

*Committee of experts on
freedom of expression and digital technologies
(MSI-DIG)*

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

21 September 2021

MSI-DIG(2020)05

**Draft Recommendation of the Committee of Ministers to member
States on the impacts of digital technologies on freedom of expression**

Preamble

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe (ETS No. 1),

Committed to the shared values of human rights, democracy and the rule of law;

Recalling that Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, “the Convention”) confers on everyone the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers, and that Article 10.2, as interpreted by the European Court of Human Rights, specifies that these rights can only be limited when such interference is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society;

Mindful of the negative obligation of member States not to encroach on freedom of expression and other human rights in the digital environment, as well as of their positive obligation to actively protect human rights and to create a safe and enabling environment for everyone to participate in public debate and freely express opinions and ideas;

Noting that private companies must not cause or contribute to adverse human rights impacts through their activities and that they must prevent or mitigate adverse human rights impacts linked to their operations, products or services;

Reiterating that freedom of expression is essential for democratic societies, and that digital technologies have become indispensable for said freedom;

Emphasising that digital technologies have expanded individuals’ and groups’ ability to receive and impart information and that they have increased the range and diversity of information individuals can access;

Conscious that digital technologies can create and strengthen social bonds, help citizens express grievances and promote alliances across borders and cultures, enable marginalised communities to build networks of solidarity, and foster more open, inclusive and diverse public spheres;

Recognising the pivotal role played by privately owned providers of digital infrastructures that enable freedom of expression online and shape the conditions under which this right can be exercised, but are not directly subject to the obligations to provide the guarantees and observe the limitations outlined in Article 10;

Recalling that media pluralism is a prerequisite for secure, widespread, and unlimited access to information on issues of public interest;

Acknowledging that professional news organisations play a crucial role in the production and distribution of high-quality information, but that new advertising and data exploitation models have jeopardised their business models, thus weakening their financial sustainability and, as a result, independence;

Recognising that well-funded and independent public service media can enhance democratic debate;

Noting that effective policymaking on the implications of digital technologies for freedom of expression requires accurate, nuanced, and comprehensive knowledge derived from rigorous and independent research, but most such knowledge, and the data required to generate it, is held but not comprehensively shared by most internet intermediaries;

Conscious of the need to protect children and all those whose human rights, in particular freedom of expression, may be disproportionately harmed by certain types of content that are widely available online, and mindful that any measures to protect them need to respect freedom of expression and other human rights;

Determined to safeguard the rights enshrined in the Convention and committed to follow up on the Helsinki Ministerial Declaration of May 2019, which demanded strong action to reverse the persistent deterioration of freedom of expression in Europe in recent decades,

Recommends that member States:

1. fully implement the Guidelines attached to this recommendation in effective cooperation with all relevant stakeholders;
2. in implementing the Guidelines, take account of the case law of the European Court of Human Rights and previous Committee of Ministers' recommendations to member States and declarations;
3. assess and review their legislative, regulatory and supervisory frameworks and policies as well as their practices with respect to the impact of digital technologies on freedom of expression to ensure that they are in line with the Guidelines, with a view to avoiding hasty and fragmented measures that may carry further adverse effects on the larger information environment;
4. ensure that this recommendation, including the Guidelines, be translated and disseminated as widely as possible and through all accessible means among competent authorities and stakeholders, including parliaments, independent authorities, specialised public agencies, civil society organisations, users, and the private sector;
5. endow their competent regulatory authorities and institutions with the necessary resources and authority to investigate, oversee and coordinate compliance with their relevant legislative and regulatory framework, in line with this recommendation;
6. engage in regular, inclusive, meaningful and transparent consultation, cooperation and dialogue with all stakeholders (including media, internet intermediaries, civil society, human rights defence organisations, the research and professional community, and education institutions), paying particular attention to vulnerable subjects, with a view to ensuring that the impacts of digital technologies on freedom of expression are comprehensively monitored, debated, and addressed;
7. encourage and promote the implementation of effective and tailored literacy programmes, in cooperation with all relevant stakeholders, to enable all individuals and groups to benefit from digital technologies for their enhanced exercise and enjoyment of freedom of expression;
8. fund and promote rigorous and independent research on the individual and societal implications of digital technologies for freedom of expression, and take meaningful steps to ensure that independent researchers free from commercial and political interests can access the necessary data held by internet intermediaries in an appropriate, human rights compliant legal framework and especially in accordance with the conditions set out in the Convention (ETS No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data, as updated by the Protocol (CETS No. 223) amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data;
9. review regularly, in consultation with all relevant actors, and report domestically and within the Committee of Ministers on the measures taken to implement this recommendation and its Guidelines with a view to enhancing their effectiveness and adapting them to evolving challenges.

