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

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1. Everyone has a right to Internet access which is inherent in the right to freedom of expression as protected in Article 10 of the European Convention on Human Rights (ETS No. 5, hereinafter "the Convention"). Council of Europe member States are obliged to secure to everyone within their jurisdiction human rights and fundamental freedoms on the Internet.
2. Internet intermediaries assume a pivotal role in providing access to the Internet and the Internet's content to billions of Internet users and are structurally essential to all online data flows. Internet intermediaries also control access to, and manage, online content. The factual and legal conditions under which access to the Internet is provided and information is sought, disseminated and received, and data is aggregated and managed by Internet intermediaries are framed by a complex combination of national, European and international laws, and by terms of service, soft law and code. In fulfilling their negative and positive human rights obligation, member States must provide a legal framework which enables Internet intermediaries to fulfill this critical role without violating human rights.
3. Member States are confronted with the need to reconcile conflicting objectives and conduct balancing exercises between competing rights involved in increasingly international settings complicated by the characteristics of the technology underlying the Internet and the multiple functions and diverse nature of Internet intermediaries.
4. Therefore, the Committee of Ministers, wishing to provide guidance for member States in developing and applying law to Internet intermediaries, and acting under the terms of Article 15.b of the Statute of the Council of Europe, recommends that member States:

- ensure that they fulfill their positive and negative obligation to secure human rights to everyone within their jurisdiction in full compliance with Articles 8 and 10 of the Convention when regulating the activities of Internet intermediaries;
- take all necessary measures, in co-operation with all relevant stakeholders, to ensure that Internet intermediaries can fulfill their role and potential in the information society without violating human rights;
- ensure online as offline the primary duty of states to protect human rights and the rule of law including procedural safeguards and effective remedies if rights have been violated;
- in doing so, adopt national and contribute to regional and international policy frameworks with due regard to the Guidelines on Internet Intermediaries set out in the appendix to this recommendation;
- promote these Guidelines in other international and regional forums that deal with Internet intermediaries.

## Appendix to Recommendation: Guidelines on Internet Intermediaries

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### 1. General principles

- 1.1. In line with Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, it is the primary duty of states to respect, protect and fulfill for everyone within their jurisdiction all rights and freedoms enshrined in the European Convention on Human Rights, online just as offline.
- 1.2. States are responsible for providing a legal framework, based on the Convention and in accordance with the well-established principles of human rights, democracy and rule of law, which promotes an online environment in which public debate can take place.
- 1.3. Specialized organs of society, such as Internet intermediaries, are required to comply with all applicable laws and to respect human rights ("the corporate responsibility to respect human rights"). Breaches of duties of the state and the obligations of specialized organs of society with regard to human rights must be matched with appropriate, easily accessible and effective remedies.
- 1.4. Each individual has a right to participate in the information society. Their right to Internet access the Internet is inherent in the right to access information and communication which is protection by the Convention. Member states are therefore obliged to guarantee access to the Internet for their citizens (Yildirim (2012), § 31). Protecting the Internet's accessibility and its capacity to store

and communicate vast amounts is essential for enhancing the public's access to news and other information (Times Newspapers Ltd. (2009), § 27).

- 1.5. Protection of Internet intermediaries complement the right to access. Internet intermediaries play a pivotal role in ensuring access to Internet content, both as access providers and as content hosts. Intermediaries are thus important sources of often specific information and have been instrumental in the emergence of citizen journalism (Cengiz, 2015).
- 1.6. When the effective exercise of Article 10 requires positive measures of protection, even between individuals or individuals and Internet intermediaries, member States are responsible to enact appropriate domestic legislation. When regulating Internet intermediaries member States have to strike a fair balance between the general interest of the community, the interests of the individual, and the interest of the intermediary (Özgür Gündem, 2000, § 43).
- 1.7. When regulating Internet intermediaries member States have to strike a fair balance between the general interest of the community, the interests of the individual, and the interest of the intermediary (Özgür Gündem, 2000, § 43).
- 1.8. With a view to ensuring the right to Internet access and the protection of Internet intermediaries states shall take positive measures and, when appropriate, regulate Internet intermediaries. Intermediaries are key players in the digital economy and any regulation pertaining to them must ensure that they can continue to offer and develop innovative services while ensuring that any new service complies with existing laws and respects human rights.
- 1.9. Member States shall ensure that regulation of Internet intermediaries is, as applicable, flexible, scalable, and innovation-friendly and must strike an appropriate balance between conflicting human rights.
- 1.10. Member States shall not delegate censorship measures to private entities, privatize law enforcement functions or imbue intermediaries with quasi-judicial functions without proper safeguards. Internet intermediaries should object to invitations to assume such functions.
- 1.11. Any restrictions on the right to freedom of expression of intermediaries must be provided by law, pursue a legitimate aim as exhaustively listed in Article 10 (2) of the Convention, and be necessary and proportionate in a democratic society.
- 1.12. A human-rights centred approach to the exercise of freedom of expression on Internet intermediaries' networks and platforms requires that their terms of service are transparent and interpreted consistently with international human rights standards; that such terms are applied and enforced consistently and proportionately; and that users of the service have access to a redress mechanism. In addition, private companies should refrain from imposing restrictions on freedom expression, which go beyond the requirements of the law.

