]

The reports by ELSA name several threats to freedom of expression online. The most often mentioned threats are hate speech, government suppression of opposition mainly by blocking and removing content and spreading of fake news.

One of the obstacles to freedom of expression is pursuits of some governments of suppressing dissidents. ELSA Azerbaijan states:

> 'The biggest threat to online freedom of expression has been government crackdown on individuals who have made critical comments on the Internet.'[455]

This suppression of freedom of expression in Azerbaijan has taken such forms as fining protestors, blacklisting and blocking websites and restricting the use of the national domain name. However, although the Azerbaijani authorities are increasingly trying to control the internet, the internet is still considered 'partly free' in other words less restrictive than most print and broadcast media, the main source of news for most Azerbaijani citizens. The media law, adopted in 1999, considers the Internet a media outlet. For this reason, all the problematic rules of law that apply to the media can be applied to regulate the Internet.[456]

The situation in Serbia seems to be quite similar. According to ELSA Serbia:

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454 European law Students' Association, Bulgaria, National Report on Internet Censorship, 62.

455 European law Students' Association, Azerbaijan, National Report on Internet Censorship, 61.

456 ibid. 61–63.

> 'In Serbia, the current government is using the side ways to cover the evidence about illegal happenings related to their political party. And they will try to cover the truth at any cost. Writing content against the ruling party can get you fired or you can get you brought to the police hearing.'[457]

The people most affected by this pressure from the government are journalists who have received intimidation, violence and arrests.[458] In contrast there are many examples of countries where pressure from the government is non-existent. Reports from such countries as the Netherlands, Finland and Italy suggest that the governments of these countries respect the freedom of expression both online and offline.

Hate speech is one of the current issues concerning freedom of expression in Europe. Countering it is an increasingly popular justification for restricting freedom of expression. In most European countries the access to freedom of expression online per se does not seem to be the problem, like in dictatorships where true censorship is enforced. Instead hate speech often makes expressing one's opinion online unappealing which de facto creates obstacles for freedom of expression online. ELSA Portugal addresses the situation in their country:

> 'A certain opinion may be illicit if it offends other rights or interests. For example, the crime of discrimination and incitement to hate and violence (Article 240 Criminal Code), which consists of developing propaganda activities that incite or encourage racial, religious or sexual discrimination, among others.'[459]

The importance of restricting hate speech on the internet is emphasised by ELSA Lithuania:

457 European law Students' Association, Serbia, National Report on Internet Censorship, 54.

458 ibid. 53–58.

459 European law Students' Association, Portugal, National Report on Internet Censorship, 30.

> 'People in Lithuania still think that the section for comments on the internet is the place to express their opinion without any restrictions. The opinion exists that no one is liable for content which people post in comment sections. It is one of the main challenges in Lithuania nowadays for both Lithuanian education and judicial systems – to educate people that the internet is the same public space as newspapers, shopping centres, city squares, etc. Therefore, the internet is a subject to the same restrictions as any other public space."[460]

The permissive attitude of Lithuanian courts towards online hate speech led to a judgement in the recent case of ECtHR *Beizaras and Levickas v. Lithuania* (no.41288/15, 14 January 2020), in which the ECtHR concluded that Lithuania had infringed Article 13 (Right to an effective remedy) and Article 14 (Prohibition of discrimination) of European Convention of Human Rights.

While naming a recent hate crime that took place in Malta, the importance of countering hate speech on the internet is addressed by ELSA Malta:

> 'As of recently, hate speech has shown to be more frequent on the internet over the past years as it tends to attract attention. This is a dangerous practice as the internet is a level playing field that is available for everyone to see, including children and young adults who are still forming their opinions on certain matters and thus considered impressionable. Such hate speech may even have a negative effect in real life and cause certain events."[461]

To curb among other harmful things hate speech, the government of France has in recent years enacted legislation to block websites with potentially objectionable content. Subsequently a secret list has been drawn up with the several websites which are likely to be blocked by the French administration. This legislation has been strongly criticized due to its secret