Appendix to Recommendation CM/Rec(20XX)XX

Guidelines on the impacts of digital technologies on freedom of expression

Scope and definitions

Freedom of expression, as protected by Article 10 of the European Convention on Human Rights (“the Convention”), is not only a fundamental individual right. It is also a means to protect and enhance democracy through open and public debate. Digital technologies can and indeed must support this right and serve this purpose.

These Guidelines are designed to assist States and public and private actors, in particular internet intermediaries, as well as media, civil society organisations, researchers, educational institutions, and other relevant actors in their independent and collaborative efforts to protect and promote freedom of expression in the digital age. The Guidelines formulate principles aimed at ensuring that digital technologies serve rather than curtail such freedom. They also provide recommendations on how to address the adverse impacts and enhance the positive impacts of the widespread use of digital technologies on freedom of expression in human rights compliant ways.

“Internet intermediaries” are understood here as defined in the Recommendation CM/Rec(2018)2 by the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries. Bearing in mind that internet intermediaries offer and perform a variety of functions and services, and may carry out several functions in parallel, where appropriate, reference is made to specific functions they perform.

The Guidelines are organised into six sections: Foundations for Human Rights-Enhancing Rulemaking; Digital Infrastructure Design; Transparency; Accountability and Redress; Education and Empowerment; and Independent Research for Evidence-Based Rulemaking. Each section offers guidance to States and other stakeholders on how to fulfil their human rights obligations and responsibilities with regard to freedom of expression, combining legal, regulatory, administrative, and practical measures.

1. Foundations for Human Rights-Enhancing Rulemaking

- 1.1. **Clear and unambiguous objectives:** Any self-regulation, co-regulation, or regulation of digital technologies that potentially restricts freedom of expression should clearly distinguish between responses to illegal forms of expression and remedies to forms of expression that are legal and protected by Article 10 of the Convention, but may be undesirable or problematic. State regulation should only restrict the dissemination of content that is illegal, and any such restrictions must comply with Article 10.2 of the Convention. For content that is legal but undesirable or problematic in a democratic society, alternative responses should be sought that are founded on the principle of flexibility as outlined in item 1.5 of these Guidelines and prioritise safeguards rather than restrictions to freedom of expression. In line with their obligation to protect human rights, States should ensure that all regulatory frameworks, including self- or co-regulatory approaches, comply with the Convention.
- 1.2. **Legality, necessity, and predictability:** Any State policies or actions interfering with the right to freedom of expression should be prescribed by law, pursue one of the legitimate aims listed in Article 10.2 of the Convention, employ proportionate means, and fulfil the requirements of legal certainty, necessity, and predictability.
- 1.3. **Precision:** States should only regulate forms of speech and types of content that they have clearly defined. Definitions that are vague and lend themselves to subjective interpretations should be

avoided in regulatory practice, as they cannot provide sufficient clarity and predictability to all parties involved and can result in disproportionate and unjustified hindrances to freedom of expression.

