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MINISTERS' DEPUTIES

Recommendations

CM/Rec(2018)2

7 March 2018

**Recommendation CM/Rec(2018)2
of the Committee of Ministers to member States
on the roles and responsibilities of internet intermediaries**

*(Adopted by the Committee of Ministers on 7 March 2018
at the 1309th meeting of the Ministers' Deputies)*

Preamble

1. In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, "the Convention"), as interpreted by the European Court of Human Rights ("the Court"), Council of Europe member States have the obligation to secure the rights and freedoms enshrined in the Convention to everyone within their jurisdiction, both offline and online. Access to the internet is a precondition for the exercise of Convention rights and freedoms online.
2. By enhancing the public's ability to seek, receive and impart information without interference and regardless of frontiers, the internet play a particularly important role with respect to the right to freedom of expression. It also enables the exercise of other rights protected by the Convention and its protocols, such as the right to freedom of assembly and association and the right to education, and it enables access to knowledge and culture, as well as participation in public and political debate and in democratic governance. However, speech and action that are incompatible with the values enshrined in the Convention are not protected by Article 10 or any of its other provisions, by virtue of Article 17 of the Convention.
3. The protection of privacy and personal data is fundamental to the enjoyment and exercise of most of the rights and freedoms guaranteed in the Convention. However, the internet has facilitated an increase in privacy-related risks and infringements and has spurred the spread of certain forms of harassment, hatred and incitement to violence, in particular on the basis of gender, race and religion, which remain underreported and are rarely remedied or prosecuted. Moreover, the rise of the internet and related technological developments have created substantial challenges for the maintenance of public order and national security, for crime prevention and law enforcement, and for the protection of the rights of others, including intellectual property rights. Targeted disinformation campaigns online, designed specifically to sow mistrust and confusion and to sharpen existing divisions in society, may also have destabilising effects on democratic processes.
4. A wide, diverse and rapidly evolving range of players, commonly referred to as "internet intermediaries", facilitate interactions on the internet between natural and legal persons by offering and performing a variety of functions and services. Some connect users to the internet, enable the processing of information and data, or host web-based services, including for user-generated content. Others aggregate information and enable searches; they give access to, host and index content and services designed and/or operated by third parties. Some facilitate the sale of goods and services, including audio-visual services, and enable other commercial transactions, including payments.
5. Intermediaries may carry out several functions in parallel. They may also moderate and rank content, including through automated processing of personal data, and may thereby exert forms of control which influence users' access to information online in ways comparable to media, or they may perform other functions that resemble those of publishers. Intermediary services may also be offered by traditional media, for instance, when space for user-generated content is offered on their platforms. The regulatory framework governing the intermediary function is without prejudice to the frameworks that are applicable to the other functions offered by the same entity.
6. The rule of law is a prerequisite for the protection and promotion of the exercise of human rights and for pluralistic and participatory democracy. Member States have the obligation to refrain from violating the right to freedom of expression and other human rights in the digital environment. They also have a positive obligation to protect human rights and to create a safe and enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock or disturb State officials or any sector of the population. This positive obligation to ensure the exercise and enjoyment of rights and freedoms includes, due to the horizontal effects of human rights, the protection of individuals from actions of private parties by ensuring compliance with relevant legislative and regulatory frameworks. Moreover, due process guarantees are indispensable, and access to effective remedies should be facilitated vis-à-vis both States and intermediaries with respect to the services in question.
7. A variety of network effects and mergers have led to the existence of fewer, larger entities that dominate the market in a manner that may jeopardise the opportunities for smaller intermediaries or start-ups and places them in positions of influence or even control of principal modes of public communication. The power of such intermediaries as protagonists of online expression makes it imperative to clarify their role and impact on human rights, as well as their corresponding duties and responsibilities, including as regards the risk of misuse by criminals of the intermediaries' services and infrastructure.
8. In addition, support for initiatives promoting media and information literacy skills for accessing and managing the digital space is essential. Such efforts should be implemented through various means, including formal and non-formal education, with a view to promoting everyone's effective and equal enjoyment of the rights enshrined in the Convention, without discrimination of any kind. Given the particularly high number of young and child users of the internet, the protection and empowerment of children regarding their safe and informed access to and exercise

of rights in the digital environment should be ensured at all times. To this end, sustained engagement is required to enhance cognitive, technical, social and critical skills among girls and boys, parents and educators on how to deal with an information and communications environment that provides access to degrading content of a sexual or violent nature.

