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## **Recommendation CM/Rec(2017x)xx of the Committee of Ministers to member States on Internet intermediaries**

**SECOND DRAFT (20 FEBRUARY 2017)**

**SUBMITTED FOR THE 3<sup>RD</sup> MEETING (27-28 MARCH 2017)**

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1. In line with the jurisprudence of the European Court of Human Rights (hereinafter "the Court"), the Council of Europe member States have the obligation to secure to everyone within their jurisdiction the rights and freedoms contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, hereinafter "the Convention") both offline and online.

2. Access to the Internet is a precondition for exercising Convention rights online. By enhancing the public's access to information and services and facilitating the dissemination of content, the Internet plays a particularly important role with respect to the freedom of expression, which includes the freedom to receive and impart information and ideas without direct or indirect interference by public authorities and regardless of frontiers.

3. A wide, diverse and rapidly evolving range of actors facilitates interactions between natural and legal persons on the Internet by performing a number of functions. Some connect users to the Internet, enable the processing of information and data, and host and store web-based services. Others aggregate information and enable searches, and give access to, host and index content and services designed and/or operated by third parties. Others facilitate the sale of goods and services and enable other commercial transactions, including payments. Often, they carry on several functions in parallel. The

multi-functionality of these actors, commonly referred to as “Internet intermediaries”, should be met with a nuanced approach that differentiates between mere hosting or transmitting services and more active, editorial-like functions that may be performed with regard to third-party content.

4. Internet intermediaries fulfill an essential role in the Internet ecosystem as gateways to information and key enablers of the exercise of rights and freedoms online, in particular the right to privacy, including personal data protection, the freedom of assembly and association, the freedom of expression, the prohibition of discrimination, the right to education, access to knowledge and culture, as well as the participation in public and political debate and in democratic governance.

5. Internet intermediaries may also interfere with the exercise of human rights. Their terms of service and community guidelines often envisage content restrictions based on broad definitions that may lead to unpredictable implementation and contain clauses that facilitate the collection, retention and processing of information from and about users, often without proper notification. Legal remedies may be lacking or provided only through automated processes. Access to justice may further be made difficult through unfavorable jurisdictional clauses. Moreover, intermediaries often moderate and rank third-party content through algorithms, and thereby influence users’ access to information online, similar to traditional media.

6. In fulfilling their central role of securing to everyone in their jurisdiction the rights and freedoms protected in the Convention and of guaranteeing public safety and national security, member States should take into account specific features of the Internet, including the end-to-end architecture and global nature of Internet networks and services, the ownership by the private sector, the anonymity of users, the volume of Internet content, and the speed at which it is produced and processed.

7. The regulatory framework and online environment in which Internet intermediaries act is diverse, multi-layered and continuously evolving. As they operate across many countries, they have to comply with conflicting laws of several jurisdictions. In line with Convention rights and the principle of the rule of law, public authorities may request Internet intermediaries to divulge personal data or remove or restrict certain content. The role of the judiciary in relation to such requests ranges in different jurisdictions from prior authorisation to post-implementation review to ensure that the restriction of content or the disclosure of personal data is prescribed by law, proportionate to the legitimate aim pursued, and necessary in a democratic society.

8. The existing legal frameworks that provide for exemptions from liability of intermediaries for third party-content are, however, increasingly being undermined by extra-legal content removal mechanisms and informal co-operation agreements between intermediaries and public authorities. Such agreements may lead to rights violations as

they may prompt intermediaries to proactively monitor, identify and remove allegedly illegal content rather than acting upon specific requests from public authority based on the rule of law.

9. Informal agreements or mechanisms may also damage user trust and create legal uncertainty. Intermediaries are increasingly required to assess the validity of requests by State authorities and/or non-state actors to remove content on the basis of vague criteria or their internal content-management policies. Intermediaries are thus tasked with the responsibility of weighing competing fundamental rights and freedoms. User choice is further limited by the fact that, due to various network effects and mergers, the market is dominated by a small number of highly influential intermediary companies.

10. While the digital era brings about new challenges for the protection of human rights and fundamental freedoms, the fundamental principles of human rights and rule of law apply online as offline. Member States have the primary obligation to protect human rights by refraining from any interference, unless such interference is prescribed by law, necessary in a democratic society, and proportionate to the aim pursued. Any State action that impacts Internet intermediaries must be clearly prescribed by law, predictable, and exercised transparently within the limits conferred by law. Member States further have the positive obligation of promoting the exercise and enjoyment of human rights and freedoms, including by protecting individuals from the actions of private parties. In case of rights violations, procedural guarantees must be in place to provide citizens with easy access to appropriate and effective remedies vis-à-vis States and intermediaries. Internet intermediaries, as all business enterprises, have the corporate responsibility to respect human rights in line with the well-established and internationally accepted UN Guiding Principles on Business and Human Rights.

