7. Freedom of Expression in the Digital Environment: How the European Court of Human Rights has Contributed to the Protection of the Right to Freedom of Expression and Information on the Internet

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1. INTRODUCTION

The jurisprudence of the European Court of Human Rights (ECtHR) during the last decade shows how the Strasbourg Court has been confronted with new dimensions, applications and liabilities in relation to the rights and the 'duties and responsibilities' following from the exercise of freedom of expression on the Internet. A search on HUDOC, the database of the ECtHR, combining the key words 'freedom of expression' and 'Internet' selects over 220 relevant judgments, and more than 60 relevant (mostly inadmissibility) decisions.¹ The ECtHR, as the most important interpreter of human rights standards in Europe with an impact far beyond the confines of its territorial jurisdiction, has also in the domain of freedom of expression in the digital environment acted as an important and influential 'norm entrepreneur.'² The ECtHR's case law not only demonstrates that the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights

¹ Search on HUDOC https://hudoc.echr.coe.int/eng accessed 1 December 2021. Notice that also some Article 8 cases (right to privacy or reputation) are relevant from the perspective of the balancing of Article 8 and Article 10 rights in the digital environment (see *infra*).

² See Jan Oster, 'On "Balancing" and "Social Watchdogs": The European Court of Human Rights as a Norm Entrepreneur for Freedom of Expression', in Lee Bollinger and Agnes Callamard (eds), *Regardless of Frontiers? Freedom of Expression and Information in the 21st century* (Columbia University Press 2020) 165.

(ECHR) is fully applicable in the digital environment; it also shows how the ECtHR has taken into account certain features of the Internet in applying Article 10 ECHR.

In a series of cases the ECtHR applied its standard case law finding that interference with Internet content related to child pornography, explicit sexual content accessible to minors, copyright infringements, breach of privacy or data protection and hate speech were in compliance with Article 10(2) ECHR as they were found ultimately necessary in a democratic society. In these cases the ECtHR found that interference with the right to freedom of expression in the digital environment were justified and corresponded to a pressing social need.³ Especially in cases dealing with hate speech, the ECtHR referred to 'the potential impact' and risk of harm of messages posted on the Internet.⁴ According to the ECtHR: 'the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms is certainly higher than that posed by the press, as unlawful speech, including hate speech and calls to violence, can be disseminated as never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.²⁵

The ECtHR in other domains emphasised some Internet-specific features, not as arguments to justify certain interferences with the right to freedom expression, but rather to robustly guarantee the right to freedom of expression and information in the digital environment. In such cases the ECtHR found that interferences or limitations at the domestic level violated the right to online freedom of expression. These cases can be clustered around five issues: (1) the blocking of websites and of social networking accounts; (2) interference with offensive, radical or extremist online content; (3) interference with the integrity of Internet archives; (4) the liability of online media platforms and internet intermediaries for user-generated content and for hyperlinks; and (5) the protection of journalists' sources in the online environment. The ECtHR's jurisprudence situated in those five clusters of cases demonstrates how the ECtHR has helped to create a higher level of guaranteeing the right to freedom of expression in the online environment, 'overruling' (the application of) pro-

³ Dirk Voorhoof, 'Same standards, different tools? The ECtHR and the protection and limitations of freedom of expression in the digital environment', in Michael O'Boyle (ed), *Human Rights Challenges in the Digital Age: Judicial Perspectives* (Council of Europe Publications 2020) 11.

⁴ *Beizaras and Levickas v Lithuania* App no 41288/15 (ECtHR, 14 January 2020) para 127.

⁵ Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) para 110. See also *Kilin v Russia* App no 10271/12 (ECtHR, 11 May 2021) paras 78–79.

visions of national law curtailing in an arbitrary, not pertinent or disproportionate way the rights protected under Article 10 ECHR. The few judgments and decisions in these categories of cases in which the ECtHR found no violation of Article 10 illustrate and clarify the very specific circumstances in which interference with online freedom of expression can exceptionally be justified by domestic authorities.⁶

This chapter focuses on the five domains in which the ECtHR developed Internet-specific case law or took some particular characteristics of the Internet or the specific Internet content into consideration, in finding violations of Article 10 ECHR. This case law of the ECtHR in support of online freedom of expression has narrowed the margin of appreciation at the level of the Member States and has reduced the possibility of interference with online freedom of speech in Europe. The case law demonstrates how the ECtHR succeeds not only in applying its supportive jurisprudence based on strong principles guaranteeing a free flow of communication in a democracy,⁷ but also how the ECtHR has strengthened the right to freedom of expression and information in the digital environment. It also shows how in some of its judgments the ECtHR has fine-tuned the justification for limitations or restrictions on freedom of online speech.