9. The regulatory framework governing the services provided by or through intermediaries is diverse, multi-tiered and continuously evolving. States are confronted with the complex challenge of regulating an environment in which private parties fulfil a crucial role in providing services with significant public service value. The task of regulation is further complicated by the global nature of the internet and related services, by the diversity of intermediaries, by the volume of internet communication and by the speed at which it is produced and processed. Owing to the fact that intermediaries operate or are used across many countries, including in a cloud-computing context, their actions may also have effects under several, sometimes conflicting, laws of different jurisdictions.

10. Internet intermediaries also develop their own rules, usually in form of terms of service or community standards that often contain content-restriction policies. Moreover, intermediaries collect, generate, retain and process a wealth of information and data from and about users. These activities may interfere with, among other rights, the users' rights to privacy and freedom of expression. Effective reporting and complaints mechanisms may be lacking, be insufficiently transparent and efficient, or be provided only through automated processes.

11. In line with the UN Guiding Principles on Business and Human Rights and the "Protect, Respect and Remedy" Framework, intermediaries should respect the human rights of their users and affected parties in all their actions. This includes the responsibility to act in compliance with applicable laws and regulatory frameworks. Owing to the multiple roles intermediaries play, their corresponding duties and responsibilities and their protection under law should be determined with respect to the specific services and functions that are performed.

12. Against this background and in order to provide guidance to all relevant actors who are faced with the complex task of protecting and respecting human rights in the digital environment, the Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe (ETS No. 1), recommends that member States:

- implement the guidelines included in this recommendation when devising and implementing legislative frameworks relating to internet intermediaries in line with their relevant obligations under the European Convention on Human Rights, the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108, "Convention 108"), the Convention on Cybercrime (ETS No. 185, "the Budapest Convention"), the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201, "the Lanzarote Convention") and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, "the Istanbul Convention"), and promote them in international and regional forums that deal with the roles and responsibilities of internet intermediaries and with the protection and promotion of human rights in the online environment;
- take all necessary measures to ensure that internet intermediaries fulfil their responsibilities to respect human rights in line with the United Nations Guiding Principles on Business and Human Rights and the Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business;
- in implementing the guidelines, take due account of Committee of Ministers Recommendation CM/Rec(2016)5 on Internet freedom, Recommendation CM/Rec(2016)1 on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality, Recommendation CM/Rec(2015)6 on the free, transboundary flow of information on the Internet, Recommendation CM/Rec(2014)6 on a Guide to human rights for Internet users, Recommendation CM/Rec(2013)1 on gender equality and media, Recommendation CM/Rec(2012)3 on the protection of human rights with regard to search engines, Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, Recommendation CM/Rec(2011)7 on a new notion of media, Recommendation CM/Rec(2010)13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling, Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet, as well as the 2017 Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data, and the 2008 Guidelines for the cooperation between law enforcement and internet service providers against cybercrime;
- implement the guidelines included in this Recommendation in the understanding that, as far as they concern the responsibilities of internet service providers that have significantly evolved in the past decade, they are intended to build on and reinforce the Human rights guidelines for internet service providers, drawn up in 2008 by the Council of Europe in co-operation with the European Internet Service Providers Association (EuroISPA);
- engage in a regular, inclusive and transparent dialogue with all relevant stakeholders, including from the private sector, public service media, civil society, education establishments and academia, with a view to sharing and discussing information and promoting the responsible use of emerging technological developments related to internet intermediaries that impact the exercise and enjoyment of human rights and related legal and policy issues;
- encourage and promote the implementation of effective age- and gender-sensitive media and information literacy programmes to enable all adults, young people and children to enjoy the benefits and minimise the exposure to risks of the online communications environment, in co-operation with all relevant stakeholders, including from the private sector, public service media, civil society, education establishments, academia and technical institutes;
- review regularly the measures taken to implement this Recommendation with a view to enhancing their effectiveness.