11. Against this background and in order to provide guidance to all relevant actors, the Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe, recommends that member States:

- implement the Guidelines included in this recommendation in particular when developing and implementing legislative frameworks with regard to Internet intermediaries;
- take all necessary measures to ensure that Internet intermediaries fulfill their role and responsibilities to respect human rights in line with the UN Guiding Principles on Business and Human Rights and the Recommendation of the Committee of Ministers to member States on Human Rights and Business;
- engage in a regular dialogue with stakeholders from the private sector, civil society, academia and the technical community, with a view to sharing information and discussing emerging technological developments related to Internet intermediaries

that impact the exercise and enjoyment of human rights and related legal and policy issues;

- promote these Guidelines in international and regional forums that deal with the roles and responsibilities of Internet intermediaries.

# Guidelines on the promotion and protection of human rights and fundamental freedoms with regard to Internet intermediaries

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## I – Duties and responsibilities of States

### 1.1 Legality

- 1.1.1. Any request, demand or other action by public authorities addressed to Internet intermediaries that interferes with human rights and fundamental freedoms must be based on law. The law must be easily accessible, non-arbitrary and otherwise in accordance with international law.
- 1.1.2. Laws, regulations and policies applicable to Internet intermediaries, regardless of their objective or scope of application, including commercial and non-commercial activities, shall guarantee effective protection of individuals' human rights and fundamental freedoms vis-à-vis potential infringements by Internet intermediaries, as well as sufficient guarantees against arbitrary application in practice.
- 1.1.3. States shall not exercise pressure on Internet intermediaries through extra-legal means, if such action is likely to lead to interferences that violate human rights or fundamental freedoms.
- 1.1.4. States cannot absolve themselves from their obligation to secure human rights and fundamental freedoms online by delegating it or parts of it to Internet intermediaries. States shall refrain from delegating through legislation or other means such authority or tasks to Internet intermediaries that oblige them to introduce procedures for balancing fundamental rights and freedoms.
- 1.1.5. The process of enacting legislation or other regulations applicable to Internet intermediaries should be transparent, accountable and inclusive, and should respect the multi-stakeholder nature of Internet governance and the various interests involved. To that end, States should regularly consult with all affected parties. Before passing legislation, and in regular intervals thereafter, States should conduct impact assessments with regard to potential negative impacts on human rights.

- 1.1.6. Taking into account the substantial differences in size and organizational structure of intermediaries, States should ensure that legislation, regulation, and policies related to Internet intermediaries are interpreted, applied and enforced without discrimination on any grounds, including residence, nationality, or gender as well as multiple or intersecting forms of discrimination.
- 1.1.7. States should ensure that legislation, regulation and policies relating to Internet intermediaries are effectively implementable, do not lead to extraterritorial effects in violation of international law and do not challenge the operation of Internet-based trans-border communication.

## **1.2. Legal certainty, proportionality, necessity, and transparency**

- 1.2.1. Any legislation applicable to Internet intermediaries and to their relations with States and individual users should be accessible and predictable. All laws should be clear and sufficiently precise to enable intermediaries and individuals to regulate their conduct.
- 1.2.2. Any legislation should include clear restrictions to discretionary powers granted to public authorities in relation to Internet intermediaries, in particular when exercised by the executive branch and law enforcement. The law must indicate the scope of such discretion to protect against arbitrary application. Abuse of discretionary power should be controlled by judicial or other independent and transparent review.
- 1.2.3. States should make available in a timely manner comprehensive information on the number, nature and legal basis of requests submitted by State authorities to Internet intermediaries that have implications for the exercise of rights and freedoms. These include content removal requests and requests for disclosure of personally identifiable information. States should not prohibit intermediaries from disclosing anonymised or aggregated information about interferences with the exercise of rights and freedoms online, whether based on court or administrative orders, private complainants' requests, or enforcement of their own content restriction policies.
- 1.2.4. States should as a general rule exercise their jurisdiction only with respect to Internet intermediaries established within their jurisdiction for the services provided to users in that jurisdiction. States should assert jurisdiction over Internet intermediaries not established within their jurisdiction or content made available by individuals located outside their territory only in limited circumstances, such as when such content is clearly unlawful under international law, in cases of universal jurisdiction, or when there is substantial connection between the content or the content-producer to that State. With a view to avoiding legal uncertainty and conflicts of laws, States shall commit to

cooperating amongst themselves and with all relevant stakeholders in order to develop common jurisdictional principles and cross-border procedures, including through appropriate non-state forums.