2. THE BLOCKING OF WEBSITES AND OF SOCIAL NETWORKING ACCOUNTS AND ACCESS TO THE INTERNET

With *Ahmet Yildirim v Turkey* on the blocking of Google sites, the ECtHR delivered an important judgment recognising the right of individuals to access the Internet, asserting that the Internet has become one of the principal means of exercising the right to freedom of expression and information.⁸ The ECtHR observed that a blocking order rendered 'large quantities of information inaccessible, substantially restricted the rights of Internet users and had a sig-

⁶ See also Wolfgang Benedek and Matthias C. Ketteman, *Freedom of Expression and the Internet* (Council of Europe Publishing 2020).

⁷ Since its first finding of a violation of Article 10 ECHR in 1979 in *Sunday Times v United Kingdom*, the ECtHR has found 925 violations of Article 10 ECHR in the period 1979–2020: European Court of Human Rights, *Annual report 2020* (Council of Europe 2021).

⁸ Ahmet Yildirim v Turkey App no 3111/10 (ECtHR, 18 December 2012) para 66. Compare with *Khursid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 December 2008), in which the ECtHR recognised a right of access to TV programmes via a satellite dish by tenants of a flat, taking into consideration *inter alia* the lack of accessibility to TV programmes in the applicants' language by other means, such as broadband or Internet access.

nificant collateral effect on the material that has not been found to be illegal.' In Cengiz and others v Turkev the ECtHR referred to YouTube as being 'undoubtedly an important means of exercising the freedom to receive and impart information and ideas. In particular ... political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism." The ECtHR gualified YouTube as 'a unique platform on account of its characteristics, its accessibility and above all its potential impact' and it observed that the blocking order precluded access to specific information which was not accessible by other means. The applicants in this case, all three law professors teaching at university, had victim status before the ECtHR, as they had actively used YouTube for professional purposes as part of their academic work, although not directly being affected by the blocking. More recently, however, in Akdeniz and others v Turkev the ECtHR applied a more restrictive and even regressive approach by denving victim status to the two applicants, academic human rights defenders and active users of the Internet, in a case of an injunction contra mundum.¹⁰

In *Kablis v Russia* the ECtHR applied its highest standard of scrutiny under Article 10 ECHR finding that a blocking procedure of some Internet posts and of a social media account violated the applicant's right to freedom of expression. As part of its reference to the general principles to be applied, the ECtHR reiterated that 'user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression.'¹¹ The ECtHR's judgment was at the same time a clear warning against too vague and overbroad legislation leaving too much power to the Public Prosecutor's Office or other authorities to block (or order the blocking of) social networking accounts or to remove (or order the removal of) alleged illegal material from the Internet, without sufficient guarantees on effective and prompt judicial review. In the case at issue the ECtHR found a lack of effective guarantees with regard to the dangers of prior restraint and to prevent any abuse of power curtailing freedom of expression on the Internet.

In four judgments of 23 June 2020 the ECtHR found that the blocking of websites and media platforms in Russia had violated the right to freedom of

⁹ Cengiz and others v Turkey App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015) para 52.

¹⁰ See *Akdeniz and others v Turkey* App nos. 41139/15 and 41146/15 (ECtHR, 4 May 2021). It is remarkable that in this case the complaint of human rights defenders was dismissed by the ECtHR, while the complaint of a journalist was accepted with regard to the same facts in relation to a human rights violation: see the dissenting opinion of Judge Kūris in annex of the judgment.

¹¹ Kablis v Russia App nos 48310/16 and 59663/17 (ECtHR, 30 April 2019) para 81.

expression and information as guaranteed by Article 10 ECHR. The cases concerned different types of blocking measures, including *collateral blocking* (where the IP address that was blocked was shared with other sites), *excessive blocking* (where the whole website was blocked because of a single page or file) and *wholesale blocking* of media outlets for their news coverage. One case was about a court order to remove a webpage with a description of tools and software for bypassing restrictions on private communications and content filters on the Internet; if this was not removed, the website would be blocked. The ECtHR once again highlighted the importance of the Internet as a vital tool in exercising the right to freedom of expression. It reiterated:

'owing to its accessibility and capacity to store and communicate vast amounts of information, the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information. The Internet provides essential tools for participation in activities and discussions concerning political issues and issues of general interest, it enhances the public's access to news and facilitates the dissemination of information in general.'