Appendix to Recommendation CM/Rec(2018)2

Guidelines for States on actions to be taken vis-à-vis internet intermediaries with due regard to their roles and responsibilities

1. Obligations of States with respect to the protection and promotion of human rights and fundamental freedoms in the digital environment

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 shall be prescribed by law, exercised within the limits conferred by law and constitute a necessary and proportionate measure in a democratic society. States should not exert pressure on internet intermediaries through non-legal means.

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, should effectively safeguard human rights and fundamental freedoms, as enshrined in the European Convention on Human Rights, and should maintain adequate guarantees against arbitrary application in practice.

1.1.3. States have the ultimate obligation to protect human rights and fundamental freedoms in the digital environment. All regulatory frameworks, including self- or co-regulatory approaches, should include effective oversight mechanisms to comply with that obligation and be accompanied by appropriate redress opportunities.

1.1.4. The process of enacting legislation or regulations applicable to internet intermediaries should be transparent and inclusive. States should regularly consult with all relevant stakeholders with a view to ensuring that an appropriate balance is struck between the public interest, the interests of the users and affected parties, and the interests of the intermediary. Before adopting legislation or regulations, States should conduct human rights impact assessments to understand and prevent or mitigate any potential negative impact on human rights.

1.1.5. States should ensure that legislation, regulation and policies related to internet intermediaries are interpreted, applied and enforced without discrimination, also taking into account multiple and intersecting forms of discrimination. The prohibition of discrimination may in some instances require special measures to address specific needs or correct existing inequalities. Moreover, States should take into account the substantial differences in size, nature, function and organisational structure of intermediaries when devising, interpreting and applying the legislative framework in order to prevent possible discriminatory effects.

1.1.6. States should ensure that legislation, regulation and policies relating to internet intermediaries are effectively implementable and enforceable and that they do not unduly restrict the operation and free flow of transborder communication.

1.2. Legal certainty and transparency

1.2.1. Any legislation applicable to internet intermediaries and to their relations with States and users should be accessible and foreseeable. All laws should be clear and sufficiently precise to enable intermediaries, users and affected parties to regulate their conduct. The laws should create a safe and enabling online environment for private communications and public debate and should comply with relevant international standards

1.2.2. Any legislation should clearly define the powers granted to public authorities as they relate to internet intermediaries, particularly when exercised by law-enforcement authorities. Such legislation should indicate the scope of discretion to protect against arbitrary application.

1.2.3. States should make available, publicly and in a regular manner, comprehensive information on the number, nature and legal basis of content restrictions or disclosures of personal data that they have applied in a certain period through requests addressed to intermediaries, including those based on international mutual legal assistance treaties, and on steps taken as a result of those requests. For purposes of transparency, States should require intermediaries to disclose clear (simple and machine-readable), easily

accessible and meaningful information about interferences with the exercise of rights and freedoms in the digital environment, whether based on court or administrative orders, private complainants' requests, or enforcement of their own content-restriction policies.

1.2.4. With a view to avoiding legal uncertainty and conflicting laws, States should commit to co-operating with each other and with all relevant stakeholders in cases where different laws apply, and should support the development of common approaches and jurisdictional principles, including through appropriate non-state forums.

1.3. Safeguards for freedom of expression

1.3.1. Any request, demand or other action by public authorities addressed to internet intermediaries to restrict access (including blocking or removal of content), or any other measure that could lead to a restriction of the right to freedom of expression, shall be prescribed by law, pursue one of the legitimate aims foreseen in Article 10 of the Convention, be necessary in a democratic society and be proportionate to the aim pursued. State authorities should carefully evaluate the possible impact, including unintended, of any restrictions before and after applying them while seeking to apply the least intrusive measure necessary to meet the policy objective.

1.3.2. State authorities should obtain an order by a judicial authority or other independent administrative authority, whose decisions are subject to judicial review, when demanding intermediaries to restrict access to content. This does not apply in cases concerning content that is illegal irrespective of context, such as content involving child sexual abuse material, or in cases where expedited measures are required in accordance with the conditions prescribed in Article 10 of the Convention.

1.3.3. When internet intermediaries restrict access to third-party content based on a State order, State authorities should ensure that effective redress mechanisms are made available and adhere to applicable procedural safeguards. When intermediaries remove content based on their own terms and conditions of service, this should not be considered a form of control that makes them liable for the third-party content for which they provide access.