- 1.4. **Proportionality:** Any regulation, compliance requirement, and administrative process put in place to achieve the goals highlighted in these Guidelines should be proportionate to the risk levels, size, and capacity of different internet intermediaries. States should only impose substantial obligations on very large internet intermediaries, defined based on their reach and ability to affect the exercise of freedom of expression, and on companies that enable or perform activities that pose a credibly high risk to freedom of expression. The criteria based on which the size, capacity, and risk levels of different internet intermediaries are assessed should be specified clearly, reviewed periodically, measured precisely, and communicated transparently.
- 1.5. **Graduated response:** In their regulatory and co-regulatory initiatives, States should acknowledge that internet intermediaries can employ various content moderation techniques beyond removal while ensuring due transparency, predictability and oversight. These techniques include prioritisation and de-prioritisation, promotion and demotion, monetisation and demonetisation (where applicable), and the provision of supplementary information to users, including trigger warnings, alerts, and additional content from official and independent authoritative sources.
- 1.6. **Focus on processes:** Regulation and co-regulation should be primarily focused on the processes through which internet intermediaries rank, moderate, and remove content, rather than on the content itself.
- 1.7. **User empowerment:** Regulatory, co-regulatory, and self-regulatory initiatives should aim to expand users' understanding, choice, and control of the impact of digital technologies on their freedom of expression without overburdening them with excessive requirements to safeguard their rights.
- 1.8. **Protection:** Individuals targeted by potentially damaging types of online expression – for example harassment, bullying, and stalking – can incur substantial harms because of the mass scale, high speed of messaging, and coordination enabled and amplified by digital technologies. The victims of these activities should have ample and effective opportunities to report perpetrators and obtain remedies.
- 1.9. **Human rights impact assessments:** When public and private actors consider interventions that may affect freedom of expression, they should preliminarily conduct and publish human rights impact assessments. If those impact assessments conclude that proposed regulation carries human rights risks, they should also include clear measures to prevent or mitigate them. As digital technologies and their uses change constantly, their impacts on freedom of expression should be reviewed regularly.
- 1.10. **Privacy:** Private actors and states can curtail individuals' right to privacy and informational self-determination by employing increasingly sophisticated surveillance and algorithmic persuasion strategies. Any activities by public and private actors should conform with the existing legal frameworks for privacy and data protection, including the Convention (ETS No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data, as updated by the Protocol (CETS No. 223) amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108 and 108+). States and private actors should furthermore comply with the privacy provisions laid down in Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems and the Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes.
- 1.11. **Multistakeholder collaboration:** The definition of policies, guidelines and regulations around digital technologies that can impact freedom of expression requires the full participation of

governments, parliaments, international organisations, internet intermediaries, media, civil society, the research community, the expert community, and users, taking into account their specific roles and responsibilities. These collaborative processes should be based on clearly defined and mutually agreed scopes and competences, adequate funding, provision of the necessary data by all stakeholders involved, streamlined procedures to close feedback loops, and clear recognition of who is responsible for implementing the outcomes. The development of international public policies and governance arrangements should enable full and equal participation of all stakeholders from all countries, as provided for by the Council of Europe Committee of Ministers Declaration on Internet governance principles.

2. Digital Infrastructure Design

- 2.1. The digital infrastructure of communication in democratic societies should be designed to promote human rights, openness, interoperability, transparency, and fair competition.
- 2.2. States and internet intermediaries should enable access to, and use of the digital infrastructure at fair, reasonable and non-discriminatory conditions to promote effective competition.
- 2.3. Internet intermediaries should enable third-party use and access to the users at non-discriminatory and fair conditions, including support for data portability and interoperability. The conditions for access and use should not result in user lock-ins.
- 2.4. State regulation should strengthen competition across all relevant media and communication markets. In addition to enforcing and amending, where necessary, competition law to limit concentration in media and communication markets, States should also modernise media concentration policies to take into account the conditions under which the attention of mass publics is channelled and commercialised, and how these processes can shape the opinions of individuals and groups in the public sphere, with a view to enhancing pluralism as a counterbalance to the increasingly concentrated power to shape public opinion.
- 2.5. States should not use their powers and policies related to competition and media concentration to interfere with the activities of internet intermediaries in ways that restrict freedom of expression and other human rights.
- 2.6. States should invest in public service media and maintain regulatory and governance frameworks that ensure that they are independent from political interference, have a clear role and remit, avoid crowding out private competitors, and serve all audiences, including younger generations, across all available digital technologies and without any discrimination. States should also support private media that demonstrably achieve the same goals without interfering with their editorial independence. This holds particularly true for local and regional media that tend to enjoy high trust and play a vital role in community building and democracy governance.
- 2.7. States should stimulate the digital transformation of news organisations and promote investment in and development of digital technologies that serve them, for example through public support for free and open source software and infrastructure development.

3. Transparency

- 3.1. States and regulators should ensure that all necessary data are generated and published to enable any analyses necessary to guarantee meaningful transparency on how internet intermediaries'

policies and their implementation affect freedom of expression among the general public and vulnerable subjects.