The ECtHR also reminded that the blocking of websites 'by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect.' And it added that 'the wholesale blocking of access to a website is an extreme measure which has been compared to banning a newspaper or television station.' The ECtHR found that the provisions of Russia's Information Act of 27 July 2006 used to block websites and online media outlets had produced excessive and arbitrary effects and had not provided proper safeguards against abusive interference by the Russian authorities. In each of the four cases the ECtHR also found that the Russian courts had not carried out examinations of the substance of what had been arguable complaints of violations of the applicants' rights and that none of the remedies available to the applicants to have their online rights to freedom of expression respected had been effective.¹²

In one of these four cases, *Engels v Russia*, the ECtHR addressed specifically the utility of filter-bypassing technologies.¹³ In this case a local Internet service provider was ordered to remove a webpage that contained information

¹² Vladimir Kharitonov v Russia, App no 10795/14 (ECtHR, 23 June 2020); OOO Flavus and Others v Russia, App nos 12468/15, 23489/15, and 19074/16, (ECtHR 23 June 2020); Bulgakov v Russia, App no 20159/15 (ECtHR 23 June 2020) and Engels v Russia, App no 61919/16 (ECtHR, 23 June 2020).

¹³ This kind of software is used for bypassing restrictions on private communications and content filters on the Internet, such as virtual private networks, the Tor browser, 'invisible Internet' technology and the 'turbo' mode in web browsers.

about bypassing content filters. It was argued that such information should be prohibited from dissemination in Russia as it enabled users to access extremist material on another, unrelated website. If the content was not removed the website would be blocked. The ECtHR found that the legal provision of the Russian Information Act that the order was based on was too vague and overly broad in order to satisfy the foreseeability requirement. The ECtHR clarified that information technologies are content-neutral and that they are a means of storing and accessing:

'Just as a printing press can be used to print anything from a school textbook to an extremist pamphlet, the Internet preserves and makes available a wealth of information, some portions of which may be proscribed for a variety of reasons particular to specific jurisdictions. Suppressing information about the technologies for accessing information online on the grounds they may incidentally facilitate access to extremist material is no different from seeking to restrict access to printers and photocopiers because they can be used for reproducing such material. The blocking of information about such technologies interferes with access to all content which might be accessed using those technologies.^{'14}

A (conditional) right of access to the Internet has been recognised as part of the right to receive information in cases where prisoners were denied access to the Internet, or at least to some Internet websites. In Kalda v Estonia the ECtHR stated that Article 10 ECHR cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners.¹⁵ It found nevertheless that in this case the authorities had breached Article 10 ECHR, as the websites Kalda was refused access to predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. The accessibility of such information promotes public awareness and respect for human rights and Kalda indeed needed access to it for the protection of his rights in pending court proceedings. The case of Jankovskis v Latvia led to a similar result.¹⁶ Because the authorities did not even consider the possibility of granting Jankovskis limited or controlled Internet access to a particular website administered by a State institution, which could have hardly posed a security risk, the ECtHR found a violation of Article 10 ECHR. Also in Ramazan Demir v Turkev the ECtHR found that the refusal by the authorities to allow a prisoner to consult Internet sites on legal matters, including the website of the ECtHR, violated the prisoner's right

¹⁴ Engels v Russia, App no 61919/16 (ECtHR, 23 June 2020) para 30.

¹⁵ Kalda v Estonia App no 17429/10 (ECtHR, 19 January 2016).

¹⁶ Jankovskis v Latvia App no 21575/08 (ECtHR, 17 January 2017).

to receive information as guaranteed under Article 10 ECHR.¹⁷ The ECtHR emphasised the important role played by the Internet in individuals' everyday lives, as an increasing amount of information and services are available only on the Internet.