## 2. Protection of the enabling role of Internet intermediaries

- 2.1. Member States shall ensure that the responsibility of Internet intermediaries is delimited in conformity with, in particular, Articles 8, 10 and 13 of the Convention.
- 2.2. Member states shall adopt an activity-based approach to regulate the responsibility of Internet intermediaries so that Internet actors performing a wide range of activities are able to benefit from (civil and criminal) liability exemptions when they (1) act as conduits for third-party expression in relation to a specific activity (e.g. search function, user-generated comments section) and (2) implement transparency best practices when dealing with third-party content.
- 2.3. Member states shall promote the development of transparency best practices for dealing with third-party content (e.g. through the adoption of codes of conduct).
- 2.4. Member states shall not require Internet intermediaries to assess the lawfulness of third-party content. They may assess whether or not content violates their terms of service, but must do so in a non-discriminatory manner and ensure that any consequences of such an assessment, and possibilities of redress, are clearly communicated and do not amount to discrimination or other human rights violations.
- 2.5. Internet intermediaries shall only be required to promptly react upon unlawful content if a clear, foreseeable and proportionate procedure has been put in place, the nature of which should depend upon the impact of such a procedure on the right to privacy and the principle of confidentiality of communications as protected by Article 8 and on Internet users' freedom of expression as protected by Article 10 of the Convention.
- 2.6. Different procedures should be applied when the content-related complaint involves a private dispute (e.g. copyright, where a notice system might be preferable) and when the content at issue is criminal (e.g. incitement to violence).
- 2.7. Member states shall only require Internet intermediaries operating at the application layer to take down unlawful content if they have actual knowledge or have been notified of the presence/transmission of manifestly unlawful content on their systems.
- 2.8. Internet access providers shall only be required to block access to unlawful content as the result of a court order. They shall not bear pre-litigation and court costs when opposing judicial blocking orders. Internet intermediaries operating at the application layer shall not bear pre-litigation and court costs when the content at stake is not found to be manifestly unlawful.
- 2.9. Member states shall put in place notice-and-counter-notice procedures by which application-level Internet intermediaries shall abide by when reacting

upon unlawful content and that shall effectively involve both issuers and recipients of content in order to render the right to an effective remedy as protected by Article 13 of the Convention effective.

- 2.10. Member states shall consider implementing in their judicial systems widely accessible and fast judicial notice-and-counter-notice procedures to issue notifications to Internet intermediaries operating at the application layer, which are more human rights compliant than (purely) privately-operated notice-and-counter-notice procedures
- 2.11. Member states shall promote the development of best practices designed for the prompt recognition of manifestly unlawful content that should rely upon notice-and-counter-notice procedures through the adoption of sectoral instruments such as codes of conduct.
- 2.12. Internet intermediaries shall not be required (following the reception of notifications or the issuance of court orders) to systematically monitor their systems in order to prevent unlawful activities in particular when the systematic monitoring of third-party content implies the implementation of privacy-intrusive measures, when the systematic monitoring of third-party content may lead to over-blocking measures or when the systematic monitoring of third-party content amounts to imposing an unreasonable financial burden on Internet intermediaries' activities.
- 2.13. Member states shall not encourage Internet intermediaries to voluntarily monitor their systems systematically in order to prevent unlawful activities, if the systematic monitoring of third-party content implies the use of privacy-intrusive and/or over-blocking measures.
- 2.14. To determine whether measures are privacy-intrusive, account shall be taken of the role played by Internet intermediaries in the process of transmission of communications and the effects of the principle of confidentiality of communications as protected by Article 8 of the Convention.
- 2.15. Member states consider the adoption of sectoral rules relating to the allocation of implementation costs of blocking or take down orders to allow Internet intermediaries to claim for reimbursement against certain categories of victims (e.g. Intellectual Property right holders) as long as the right to an effective remedy as protected by Article 13 of the Convention is not jeopardized.