1.3.4. State authorities should consider the adoption of appropriate legislation to prevent strategic lawsuits against public participation (SLAPP) or abusive and vexatious litigation against users, content providers and intermediaries which is intended to curtail the right to freedom of expression.

1.3.5. State authorities should not directly or indirectly impose a general obligation on intermediaries to monitor content which they merely give access to, or which they transmit or store, be it by automated means or not. When addressing any request to internet intermediaries or promoting, alone or with other States or international organisations, co-regulatory approaches by internet intermediaries, State authorities should avoid any action that may lead to general content monitoring. All co-regulatory approaches should comply with rule of law and transparency safeguards.

- 1.3.6. State authorities should ensure that the sanctions they impose on intermediaries for non-compliance with regulatory frameworks are proportionate because disproportionate sanctions are likely to lead to the restriction of lawful content and to have a chilling effect on the right to freedom of expression.
- 1.3.7. States should ensure, in law and in practice, that intermediaries are not held liable for third-party content which they merely give access to or which they transmit or store. State authorities may hold intermediaries co-responsible with respect to content that they store if they do not act expeditiously to restrict access to content or services as soon as they become aware of their illegal nature, including through notice-based procedures. State authorities should ensure that notice-based procedures are not designed in a manner that incentivises the take-down of legal content, for example due to inappropriately short timeframes. Notices should contain sufficient information for intermediaries to take appropriate measures. Notices submitted by States should be based on their own assessment of the illegality of the notified content, in accordance with international standards. Content restrictions should provide for notice of such restriction being given to the content producer/issuer as early as possible, unless this interferes with ongoing law-enforcement activities. Information should also be made available to users seeking access to the content, in accordance with applicable data protection laws.
- 1.3.8. In order to ensure that illegal content – as determined either by law or by a judicial authority or other independent administrative authority whose decisions are subject to judicial review – is effectively prevented from being accessed, States should co-operate closely with intermediaries to secure the restriction of such content in line with the principles of legality, necessity and proportionality. They should also take into account the fact that automated means, which may be used to identify illegal content, currently have a limited ability to assess context. Such restrictions should not prevent the legitimate use of identical or similar content in other contexts.
- 1.3.9. Where intermediaries produce or manage content available on their platforms or where intermediaries play a curatorial or editorial role, including through the use of algorithms, State authorities should apply an approach that is graduated and differentiated, in line with Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States on a new notion of media. States should determine appropriate levels of protection, as well as duties and responsibilities according to the role that intermediaries play in content production and dissemination processes, while paying due attention to their obligation to protect and promote pluralism and diversity in the online distribution of content.
- 1.3.10. States should encourage appropriate self-regulatory frameworks or the development of co-regulatory mechanisms, taking due account of the role of intermediaries in providing services of public value and facilitating public discourse and democratic debate, as protected by Article 10 of the Convention.
- 1.4. Safeguards for privacy and data protection
- 1.4.1. Any demand or request by State authorities addressed to internet intermediaries to access, collect or intercept personal data of their users, including for criminal justice purposes, or any other measure which interferes with the right to privacy, shall be prescribed by law, pursue one of the legitimate aims foreseen in Article 8 of the Convention and Article 9 of Convention 108, and be used only when it is necessary and proportionate in a democratic society. The protection of the right to privacy and data protection extends to devices used for accessing the internet or stored data.
- 1.4.2. State authorities should ensure that their legal frameworks and the ensuing policies and practices of intermediaries uphold the principles of data protection (lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage time limitations and data security, including integrity and confidentiality) and guarantee the rights of the data subject in full compliance with Convention 108.
- 1.4.3. State authorities should protect the right to confidentiality of all private communications facilitated by internet intermediaries, extending to the content of the communication and metadata, and should ensure that levels of data protection and respect for privacy, in conformity with Convention 108, are also guaranteed in situations of transborder data flows.
- 1.4.4. Surveillance measures undertaken by States, whether in co-operation with internet intermediaries or not, should be targeted, precisely defined, subject to effective external oversight and compliant with Article 8 of the Convention, as well as Article 9 and other relevant provisions of Convention 108. They should also include guarantees for the exercise of data subjects' rights and effective redress mechanisms.
- 1.4.5. State authorities should ensure that appropriate complementary safeguards, such as explicit consent of the data subject, apply to the automatic processing of special categories of data as defined in Article 6 of Convention 108.
- 1.5. Access to an effective remedy
- 1.5.1. States should guarantee accessible and effective judicial and non-judicial procedures that ensure the impartial review, in compliance with Article 6 of the Convention, of all claims of violations of Convention rights in the digital environment, such as the right to life, the right to liberty and security, the right to respect for privacy, the right to freedom of expression or the right not to be discriminated against in the enjoyment of the rights and freedoms set forth in the Convention.
- 1.5.2. States should guarantee an effective remedy for all violations of human rights and fundamental freedoms set forth in the Convention by internet intermediaries, in compliance with Article 13 of the Convention. They should furthermore ensure that intermediaries provide users or affected parties with access to prompt, transparent and effective reviews for their grievances and alleged terms of service violations, and provide for effective remedies, such as the restoration of content, apology, rectification or compensation for damages. Judicial review should remain available, when internal and alternative dispute settlement mechanisms prove insufficient or when the affected parties opt for judicial redress or appeal.
- 1.5.3. States should proactively seek to reduce all legal, practical or other relevant barriers that could lead to users, affected parties and internet intermediaries being denied an effective remedy to their grievances.
- 1.5.4. States should support age- and gender-sensitive activities promoting media and information literacy to ensure that all users are effectively made aware of their rights and freedoms, in particular regarding their right to an effective remedy vis-à-vis both State authorities and internet intermediaries. The promotion of media and information literacy should encompass education about the rights of all stakeholders,