3. INTERFERENCE WITH OFFENSIVE, RADICAL OR EXTREMIST ONLINE CONTENT

When a case involves access to information, or statements or news reporting contributing to public debate about matters that are important in society, the ECtHR often develops additional arguments in support of upholding high standards on the right to freedom of expression and information on the Internet, leaving hardly any possibility for interference by public authorities. The ECtHR opposes over-broad limitations on forms of extremist or hate speech, which carry the risk of arbitrarily curtailing the right to online freedom of expression.¹⁸

In some cases applicants complained of a violation of their rights to privacy and reputation under Article 8 ECHR,¹⁹ but the ECtHR, referring to the importance of debate on matters of public interest, including on Internet platforms, saw no reason to overrule the domestic authorities' policy of abstaining from interference with the right to freedom of expression in the online environment in these cases.²⁰ In dealing with the complaints based on Article 8 ECHR, the ECtHR substantially referred to the impact of imposing liability on Internet intermediaries for defamatory content. In *Rolf Anders Daniel Pihl v Sweden*, for instance, the ECtHR observed that an offensive blog post and comment

¹⁷ Ramazan Demir v Turkey App no 68550/17 (ECtHR, 9 February 2021). See also Mehmet Reşit Arslan and Orhan Bingöl v Turkey App nos 47121/06, 13988/07 and 34750/07 (ECtHR, 18 June 2019), in which the ECtHR found a violation of the right to education under Article 2 of Protocol 1 because the applicant-prisoners, who wanted to continue their higher education, were refused access to the Internet.

¹⁸ Mariya Alekhina and others v Russia App no 38004/12 (ECtHR, 17 July 2018), Savva Terentyev v Russia App no 10692/09 (ECtHR, 28 August 2018), Kablis v Russia App no 48310/16 and 59663/17 (ECtHR, 30 April 2019) and Üçdağ v Turkey App no 23314/19 (ECtHR, 31 August 2021): see *infra*.

¹⁹ See also Dirk Voorhoof, 'Freedom of Expression *versus* Privacy and the Right to Reputation. How to Preserve Public Interest Journalism', in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony*? (OUP 2015) 148.

²⁰ See e.g. (also *infra*) Rolf Anders Daniel Pihl v Sweden App no 74742/14 (ECtHR, 9 March 2017 (decision)), Payam Tamiz v the United Kingdom App no 3877/14 (ECtHR, 19 September 2017 (decision)), Egill Einarsson v Iceland (No. 2) App no 31221/15 (ECtHR, 17 July 2018), Høiness v Norway App no 43624/14 (ECtHR, 17 March 2019) and Jezior v Poland App no 31955/11 (ECtHR, 4 June 2020).

had been removed expeditiously after being notified that the post was incorrect and after receiving the request to have the post and the comment removed. Imposing a duty of pre-monitoring or *ex-ante* control and blocking comments that might be in breach of the law would violate a platform's and the users' right to freedom of expression under Article 10 ECHR.²¹

In other cases the applicants argued that the privacy or reputational rights of persons exposed in Internet reporting had been overprotected in violation of Article 10 ECHR, such as in *Rebechenko v Russia*.²² The ECtHR valued the statements of a blogger who had posted a video on YouTube with offensive and sharp criticism on a public figure as those of a 'public watchdog' and it found that the measures imposed on him for defamation violated Article 10 ECHR. The ECtHR noted that the order to delete the video, to publish a retraction, and to pay non-pecuniary damages could discourage participation in debates on matters of legitimate public concern. The ECtHR referred to the essential role played by the press, but also by non-governmental organisations, bloggers and popular users of social media, exercising watchdog functions in a democracy.²³

In the case of *Savva Terentyev v Russia* the ECtHR introduced a particularly high level of free speech protection for insulting comments about police officers published on a blog. The ECtHR confirmed that some of the wording in the blog post was offensive, insulting and virulent, but it found that the (emotional) comments as a whole could not be seen as inciting hatred or violence against police officers. Furthermore, the ECtHR found that the potential of the applicant's comment to reach the public and thus to influence its opinion was very limited.²⁴ Also in *Kablis v Russia* the ECtHR analysed the content

 $^{^{21}}$ Rolf Anders Daniel Pihl v Sweden App no 74742/14 (ECtHR, 9 March 2017 (decision)) paras 31 and 35. The ECtHR also emphasised the fact that the post and the comment, although offensive, did not amount to hate speech or incitement to violence (paras 25 and 37).

 $^{^{22}}$ Rebechenko v Russia App no 10257/17 (ECtHR, 16 April 2019). See also Herbai v Hungary App no 11608/15 (ECtHR, 5 November 2019): the ECtHR held that the dismissal of an employee for publishing articles on a website that could tarnish the reputation of his employer violated the employee's right to freedom of expression under Article 10 ECHR.

²³ Rebechenko v Russia App no 10257/17 (ECtHR, 16 April 2019) para 21. See also Magyar Helsinki Bizottság v Hungary App no 18030/11 (ECtHR Grand Chamber, 8 November 2016). See further Chapter 8 of this book: Kristina Cendic and Gergely Gosztonyi, 'New Technologies and Public Watchdogs Before the ECtHR: Reflections on European Supranational Litigation.'