- 3.2. States should assist private actors and civil society organisations in the development of independent institutional mechanisms that ensure impartial and comprehensive verification of the completeness and accuracy of any data made available by internet intermediaries in their transparency efforts.
- 3.3. Internet intermediaries should publish the necessary information in machine-readable format to ensure transparency on their policies at different levels and in pursuit of different goals including: empowering users; enabling third-party auditing and oversight; and informing independent efforts to counter problematic content online. These transparency requirements should be proportionate to the size, capacity, function, and risk levels of different internet intermediaries.
- 3.4. Internet intermediaries should provide adequate transparency on the design and implementation of their terms of service and their key policies for content moderation, such as information regarding removal, recommendation, amplification, promotion, downranking, monetisation, and distribution, particularly with respect to their outcomes for freedom of expression.
- 3.5. When internet intermediaries create or significantly update their key policies and terms of service, they should engage in open, transparent, and meaningful consultations with relevant public and private stakeholders. These processes should explore the ways in which policies and terms of service affect freedom of expression and other human rights. Internet intermediaries should provide full information on the process, content and outcome of these consultations, declaring all the feedback they received and explaining whether and how they implemented it.
- 3.6. When there are legitimate concerns that their policies may lead to discrimination, internet intermediaries should provide information that allows independent third parties to evaluate whether their policies are implemented in a non-discriminatory way, including by disclosing the datasets based on which automated systems are trained in order to identify and correct sources of algorithmic bias.

4. Accountability and Redress

- 4.1. States should ensure that any person whose freedom of expression is limited as a result of regulation can seek effective redress mechanisms against these restrictions in a simple, accessible and affordable way before courts.
- 4.2. States should ensure that any news provider whose editorial freedom is threatened as a result of internet intermediaries' application of their terms of service or content moderation policies is able to seek timely and effective redress mechanisms.
- 4.3. States should strengthen all relevant regulatory authorities and equip them with adequate resources and competencies so they can adequately monitor the impact of digital technologies on freedom of expression. States should also ensure that internet intermediaries provide the necessary information for these monitoring activities in due course.
- 4.4. States may, where necessary and particularly in case of public emergency in the sense of Article 15 of the Convention, as interpreted in case law by the Court, introduce appropriate and proportionate obligations for internet intermediaries to promote public interest content. Internet intermediaries should offer a higher level of protection for public interest content which should be clear, non-discriminatory, and transparently defined.

- 4.5. When internet intermediaries enforce any restrictions on freedom of expression, they should provide users affected by such restrictions with clear information on the policies based on which their rights have been limited. Internet intermediaries should also provide timely and effective redress mechanisms that allow the affected individuals to submit an appeal without undue costs, delays, or difficulties. To this end, they should offer users clear guidelines on how they can appeal and information on how and when such appeal would be adjudicated. Internet intermediaries should implement this provision in accordance with the Council of Europe Guidance note on best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory mechanisms of content moderation.
- 4.6. Internet intermediaries should set up processes and procedures to ensure that information collected from their users' appeals is used to identify and implement necessary improvements of key policies, thus preventing future grievances and damages.
- 4.7. In situations where the public is likely to experience substantial damage from content circulating online, internet intermediaries should remove this content if they have made clear it is not allowed on their platform. They should also distribute corrections or alerts issued by authoritative institutions as soon as possible and in a manner that ensures that the remedy is commensurate to the likely damage caused, for instance by targeting a similar audience as the one originally reached by the damaging content.

5. Education and Empowerment

- 5.1. States should enhance privacy and informational self-determination of individuals by enabling users to exercise greater control over the data they generate, the inferences derived from such data, and the content they access or do not access as a result. States should require internet intermediaries to meaningfully inform individuals in advance about the data their algorithmic systems will process, including the purposes and possible outcomes of these operations. States should empower users to control their data, including if and how they are targeted and profiled, and mandate appropriate interoperability. States should ensure that internet intermediaries enable users to easily and quickly modify the parameters of the service to ensure that they are not subjected to profiling. This option should be presented prominently and in a neutral manner.
- 5.2. States should enable all individuals to access digital literacy education that helps understand the conditions under which digital technologies affect freedom of expression, how information of varying quality is produced, distributed, and processed, and the ways in which individuals can protect their rights. States should also support joint educational initiatives by public institutions, international organisations, media, universities, user groups, civil society actors, internet intermediaries, and other stakeholders. Particular emphasis should be placed on the empowerment of vulnerable subjects and those with limited access to quality information.
- 5.3. Digital literacy programs should enhance awareness of the kinds of personal data that are processed and/or generated by digital devices, software and applications, the processes and user behaviours that generate them, the ways in which algorithms draw inferences from them, and the purposes for which different public and private organisations employ these inferences to influence the attitudes and behaviours of individuals and groups. They should also highlight any opportunities users have to exercise control over the ways in which their data are used.