460 European law Students' Association, Lithuania, National Report on Internet Censorship, 46.

461 European law Students' Association, Malta, National Report on Internet Censorship, 28.

use and limits and even described by activists as a 'secret police censorship.'[462] In contrast, according to ELSA Spain, the Spanish legal system tends to extend the protection of hate speech to the detriment of freedom of expression.[463]

Blocking and removing of content is another concerning issue. In many countries there are a few regulations scattered across different acts which might hinder the transparency of blocking or removing content.[464] Blocking of content is particularly the issue in Turkey which has one of the lowest rankings regarding the access to freedom of expression online. A civil society initiative that lists blocked websites in Turkey found that more than 240 thousand websites were inaccessible as of December 2018. This is one of the reasons ELSA Turkey concludes in its report that the accusations raised by the European Commission in recent years – namely that Turkish law is not able to guarantee a level of freedom of expression as demanded by the European Convention on Human Rights and the European Court of Human Rights remain true.[465]

In Azerbaijan too there is a proposal for a law that would give the government the right to regulate the Internet widely, with the purpose of 'protecting children from pornography and other harmful content on the Internet'.[466]

ELSA Germany addresses the situation in Germany:

462 European law Students' Association, France, National Report on Internet Censorship, 43 – 45.

463 European law Students' Association, Spain, National Report on Internet Censorship, 90–93.

464 European law Students' Association, Poland, National Report on Internet Censorship, 55–57.

465 European law Students' Association, Turkey, National Report on Internet Censorship, 83–93.

466 European law Students' Association, Azerbaijan, National Report on Internet Censorship, 63.

> 'The self-regulation by private operators could proof dangerous and could either to decline of freedom of expression online or to an over-regulation, unlawfully harming other constitutional values and thus needs to be evaluated.'[467]

Blocking and removing seem to be issues in Hungary and the United Kingdom too.[468]

Defamation and fake news are another issue. Especially in Albania fake news have become a major problem and there have been no efficient mechanisms to stop them. In response to this the Albanian government has brought a set of controversial laws informally called the Anti-defamation Package (Paketa Antishpifje) to guide the online media in the right path and to correct such problems. The new legislation added a new institution with competences to supervise media activity, the Authority of Electronic and Postal Communications. According to ELSA Albania, not only these laws may fail to correct the current unlawful situation, but may have a negative impact, as they put the government in a very superior position towards the media. However, the president of Albania approved a presidential decree institutionalising his approach against these changes. This implies that the Albanian legal framework on online media is now in a vicious circle, where if the laws are unenforced, this would show a lack of control by the state; and if they are enforced, they could breach the freedom of expression.[469]

The ongoing COVID-19 pandemic has been used as a justification to restrict freedom of expression by the government of Romania. ELSA Romania reports:

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467 European law Students' Association, Germany, National Report on Internet Censorship, 69.

468 European law Students' Association, Hungary, National Report on Internet Censorship., 56–61.; European law Students' Association, the United Kingdom, National Report on Internet Censorship, 61-65.

469 European law Students' Association, Albania, National Report on Internet Censorship, 55–57.

> 'In accordance with Article 54 of Decree no. 195/2020, the National Authority for Administration and Regulation in Communications ('NAARC') may order a series of measures to block information that promotes 'false news about the evolution of COVID-19 and protection measures and prevention'.'[470]

The answers to question 10 vary widely among different countries. Some countries seem to have major problems with freedom of expression online while others have minor defects. Some of the countries have not been given a grade from 1 to 5. Many of the national ELSA divisions have given great weight to the threat of curbing freedom of expression by the governments of these countries.

[470] European law Students' Association, Romania, National Report on Internet Censorship, 49.

Conclusion

At present, it is undeniable that freedom of expression and the right to information are essential aspects of a functioning democratic society and are necessary in enhancing the protection of further fundamental rights.

This report aimed at identifying the similarities and discrepancies in the approaches undertaken by 23 European countries in regard to freedom of expression online, blocking and takedown measures and procedures, the interplay between the private sector and public authorities and the balancing of freedom of expression with other fundamental rights.