²⁴ Savva Terentyev v Russia App no 10692/09 (ECtHR, 28 August 2018) para 81. See also Bon v Croatia App no 26933/15 (ECtHR, 18 March 2021).

and the context of the messages on the Internet and it found that they did not create a real risk of public disorder or crime.²⁵

The ECtHR does not accept too vaguely motivated decisions by domestic (judicial) authorities when interfering with alleged online incitement to violence or condoning of terrorism. In $\ddot{U}cda\breve{g} v$ *Turkey* an imam was convicted for disseminating propaganda in favour of a terrorist organisation on account of two posts published on his Facebook account referring to the Kurdistan Workers' Party (PKK). The ECtHR found that the domestic courts' decisions failed to provide an adequate explanation of the reasons why the impugned content had to be interpreted as condoning, praising and encouraging the methods of violence or threats implemented by the PKK. The ECtHR held that by convicting Mr Üçdağ on charges of propaganda in favour of a terrorist organisation for having posted controversial contents on his Facebook account, the domestic authorities had failed to conduct an appropriate balancing exercise, in line with the criteria set out in the ECtHR's case law.²⁶

The ECtHR has also found that the right to freedom of expression of the members of the punk band Pussy Riot had been violated on account of declaring the Pussy Riot video material available on the Internet as extremist and banning it.²⁷ The Pussy Riot members complained not only about their conviction and imprisonment for attempting to perform one of their protest songs in a Moscow cathedral, but also about the banning of the video footage of their attempted performance that was uploaded onto their website and YouTube. The ECtHR emphasised that Pussy Riot's actions contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers. Declaring Pussy Riot's online video materials 'extremist' and placing a ban on access to them was incompatible with Article 10 ECHR.

4. INTERFERENCE WITH THE INTEGRITY OF INTERNET ARCHIVES

The ECtHR has shown particular reluctance to allow interference with online archives held by media outlets. In one of the first cases dealing with aspects

²⁵ *Kablis v Russia* App nos 48310/16 and 59663/17 (ECtHR, 30 April 2019). See also *Vedat Şorli v Turkey* App no 42048/19 (ECtHR, 19 October 2021): pre-trial detention and a suspended sentence of one year in prison for sharing on Facebook two posts, including a caricature, insulting the Turkish president, violated Article 10 ECHR; and *A.M. v Turkey* App no 67199/17 (ECtHR, 19 October 2021): disciplinary sanction for insulting the Prophet Mohammed in a video recording uploaded on YouTube violated Article 10 ECHR.

²⁶ Üçdağ v Turkey App no 23314/19 (ECtHR, 31 August 2021) paras 85–86.

²⁷ Mariya Alekhina and others v Russia App no 38004/12 (ECtHR, 17 July 2018).

of freedom of expression in the digital environment, the ECtHR elaborated on some general principles on access to news and information and on the specific features of Internet archives.²⁸ Although in Times Newspapers Ltd (nos. 1-2) v the United Kingdom the ECtHR finally did not find a violation of Article 10 ECHR, the ECtHR's approach illustrated that the characteristics of newspapers' Internet archives and the kind of specific interference with Internet content can have an influence on whether or not a violation of Article 10 ECHR has occurred. The judgment in *Times Newspapers Ltd (nos. 1–2)* v the United Kingdom in general terms observed the 'substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free.' The ECtHR took the opportunity to refer to positive aspects of the Internet and its particular importance by stating that 'in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.' The ECtHR observed that Times Newspapers was not ordered to remove the potentially defamatory articles from its Internet archive, as it was only requested to publish an appropriate qualification to an article contained in its Internet archive, where it had been brought to the notice of the newspaper that a libel action had been initiated in respect of that same article published in the written press.