- 5.4. Digital literacy programmes should be inclusive and informed by rigorous and independent research, and empower individuals with awareness of the available redress mechanisms against damages they may suffer from other users' expression as well as any infringements of their freedom of expression.
- 5.5. Considering the novelty and complexity of many forms of communication enabled by digital technologies, States should promote public debate and empower expert and scientific communities to provide evidence-based guidance on how to distinguish between uses of digital technologies that enable permissible persuasion and uses that entail unacceptable manipulation that encroaches on freedom of expression, particularly as regards self-determination and the ability to hold opinions. The results of these debates should inform public policies and digital literacy programmes.

6. Independent Research for Evidence-Based Rulemaking

- 6.1. States should provide adequate funding for rigorous and independent research in the public interest that illuminates the individual and societal impacts of digital technologies for human rights, particularly freedom of expression, across different social, political, legal, and cultural contexts, with a view to enabling evidence-based analysis, debate, and rulemaking on these issues.
- 6.2. While protecting the rights enshrined in Article 8 of the Convention, States should ensure that researchers can access data held by internet intermediaries in ways that are secure, legal, and privacy compliant. Such research should always respect users' rights to privacy and relevant data protection legislation, have an appropriate legal basis for processing personal data, and be conducted in an ethical and responsible way. States should clearly establish what data held by internet intermediaries can be shared with independent researchers. Where statutory frameworks do not specify this, regulatory authorities should provide interpretation that safeguards both users' right to privacy and rigorous and independent research in the public interest.
- 6.3. Data lawfully collected for other purposes by internet intermediaries may be processed for the purposes of conducting rigorous and independent research under the condition that such research is developed with the goal of safeguarding substantial public interest in understanding and governing the implications of digital technologies for human rights and, in particular, freedom of expression. States may determine and specify the kinds of research that fulfil public interest purposes in compliance with Council of Europe standards and values.
- 6.4. National competent authorities should, in collaboration with researchers and internet intermediaries, create secure environments that facilitate research into the societal and individual implications of the use of digital technology for human rights and, in particular, freedom of expression. National statutes can further specify the processes and conditions of the setting up, maintenance, and monitoring of such secure environments. Researchers operating in these environments retain full responsibility for compliance with data protection and other relevant regulations.
- 6.5. Internet intermediaries should make accurate and representative individual-level data available for independent research on the effects of digital technologies on human rights and, in particular, freedom of expression. Data should be shared in compliance with personal data protection laws and independent of commercial and political influence. Any dataset made available for these purposes should be anonymised using state of the art techniques and based on the principles stipulated by the Convention 108 and 108+.
- 6.6. Researchers should only be allowed to access individual-level data held by internet intermediaries if they have been vetted by an independent scientific institution based on their qualifications and the merits of their projects, are affiliated with a university, have received approval by their university's

ethical review board, hold the necessary expertise to analyse and safeguard the data, and do not have commercial or political interests that conflict with the research they wish to pursue. Public institutions may set up processes whereby independent research organisations can be periodically accredited so that researchers operating within them can also be granted access to data held by internet intermediaries at the same conditions and with the same safeguards. Public and private actors should incentivise collaborations between researchers affiliated with universities and those operating in research institutions, news media, and civil society organisations.

- 6.7. Researchers and their institutions should be jointly and substantially liable if they process these data in violations of users' privacy or other provisions of the law. When such joint liability is incompatible with national legislation, States should consider revising their statutes to make it possible as an additional guarantee of researchers' ethical conduct and institutional accountability.
- 6.8. To protect researchers' independence, data sharing agreements between internet intermediaries and researchers should clarify that internet intermediaries cannot interfere with the design, analysis, and publication of research based on the data they make available. Independent scientific institutions should monitor the implementation of these agreements and adjudicate any disputes.
- 6.9. Internet intermediaries that provide researchers with access to the data they hold should retain the right to object to any uses of the the data they shared that may compromise users' privacy or data protection rights, or otherwise violate the law. When they provide adequate safeguards to users' privacy in sharing data with researchers, internet intermediaries should be immune from liability resulting directly from the sharing of such data.
- 6.10. States should ensure that internet intermediaries' terms of service do not discriminate against research into their societal and individual implications for human rights and, in particular, freedom of expression, and that researchers who have received approval by an ethical review board or equivalent body cannot be held liable under the pretext of breaking the internet intermediaries' terms of service while conducting their research.