As seen in previous chapters, the regulation on blocking and takedown of Internet content differs widely among the jurisdictions analysed. Only 6 out of 23 countries currently have specific legislation on the matter, while the majority of legal system approach the issue relying on multiple different legal sources.

Furthermore, the grounds on which content may be blocked or taken down also vary among jurisdictions. Only a few jurisdictions, such as Finland and Portugal, provide for both civil and criminal law grounds, whereas others only provide for soft-law measures, which is the case in Ireland and Bulgaria.

When taking into consideration the legal context which could lead to content being blocked a further distinction can be made. In this regard, all jurisdictions under consideration award utmost protection to rights of children, copyright, and, for European Union Member States, data protection. On the contrary, when dealing with different issues, for instance defamation or terrorist content, the threshold to be met in order to obtain blocking or takedown is higher in certain countries than in others.

After an analysis on the safeguards provided for the balancing freedom of expression and censorship online, it appears that there are dramatic differences in the approaches taken by the 23 jurisdictions. While some, such as the Netherlands, utilise a very precise and wide-ranging approach, others struggle with unclear terminology of legislation, like Poland, or the lack of an independent regulator, as in Serbia.

A closer look on the role of the private sector was needed considering, on the one hand, its enormous influence in this sector, and, on the other hand, that only 10 out of 23 countries have specific legislation on self-regulation by the private sector. The above-mentioned unclear terminology of certain legislators could leave an undesired discretion to private entities. In this regard, it is worth noting how the European Court of Human Rights has stressed the need to reinforce public scrutiny on private entities.

In order to give a comprehensive analysis of freedom of expression, and blocking and takedown procedures, it was necessary to put under scrutiny the right to be forgotten under European Union law and its impact on non-European Union jurisdictions. Indeed, notwithstanding some more restrictive approaches found in fewer EU member states, it can be overall said that, upon the adoption of the GDPR in the EU and its extraterritorial effect, the right to be forgotten was officially recognised not only in the European Union but also in non-EU countries by both legislators and judicial bodies.

The role of the EU legislator has revealed itself less impactful in relation to the second liability of internet intermediaries. Indeed, the terminology of the E-Commerce Directive contains inconsistencies that result in different interpretations by the Member States when transposing the directive into national law. It must be nevertheless pointed out that some Member States, such as Germany and Finland have further increased the obligations of internet intermediaries towards public authorities. Overall, the directive establishes a liability exemption for three main types of IPSs, trend which is also seen in non-EU countries.

At the same time, jurisdictions have been encouraging the private sector to adopt codes of conduct, while also imposing on private entities a duty to promptly inform public authorities of illegal activity and make known measures adopted in order to ensure transparency of ISPs' actions.

Currently, the internet is regulated in three main different ways: self-regulation by internet intermediaries; regulation through supranational and national legislative frameworks; and other aspects as market needs, social norms and technological developments. Yet, the results from ELSA's National Reports have underlined an increasing need for uniform hard law concerning blocking and takedown of internet content, the liability of internet intermediaries and, to a certain extent, also the right to be forgotten.

As far as the former is concerned, in the field of intellectual property rights these developments can already be seen in almost all jurisdictions, and the same applies to child pornography. Yet, some of the legal systems observed, such as Spain and Azerbaijan, still need to improve the overall access to the internet, which hinders the achievement of uniformity at the European level. Also, in this context, the action of the European Union legislator seems to be shaping the future not only of EU member states but also of neighbouring third countries.

With regard to the liability of internet intermediaries, after comparing the different solutions found in the 23 jurisdictions, it can be acknowledged that ISPs paly a major role in managing internet censorship. This is why, overall, countries aim to increase obligations and liabilities of private operators and insist on the need for further EU measures in this matter, possibly overcoming the implementation issues found in the Copyright Directive and in the E-Commerce Directive.