including other users and affected parties.

2. Responsibilities of internet intermediaries with respect to human rights and fundamental freedoms that States should aim to ensure

2.1. Respect for human rights and fundamental freedoms

2.1.1. Internet intermediaries should in all their actions respect the internationally recognised human rights and fundamental freedoms of their users and of other parties who are affected by their activities. This responsibility, in line with the United Nations Guiding Principles on Business and Human Rights, exists independently of the States' ability or willingness to fulfil their own human rights obligations.

2.1.2. The responsibility of intermediaries to respect human rights and to employ adequate measures applies regardless of their size, sector, operational context, ownership structure or nature. The scale and complexity of the means through which intermediaries meet their responsibilities may vary, however, taking into account the severity of impact on human rights that their services may have. The greater the impact and the potential damage to the objects of legal protection and the higher the value of the services for the exercise of human rights, the greater the precautions that the intermediary should employ when developing and applying their terms and conditions of service, community standards and codes of ethics aiming, notably, to prevent the spread of abusive language and imagery, of hatred and of incitement to violence.

2.1.3. Any interference by intermediaries with the free and open flow of information and ideas, be it by automated means or not, should be based on clear and transparent policies and be limited to specific legitimate purposes, such as restricting access to illegal content, as determined either by law or by a judicial authority or other independent administrative authority whose decisions are subject to judicial review, or in accordance with their own content-restriction policies or codes of ethics, which may include flagging mechanisms.

2.1.4. Internet intermediaries should carry out regular due diligence assessments of their compliance with the responsibility to respect human rights and fundamental freedoms and with their applicable duties. To this end, they should conduct assessments of the direct and indirect human rights impacts of their current and future policies, products and services on users and affected parties, and ensure 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 openly as possible and encourage active user engagement. They should be mindful of the public service value of the services they deliver and should seek to avoid or mitigate any adverse effects on the effective exercise of rights by their users or affected parties.

2.1.5. Internet intermediaries should seek to provide their products and services without any discrimination. They should seek to ensure that their actions do not have direct or indirect discriminatory effects or harmful impacts on their users or other parties affected by their actions, including on those who have special needs or disabilities or may face structural inequalities in their access to human rights. In addition, intermediaries should take reasonable and proportionate measures to ensure that their terms of service agreements, community standards and codes of ethics are applied and enforced consistently and in compliance with applicable procedural safeguards. The prohibition of discrimination may under certain circumstances require that intermediaries make special provisions for certain users or groups of users in order to correct existing inequalities.