### **1.3. Safeguards for freedom of expression**

- 1.3.1. All laws that may lead to interferences with the freedom of expression, including when applied by intermediaries, must respect the established jurisprudence of the Court with regard to freedom of expression, specifically on the Internet. In particular must the legal framework be precise and provide specific rules for the scope of and procedures for monitoring, removing and restricting content as well as for effective judicial review of all such actions.
- 1.3.2. Any request by State authorities addressed to Internet intermediaries to restrict access to or remove content must be based on law and pursue one of the legitimate aims foreseen in Article 10.2 of the Convention. Any such restriction must be necessary in a democratic society for the pursuit of a legitimate public good and proportionate to the aim pursued. Any legal terms used to designate content to be restricted must be clearly described by law. State authorities must carefully evaluate any restrictions before applying them and seek to apply the least restrictive measure. In doing so, States should recognise that in a democratic society not only information and ideas that are favorably received or regarded as inoffensive are protected, but also those that offend, shock or disturb, including political dissent and protest.
- 1.3.4. State authorities should not, through legal or extra-legal means, compel or incentivise Internet intermediaries to determine the lawfulness of third-party content or to censor lawful communication, including content that offends, shocks, or disturbs. State authorities shall seek to obtain an order by a court or an independent authority to establish the unlawfulness of content before demanding intermediaries to restrict access.
- 1.3.4. States should ensure in law and practice that intermediaries are not held liable for the content on their platforms. In cases where the functions of Intermediaries consist in storing content from third parties, they may be held liable only if they do not act expeditiously in reaction to standardised notification procedures, and remove illegal content or disable access thereto as soon as they are made aware of its illegality. Takedown procedures should not be designed in a manner that creates incentives to remove or block lawful content, for instance by providing very short timeframes.
- 1.3.5. The removal of content or restriction of access to content can only be justified by law if there is a pressing social need for the removal of the content or the restriction of access. All content restrictions should allow notice of such

restriction to both the content producer/issuer and users seeking access to the content, including information on how to proceed in order to challenge the removal/restriction order.

- 1.3.6. In cases where intermediaries perform different functions, State authorities should apply an approach that is differentiated and graduated in line with Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media. They should acknowledge that rights and duties of intermediaries, in particular liability for third-party content, depends on the role and position an intermediary takes both de jure and de facto.
- 1.3.7. While notice-and-takedown is a well-established approach to limiting liability of intermediaries, States may apply a more graduated approach in relation to specific content. Notice-and-(counter) notice procedures may be more sensible for copyright issues, notice-wait-and-takedown approaches for defamation, notice-and-takedown and notice-and-suspension for serious cases of hate speech. Notice-and-judicial-take-down should only serve as complementary solutions. Automatic takedown should only be applied to content prohibited by international law.
- 1.3.8. State authorities should not directly or indirectly impose an obligation on Intermediaries to systematically monitor the activities of their users in order to prevent unlawful activities or unlawful third-party content, be it by automated means or not. Before addressing any request to Internet intermediaries or promoting, alone or with other States or international organisations, co-regulatory approaches by Internet intermediaries, State authorities shall consider their duty to minimise such monitoring, as well as the limits of automated means of content monitoring that are unable to assess context.

#### **1.4. Safeguards for privacy and data protection**

- 1.4.1. Any demand or request by State authorities addressed to Internet intermediaries to access personal information or other data of their users, or any other measure which interferes with the right to privacy, must be based on law and pursue one of the legitimate aims foreseen in Article 8.2 of the Convention and must be necessary and proportionate to the aim pursued. The protection of the right to privacy and data protection extends to devices used to access the Internet or store data.
- 1.4.2. State authorities should ensure that Intermediaries' policies and practices uphold the principles of data processing (lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage time limitations, integrity and confidentiality) and guarantee the rights of the data subject in full compliance



with the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No.108).

- 1.4.3. Surveillance measures undertaken by States, in cooperation with Internet intermediaries or not, must be targeted and comply with Article 8.2 of the Convention. In particular they must be mandated by law and must include sufficient procedural and oversight safeguards. All surveillance must be authorised by a judge or other independent body. States authorities should ensure that intermediaries appropriately confine, in compliance with the principles and purposes of the Convention, data linkage practices across services.