Additionally, according to the findings of this report, the protection and effectiveness of the right to be forgotten could be improved in the future. Notwithstanding the wide-ranging impact of the GDPR, only 5 member states have strictly and completely shown compliance with it, while others,

such as Germany, should revise their national law in order to guarantee the same degree of protection. Moreover, while some countries, for instance the Netherlands, consider the right to erasure an imperative right, other jurisdictions completely lack measures in this regard, such as Armenia, Serbia and North Macedonia.

A commonality among all 23 countries regards the constitutional protection to the right to freedom of expression, in compliance with Article 10 of the ECHR. This right, however, needs to be balanced with the protection against hate speech in light of other's right to dignity and reputation. With the exception of 4 jurisdictions which either afford insufficient protection or impose an excessively high threshold for criminality, the majority of legal systems analysed tackle the issue through specific criminal law provisions, such as is the case in Spain and North Macedonia, and through indirect approaches guaranteeing greater protection, for example Azerbaijan and Greece.

Further action in protection against hate speech could be found in self-regulation by ISPs, according to some National Groups. Indeed, it is suggested that ISPs establish filters to automatically block hate speech. Nevertheless, doubts arise over the lack of transparency of these intermediaries, especially considering that the criteria for removal are uncertain due to the lack of uniform legal guidelines. This is why the Irish and the German National Groups have stressed the need for an independent body regulating and overseeing ISPs.

The report has shown that in the legal systems concerned, there are common grounds for limiting freedom of expression online, i.e. child pornography, terrorism, racism, and national security. Contrariwise, when addressing issues related to defamation, public order and political grounds, the degree of limitation differs. Therefore, possible future improvements in both substantial and non-substantial law were outlined.

In regard to the former, three main issues were identified. Firstly, a complex matter regards anonymity online and liability of internet providers

considering the risk of premature blocking by intermediaries. Secondly, National Groups promote the enhancement of legal clarity and certainty in order to avoid disproportionality due to the vagueness of the law and the lack of a specific set of rules. Thirdly, the sanctions imposed for certain violations in some jurisdictions should be revised according to the UN and ECHR recommendation not to hinder the individuals' freedom of expression.

For what concerns the latter, it needs to be acknowledged that non-substantive law and non-legal matters are fundamental in ensuring a fair balance of the concurring rights at stake. Indeed, the prohibitive expenses involved with the legal actions should be lowered in order not to demotivate or deter victims from seeking justice. Furthermore, the judiciary in every concerned legal system should be structured in a way to, firstly, guarantee its independence and impartiality - especially in cases concerning political opinions - and, secondly, ensure that decisions are taken in a timely and efficient manner. Lastly, it is of significant importance that legal systems raise awareness of citizens not only over their rights on the internet - including privacy rights and data protection - but also over the hidden risks in cyberspace.

Comparative Report on Internet Censorship

International Focus Programme on Law and Technology

Concluding Report of the International Legal Research Group on Internet Censorship (eds)

The comparative report on Internet Censorship provides the reader with a comprehensive overview of regulation of freedom of expression online across 24 different European jurisdictions. The concluding report discusses the concept of censorship and its boundaries with the right to information. The report explores regulation of blocking and takedown of internet content, particularly whether specific legislation on the issue exists and if the area is self-regulated in each country. Furthermore, the report includes analyses of the right to be forgotten in each of the participating countries and finally the regulation of the liability of internet intermediaries. Each analysis looks into both existing regulations and policy papers as well as any cases that may exist on the topic.

In addition to the analyses, the report assesses how the legislation regarding blocking and takedown of online content, liability of internet intermediaries and the right to be forgotten will develop in each country over the coming five-year period. Finally, the report assesses balancing issues in terms of reaching a balance between allowing freedom of expression online and protecting against online hate speech as well as protecting other rights online.

The report is an excellent tool for students, academics and practitioners who wish to gain an overview of European policies, regulation and case law regarding freedom of expression online. Furthermore, the report serves as a great starting point for further research as it contains tables with translation of relevant legislation, literature and jurisprudence.

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