2.2. Transparency and accountability

2.2.1. Internet intermediaries should ensure that all terms of service agreements and policies specifying the rights of users and all other standards and practices for content moderation and the processing and disclosure of user data are publicly available in clear, plain language and accessible formats. When operating globally, intermediaries should translate such documents into the languages that their users and affected parties understand. Users should be notified in advance of all changes in relevant policies regarding the intermediaries' terms and conditions of service as applicable and without delay, and in formats that they can easily access and understand, including explanatory guides.

2.2.2. The process of drafting and applying terms of service agreements, community standards and content-restriction policies should be transparent, accountable and inclusive. Intermediaries should seek to collaborate and negotiate with consumer associations, human rights advocates and other organisations representing the interests of users and affected parties, as well as with data protection authorities before adopting and modifying their policies. Intermediaries should seek to empower their users to engage in processes of evaluating, reviewing and revising, where appropriate, intermediaries' policies and practices.

2.2.3. Internet intermediaries should clearly and transparently provide meaningful public information about the operation of automated data processing techniques in the course of their activities, including the operation of algorithms that facilitate searches based on user profiling or the distribution of algorithmically selected and personalised content, such as news. This should include information on which data is being processed, how long the data processing will take, which criteria are used, and for what purpose the processing takes place.

2.2.4. Intermediaries should regularly publish transparency reports that provide clear (simple and machine-readable), easily accessible and meaningful information on all restrictions to the free and open flow of information and ideas and all requests for such restriction, as well as requests for data access and preservation, whether based on court orders, international mutual legal assistance treaties, private complainant's requests or the enforcement of their own content-restriction policies.

2.3. Content moderation

2.3.1. Internet intermediaries should respect the rights of users to receive, produce and impart information, opinions and ideas. Any measures taken to restrict access (including blocking or removing content) as a result of a State order or request should be implemented using the least restrictive means.

2.3.2. When restricting access to content in line with their own content-restriction policies, intermediaries should do so in a transparent and non-discriminatory manner. Any restriction of content should be carried out using the least restrictive technical means and should be limited in scope and duration to what is strictly necessary to avoid the collateral restriction or removal of legal content.

2.3.3. Any restriction of content should be limited in scope to the precise remit of the order or request and should be accompanied by information to the public, explaining which content has been restricted and on what legal basis. Notice should also be given to the user and other affected parties, unless this interferes with ongoing law-enforcement activities, including information on procedural safeguards, opportunities for adversarial procedures for both parties as appropriate and available redress mechanisms.

2.3.4. All members of staff of intermediaries who are engaged in content moderation should be given adequate initial and ongoing training on the applicable laws and international human rights standards, their relationship with the intermediaries' terms of service and their internal standards, as well as on the action to be taken in case of conflict. Such training may be provided internally or externally, including through associations of intermediaries, and its scope should correspond to the importance of the intermediaries' role and the impact that their actions may have on the ability of users to exercise their freedom of expression. Staff should also be provided with appropriate working conditions. This includes the allocation of sufficient time for assessing content and opportunities to seek professional support and qualified legal advice where necessary.

2.3.5. Automated means of content identification are useful to prevent the reappearance of specific items of previously restricted content. Due to the current limited ability of automated means to assess context, intermediaries should carefully assess the human rights impact of automated content management, and should ensure human review where appropriate. They should take into account the risk of an over-restrictive or too lenient approach resulting from inexact algorithmic systems, and the effect these algorithms may have on the services that they provide for public debate. Restrictions of access to identical content should not prevent the legitimate use of such content in other contexts.

2.3.6. In cases where content is restricted by intermediaries in line with their own content-restriction policies because it contains an indication of a serious crime, restriction should be accompanied by adequate measures to ensure that evidence is retained for effective criminal law investigations. If intermediaries have specific knowledge of such restricted content, they should report this to a law-enforcement authority without undue delay.

2.4. Use of personal data

2.4.1. Intermediaries should not disclose personal data to a third party unless required by law or requested to do so by a judicial authority or other independent administrative authority whose decisions are subject to judicial review that has determined that the disclosure is consistent with applicable laws and standards, necessary in a democratic society and proportionate to the legitimate aim pursued.