### **1.5. Access to an effective remedy**

- 1.5.1. States should proactively seek to reduce all legal, practical or other relevant barriers that could lead to a denial of access to an effective remedy for grievances of individual users
- 1.5.2. States should guarantee easily accessible and effective mechanisms for all individuals to challenge all legal or extra-legal actions that interfere with the right to freedom of expression or the right to privacy, or other Convention rights, in compliance with Articles 6 and 13 of the Convention.
- 1.5.3. States should guarantee an effective remedy for all violations of human rights and fundamental freedoms by Internet intermediaries in compliance with Article 6 and 13 of the Convention. This includes ensuring that intermediaries ensure prompt and effective review of user grievances and alleged terms of service violations, and provide for effective remedies, including judicial review, when internal and alternative dispute settlement mechanisms prove insufficient or where the individual(s) concerned opt for judicial redress as their preferred option.

## **II - Responsibilities of Internet intermediaries with regard to human rights and fundamental freedoms**

### **2.1. Respect for human rights and fundamental freedoms**

- 2.1.1. Internet intermediaries shall in all their actions respect the internationally recognised human rights and fundamental freedoms of their users and of third parties who are affected by their activities. The responsibility to respect human rights exists independently of the States' duty ability or willingness to fulfill their own human rights obligations.

- 2.1.2. The responsibility of intermediaries to respect human rights applies regardless of their size, sector, operational context, ownership or structure, impact and nature of the intermediary service. Nevertheless, the scale and complexity of the means through which intermediaries meet their responsibility may vary according to these factors and the human rights impact of an intermediary's business model and practices.
- 2.1.3. Internet intermediaries should engage in regular due diligence assessments regarding human rights and gender equality. These should include an assessment of actual and potential direct and indirect human rights impacts of their actions, both on users and third parties, and an appropriate follow-up to these assessments by acting upon the findings and monitoring and evaluating the effectiveness of identified responses. Intermediaries should conduct these assessments as open as possible and encourage user engagement.
- 2.1.4. Intermediaries should ensure that their terms of service and any contractual relations with other parties respect their human rights obligations. They shall further ensure that their terms of service agreements and internal policies are applied and enforced consistently and in compliance with applicable due process safeguards, including notification and access to effective remedies, and that their actions do not have discriminatory effects on users or third parties, including actual or potential users who may have special needs. The prohibition of discrimination may require under certain circumstances that intermediaries make special provisions for users or groups of users that face factual inequality in their access to rights in order to correct this inequality and prevent discriminatory effects.

## **2.2. Accountability and transparency**

- 2.2.1. Internet intermediaries should apply due diligence in all their actions. All interference by intermediaries with free and open data traffic and communications should be based on clear policy and transparent criteria with sufficient procedural guarantees and must be limited to specific legitimate purposes, such as to preserve the integrity and security of the network, in line with the human rights and fundamental freedom guaranteed in the Convention.
- 2.2.2. Internet intermediaries should ensure that all terms of service agreements and especially policies specifying the rights of users and the content moderation tools, standards and practices for content moderation and disclosure of user data are publicly available in clear, plain language and accessible formats. They should notify users of all changes in relevant policies as applicable and without delay (and, if possible, well in advance), and in formats that enable individuals to process and understand the changes without unreasonable effort. Continued

use of a service should not be made contingent on accepting terms of service that are more restrictive of privacy, data protection or freedom of expression rights.

- 2.2.3. The process of developing and applying private law terms of service agreements and content restriction policies should be transparent, accountable and inclusive. Intermediaries should seek to engage in negotiations with consumer associations and other organisations representing the interests of users before adopting policies and undertake human rights impact assessments for all of them, and regularly after adoption. Any such assessments should be made public. Internet intermediaries should seek to empower their users to engage in processes of monitoring, evaluating, reviewing and revising, where appropriate, intermediaries' policies and practices to better reflect a commitment to human rights and fundamental freedoms.
- 2.2.4. Internet intermediaries should clearly and transparently inform their users about the operation of automated data processing techniques in the performance of their functions, including through algorithms that facilitate searches based on user profiles and predicted preferences, or the distribution of algorithmically selected and curated news. They must also inform users clearly about the monetisation of their data and communications, including identification of the parties involved so as to enable individuals to adapt their conduct. Processing of user data should be limited to the purpose consented to and services existing at the time of agreement by users.
- 2.2.5. Intermediaries should regularly publish transparency reports that provide specific anonymised information about all interference with free and open data traffic and communications and about all requests received for such interference. Such reports should cover requests for disclosure of user data and content removal, whether based on court orders, private complainants' requests, or enforcement of their own content restriction policies.

