The roles and responsibilities of internet intermediaries: the Council of Europe perspective

Speaker: Elena Lopatina
Les rôles et les responsabilités des intermédiaires d'internet: la perspective du Conseil de l’Europe

L'intervenant: Elena Lopatina
The Council of Europe approach →
based on key values:

- Human rights
- Democracy
- Rule of law
Human rights regime in CoE member states:

- Convention for the Protection of Human Rights and Fundamental Freedoms applies both offline and online;

- States have the obligation to secure to everyone within their jurisdiction the rights and freedoms contained in the Convention, both offline and online.
Human rights in the online environment:

- Access to the internet = precondition;
- Freedom of expression = key enabler;
- New opportunities = new challenges;
- Intermediaries = private actors.
INTERNET USERS

- use online services
- make online payments / transactions
- look for / share information
- perform other daily activities

INTERNET INTERMEDIARIES

- connect users to the internet
- enable the processing of information and data
- host and store web-based services
- perform other intermediary functions
But also internet intermediaries:

- search for, identify and remove allegedly illegal content
- are required to assess the validity of requests from public or private parties to remove certain content

On the basis of:

- official requests from public authorities
- internal content-management policies
- (often insufficient) regulatory framework
- informal co-operation agreements with public authorities
Reason for concern:

balancing of fundamental rights
against other fundamental rights,
or legitimate interests / goals
= untypical function for internet intermediaries

This function typically belongs to states and must be performed in compliance with the following criteria established in the ECtHR case-law on Article 10:

- interference based on law (lawfulness + predictability);
- legitimate aim for interference;
- interference necessary in a democratic society (proportionality);
- safeguards + effective remedies available.
Need for re-establishing human rights-based and rule of law-based approach

In other words:

• internet must not be a lawless space;
• human right must be equally guaranteed and protected online and offline;
• non-liability of intermediaries for third-party content;
• obligations / responsibilities of all stakeholders must be clearly established and strictly observed;
• safeguards and effective remedies must be in place.

This is the overall objective of the draft recommendation on internet intermediaries
Work on the draft recommendation on internet intermediaries:

- adopting guidelines for CoE member states, to be used as a reference point in developing domestic policies and legislation.

This is carried out by:

the Committee of experts on internet intermediaries (MSI-NET)

under the supervision of the Steering Committee on media and Information Society of the Council of Europe (CDMSI)
Work on the draft recommendation on internet intermediaries:

• started in 2016;

• takes into account the conclusions of the Comparative study on blocking, filtering and take-down of illegal internet content (Swiss Institute of Comparative Law, December 2015);

• is expected to be accomplished by the end of 2017.
Challenges to development of regulatory framework:

- applicability and implementation of international human rights obligations of states, taking account of the roles of other stakeholders;

- diversity and multi-functionality of intermediaries;

- cross-border nature of the internet;

- increased risks to human rights in the online environment.
⇒ re-working of and delineating clear differentiation between obligations of states and responsibilities of internet intermediaries

Legal basis:

• Convention for the Protection of Human Rights and Fundamental Freedoms;
• Case law of the European Court of Human Rights;
• UN “Guiding Principles on Business and Human Rights: Implementing the UN ‘Protect, Respect and Remedy’ Framework” (2011);
• Committee of Ministers’ Recommendation CM/Rec(2016)3 on human rights and business
Member states:

- negative obligation to refrain from violating human rights;
- positive obligation to protect human rights and to create an enabling environment:
  - put in place a sufficiently developed legal framework;
  - prevent, investigate, punish and redress private actors’ abuse;
  - take other appropriate measures.

(see, for instance, *Van der Mussele v. Belgium*, no. 8919/80, 23 November 1983; *Ahmet Yildirim v. Turkey*, no. 3111/10, 18 December 2012)
Internet intermediaries:

- corporate responsibility to respect human rights;

- duty of care (as persons carrying out a professional activity):
  - proceed with a high degree of caution when pursuing their occupation;
  - take special care in assessing the risks that such activity entails;
  - assess possible impact on human rights;
  - put in place safeguards and effective remedies.

(see, for instance, *Delfi AS v. Estonia* (GC), no. 64569/09, 16 June 2015; *MTE and Index.hu ZRT v. Hungary*, no. 22947/13, 2 February 2016)
open and function-based approach to regulating internet intermediaries’ activities

This implies differentiating:

content with respect to which editorial functions are performed

≠

content with respect to which intermediary functions are performed
Internet intermediaries may also:

- moderate and rank content, including through automated techniques
- exert other forms of control / influence users’ access to information online
- collect, retain and process users’ information and data

On the basis of:

- terms of service
- in-house policies
Specific features of this group of functions:

- editorial nature, rights/responsibilities similar to the media;
- impact on human rights and fundamental freedoms + risk of interference;
- liability of internet intermediaries.

Human rights and the rule of law perspective:

- respect for human rights and fundamental freedoms;
- transparency and accountability;
- safeguards in case if interference is requested by public authorities;
- other safeguards + effective remedies.

Reference point: CM/Rec(2011)7 on a new notion of media
• Thank you for your attention!

www.coe.int/freedomofexpression