2.4.2. Internet intermediaries should limit the processing of personal user data to what is necessary in the context of a clearly defined purpose, which is explicitly communicated to all users in a proactive manner. The processing, including collection, retention, aggregation, storage, adaptation, alteration, linking or sharing of personal data shall be based on the free, specific, informed and unambiguous consent of the user, with respect to a specific purpose, or on another legitimate basis laid down by law, as prescribed by Convention 108. Complementary safeguards such as explicit consent, anonymisation or encryption, should be applied to the automatic processing of special categories of data, as defined in Article 6 of Convention 108.

2.4.3. User data should only be aggregated and migrated across multiple devices or services following the free, specific, informed and unambiguous consent of users. Users should have the option of using a service without agreeing to such combining of their data. "Privacy by default" and "privacy by design" principles should be applied at all stages with a view to prevent or minimise the risk of interference with the rights and fundamental freedoms of users.

2.4.4. Users have the right to access their personal data and to obtain correction, deletion and blocking of it. Intermediaries should therefore provide them with relevant information at all stages of processing, using clear and plain language, especially where such information is addressed to children. Moreover, intermediaries should inform users clearly about the conditions under which they may exercise the right to personal data erasure, to object to the processing of data and to withdraw consent provided for the processing of personal data, following which all processing based on the consent of the user should be terminated.

2.4.5. Intermediaries should act in line with applicable legal conditions and safeguards regardless of where the collection of data has occurred and including with respect to transborder data flows.

2.4.6. Any tracking and profiling of users by intermediaries should be fully transparent for users. In order to protect their users' online identity, internet intermediaries should not employ profiling and digital tracking techniques that infringe on the user's exercise of human rights, including the right to freedom of expression and the right to privacy. Intermediaries should seek to protect their users from tracking and profiling by third parties. Adequately trained staff should oversee all matters related to the disclosure of user data to third parties in line with the intermediaries' responsibilities and duties under international personal data protection and privacy standards. A person whose human rights are impacted in a considerable manner by a decision that is taken on the basis of profiling or affected by legal consequences stemming from that decision should be able to object to that decision.

2.5. Access to an effective remedy

2.5.1. Internet intermediaries should make available – online and offline – effective remedies and dispute resolution systems that provide prompt and direct redress in cases of user, content provider and affected party grievances. While the complaint mechanisms and their procedural implementation may vary with the size, impact and role of the internet intermediary, all remedies should allow for an impartial and independent review of the alleged violation. These should – depending on the violation in question – result in inquiry, explanation, reply, correction, apology, deletion, reconnection or compensation.

2.5.2. Complaint mechanisms, including notice-based procedures, should comply with applicable procedural safeguards and should be accessible, equitable, compatible with rights, transparent and affordable. They should also include built-in safeguards to avoid conflicts of interest when the company is directly administering the mechanism, for example, by involving oversight structures. Complaints should be handled without unwarranted delays and the relevant mechanisms should not negatively impact the opportunities for complainants to seek recourse through independent national, including judicial, review mechanisms.

- 2.5.3. Intermediaries should ensure that all users and other parties affected by their actions have full and easy access to transparent information in clear and easily understandable language about applicable complaint 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 users. Intermediaries should not, however, make alternative dispute mechanisms obligatory as the only means of dispute resolution.
- 2.5.6. Intermediaries should engage in dialogue with consumer associations, human rights advocates and other organisations representing the interests of users and affected parties, as well as with data protection and other independent administrative or regulatory authorities, to ensure that their complaint mechanisms are designed, implemented, evaluated and improved through participatory processes. They should also regularly analyse the frequency, patterns and causes of complaints received in order to learn lessons to improve their policies, procedures and practices and prevent future grievances.
- 2.5.7. Intermediaries should engage in and promote targeted age- and gender-sensitive efforts to promote the awareness of all users of their rights and freedoms in the digital environment, both vis-à-vis States and intermediaries, including, in particular, information about applicable complaint mechanisms and procedures. The promotion of media and information literacy should encompass education about the rights of all stakeholders, including other users and affected parties.

Related documents

Meetings

1309th meeting of the Ministers' Deputies (7 March 2018) - Meetings 2018 / 07 March 2018 / *English* 

1309th meeting of the Ministers' Deputies (7 March 2018) - Meetings 2018 / 07 March 2018 / *English* 

Committee of Ministers; Council of Europe

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Steering Committee on Media and Information Society (CDMSI) - a. Abridged report of the 13th meeting (Strasbourg, 5-8 December 2017) [1309 meeting]