### **2.3. Safeguards for freedom of expression**

- 2.3.1. Internet intermediaries shall respect the rights of users to receive and impart information and ideas. Due consideration must be given to the size of the intermediary and the substitutability of the service and forum it provides. They should not on a general basis conduct ex ante monitoring or filtering to detect unlawful content, except regarding content prohibited by international law. All measures taken to restrict access to, remove, or block content on behalf of a State must be based on an order by a court or an independent authority, and must be effectuated through the least restrictive technical means. All restriction of content should be limited in scope to the precise remit of the order, whose

validity must be reviewed periodically. Procedural safeguards must further be in place to inform the user whose content is challenged, including information with respect to access to effective remedies.

- 2.3.2. Intermediaries should seek to protect the rights to freedom of expression of their users when confronted with government requests for content restriction that are inconsistent with internationally recognised laws and standards. If the content in question is in compliance with the content restriction policies of intermediaries, these should challenge the order in view of its legality, necessity and proportionality in a democratic society.
- 2.3.3. When restricting access to certain content in line with their content restriction policies, intermediaries should do so in a transparent and non-discriminatory manner, and by the least restrictive technical means. They should further ensure that users are fully aware of the nature of the content restriction, including with regard to the use of automated flagging techniques, are notified and have a possibility to challenge the restriction. If an internal redress process does not lead to a satisfactory conclusion, they should cooperate in any subsequent judicial proceedings. Content should be reinstated without delay if the appeal against the restriction of content is successful or if there is no longer a pressing social need to restrict the access to the content at issue.
- 2.3.4. Recognising that automated means of content restrictions may be necessary to prevent similar content from reappearing, intermediaries should carefully assess the human rights impacts of automated content management, for example through predictive profiling, and the importance of considering an expression's context.
- 2.3.5. Where access to content is restricted or denied, or content removed, the intermediary should display a notice that is visible when attempts to access the content are made, that clearly explains what content has been restricted on what legal basis.

#### **2.4. Safeguards for privacy and data protection**

- 2.4.1. Internet intermediaries should limit the collection of personal data from individual users to what is directly necessary in the context of a clearly defined and explicitly communicated purpose. The collection, retention, aggregation or sharing of personal data must be based on a legitimate interest and in almost all cases the informed and unambiguous consent of the individual user with respect to the specific purpose in line with Convention 108. Convention 108. The aggregation of data through multiple services or devices must be specifically permitted by users who have to be informed about the nature and purpose of any aggregation in order to properly give consent. Users maintain the right to

review, modify, and delete personal data and may withdraw their consent at any time, which shall prevent any further processing of that data.

- 2.4.2. Intermediaries shall respect the rights to privacy of their users when confronted with government demands that compromise these rights in a manner inconsistent with internationally recognised laws and standards.
- 2.4.3. Intermediaries should not disclose personally identifiable information about a user unless requested to do so by a court or other competent national authority that has determined with sufficient evidence that the disclosure is necessary in a democratic society and proportionate to the legitimate aim pursued.

## **2.5. Access to an effective remedy**

- 2.5.1. Internet intermediaries shall make available effective complaint mechanisms and dispute resolution systems that provide prompt and direct redress in cases of user grievances and alleged violations of terms of service. While the complaint mechanisms and their procedural implementation may vary with the size, impact and role of the Internet intermediary, they shall be easily accessible, transparent and meet the principles enshrined in Article 13 of the Convention. Intermediary-based complaint mechanisms shall not supplant state-based judicial and non-judicial review mechanisms.
- 2.5.2. All complaint mechanisms shall comply with due process safeguards and must include the right to be heard in an independent and impartial process that leads to a reasoned decision which is open to appeal.
- 2.5.3. Intermediaries should ensure that all users and third parties affected by their actions have full and easy access to information about applicable complaints mechanisms, the various stages of the procedure, indicative time frames, and expected outcomes.
- 2.5.4. Intermediaries should not include in their terms of service waivers of rights or hindrances to the effective access to remedies, such as mandatory jurisdiction outside of a user's country of residence or non-derogable arbitration clauses.
- 2.5.5. Intermediaries should seek to provide access to alternative review mechanisms that can facilitate the resolution of disputes that may arise between individual users. Intermediaries should not, however, make alternative dispute mechanism obligatory as the only means of dispute resolution.
- 2.5.6. Intermediaries should regularly analyse the frequency, patterns and causes of complaints received in order to learn lessons for improving their policies, procedures and practices and for preventing future grievances.

- 2.5.7. Intermediaries should engage in dialogue with consumer associations and other organisations representing the interests of users in order to ensure that their complaint mechanisms are designed, implemented, and evaluated through a participatory process.