### 3. Limits to the regulation of intermediaries

- 3.1. States are obliged to combat violence and other criminal or unlawful activities online. Fulfilling this obligation may justify the imposition of duties upon intermediaries to remove content, communicate user information or suspend access for users or to domain names.
- 3.2. Given the importance of the right to Internet access and freedom of expression, any restrictions on intermediaries impacting these rights, must be

provided by law, pursue a legitimate aim as exhaustively listed in Article 10 (2) of the Convention, and be necessary and proportionate in a democratic society.

- 3.3. Any laws or regulations governing the liability of intermediaries must be accessible and sufficiently precise so as to enable them to foresee the consequences of their conduct. Moreover, for the requirements of accessibility and foreseeability to be met, the law must also afford a measure of legal protection against arbitrariness and lay down adequate procedural safeguards so as to provide effective protection to Convention rights, including the right to freedom of expression. Such protection is not limited to interferences with freedom of expression emanating from public authorities. Member States are also responsible for preventing and remedying Convention violations by private persons or entities under the conditions laid out above.
- 3.4. Member States shall not encourage Internet intermediaries, independently or collectively, to monitor and censor expression that is neither illegal under international nor national law.

#### 4. Encouraging human rights-sensitive business practices by Internet intermediaries

- 4.1. Recognizing that most aspects of the relationship between intermediaries and users are covered by private law, member States shall provide incentives to Internet intermediaries to develop business practices that are sensitive to human rights, in particular freedom of expression and data protection.
- 4.2. Member states shall strive to ensure that contracts between users and intermediaries are consistent with the principles underlying the Convention (Khurshid Mustafa and Tarzibachi 2008, § 33, 16; Pla and Puncernau (2004), § 59).
- 4.3. Member States shall ensure that consumer and data protection laws are respected by Internet intermediaries and to that end consider encouraging regular reviews of terms of service, intermediaries' monetizing policy, the use of personal data, the decision-making remit of algorithms (especially news and search algorithms), clear and transparent procedures for reporting of content and decision-making criteria respecting regarding reported content.
- 4.4. States shall encourage transparency in and accountability of Internet intermediaries and shall only subject Internet intermediaries to requests for removal of content or regarding customer data, when provided by law and necessary in a democratic society.
- 4.5. States shall encourage intermediaries to provide quick and effective avenues for redressing user grievances and terms of service violations, and provide for effective remedies within national legal systems, when internal and alternative dispute settlement mechanisms prove insufficient.

- 4.6. While respecting the rights of Internet intermediaries, member States shall promote the evolution of online public sphere. In particular, when decisions by Internet intermediaries have the effect of preventing any effective exercise of the freedom of expression, member States may need to protect the enjoyment of Convention rights by regulating property rights in way that safeguards the Internet as a communicative space.

## 5. Jurisdictional challenges to the activities of Internet intermediaries

- 5.1. The nature of the Internet implies that intermediaries will be subjected to different legal systems. This can have chilling effects on the information available through intermediaries.
- 5.2. Member states shall ensure that their obligation to respect, protect and fulfill for everyone within their jurisdiction all rights and freedoms enshrined in the Convention is exercised in a way that does amount to a misuse of legal processes.
- 5.3. Recognizing the sovereign equality of all member States, and the margin of appreciation in developing the normative framework within each member States, no member State shall pass laws that have substantial and unwarranted extra-territorial effects.
- 5.4. Member States shall not introduce data localization requirements or require Internet intermediaries to have a physical presence in their country.
- 5.5. Member States shall ensure that national courts only assert jurisdiction over intermediary operating across borders when the operation has a sufficiently serious impact upon a would-be claimant. Cases by private parties should only be brought when they can establish that they have a real substantial connection to that jurisdiction and have suffered substantial harm in that jurisdiction.
- 5.6. States shall encourage the development, in the appropriate forums, of a dialogue to solve issues of conflict of laws and jurisdiction.