In other cases the importance of the Internet and Internet archives as formulated in *Times Newspapers Ltd (nos. 1–2) v the United Kingdom* had a decisive impact on the finding of a violation of Article 10 ECHR. In the case of *Wegrzynowski and Smolczewski v Poland* two lawyers complained that the Polish authorities, by refusing to order that an online version of a news article should be removed from the newspaper's website archive, breached their rights to respect for their private life and reputation as protected by Article 8 ECHR. The ECtHR stated, however,

'that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations'

The ECtHR referred in particular to the approach of the Polish courts, suggesting that instead of removing defamatory content from the Internet, 'it would be

²⁸ *Times Newspapers Ltd (nos. 1–2) v the United Kingdom* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009), especially paras 27 and 45.

desirable to add a comment to the article on the website informing the public', in this case about the outcome of the civil proceedings in the defamation case.²⁹

The ECtHR has also introduced and applied important principles with regard to the 'right to be forgotten' in relation to the right to freedom of expression and online media archives. The ECtHR dismissed an Article 8 'right to be forgotten' application in respect of online information on German media portals concerning a murder conviction of two persons. The ECtHR confirmed that the media have the task of participating in the creation of democratic opinion, by making available to the public old news items that had been preserved in their online archives. The ECtHR found that the refusal by the German courts to order anonymisation of the online article at issue did not violate Article 8 ECHR.³⁰

Two recent judgments, however, seem to take a step backwards with regard to the protection of the integrity or the accessibility of online news archives. In contrast with M.L. and W.W. v Germany, in Hurbain v Belgium the ECtHR found that a claim for a 'right to be forgotten' was justified. The ECtHR came to the conclusion that a court order to anonymise an article in a newspaper's electronic archive which mentioned the full name of a driver (Mr G) who had been responsible for a deadly road accident in 1994 did not violate Article 10 ECHR.³¹ The ECtHR observed that the requirement for a publisher to anonymise an article whose lawfulness had not been questioned carried a risk of a chilling effect on press freedom, in other words the risk that the press might refrain from keeping certain news stories in its online archives or that it might omit individual elements from articles which might later become the subject of such a request. It also recognised that altering the archived version of an article would undermine the integrity of the archive and thus its very essence. Therefore, domestic courts need to be particularly vigilant when granting a request for anonymisation or modification of the digital version of an archived article for the purposes of ensuring respect for a person's private life. The ECtHR found, however, that in this case there were pertinent and sufficient reasons to justify the domestic court order for anonymisation of the online article at issue, the right to maintain online archives available to the public not being an absolute right. According to the ECtHR the Belgian courts had weighed up Mr G's right to respect for his private life, on the one hand,

²⁹ Wegrzynowski and Smolczewski v Poland App no 33846/07 (ECtHR, 16 July 2013) paras 65–66.

³⁰ *M.L. and W.W. v Germany* App nos 60798/10 and 65599/10 (ECtHR, 28 June 2018).

³¹ *Hurbain v Belgium* App no 57292/16 (ECtHR, 22 June 2021). The judgment did not become final, as on 11 October 2021 the case was referred, on request by the applicant, to the Grand Chamber of the ECtHR.

and the newspaper editor-in-chief's freedom of expression, on the other, in accordance with the criteria laid down in the ECtHR's case law.³² The ECtHR explained that the conclusion it had reached in the present case did not involve any obligation for the media to check their archives on a systematic and perma-

nent basis. When it comes to the archiving of articles, the media do not need to make an *ex ante* or *proprio motu* verification whether the rights under Article 8 ECHR are respected. They are only required to make such verification, and therefore to weigh up the various rights at stake, when they receive an express request to that effect.³³

In *Biancardi v Italy* the ECtHR found no violation of Article 10 ECHR in a case where the editor-in-chief of an online newspaper was held liable under civil law for not having promptly deindexed an article despite a request by the private individuals named in the article to remove it from the Internet.³⁴ The ECtHR emphasised that there had not been an order to permanently remove the article from the news archive or any intervention regarding the anonymisation of the online article; while the deindexing of the article at issue, on request, was justified because it contained sensitive data related to criminal proceedings. Several third-party interveners argued that journalistic articles should not be delisted or deindexed and that individuals should not be

³³ For a critical comment on this finding by the ECtHR in *Hurbain v Belgium*, see the dissenting opinion of Judge Pavli. According to Judge Pavli the judgment goes against an emerging but clear European consensus that 'right to be forgotten' claims in the online environment can, and should, be effectively addressed through deindexation of search engine results, while preserving the integrity of the original historical material, unless the privacy claimant can show that, for some exceptional reason, deindexation would be not sufficient or adequate in the specific case. Judge Pavli argues in essence that Mr G's privacy rights could have been adequately protected by removing the article from name-based search results on general search engines: such a measure would have prevented the article from becoming easily accessible through curiosity-driven or other random search queries. At the same time, it would have preserved the integrity of press archives and allowed full access to the unaltered original source to those persons (journalists, researchers or others) who might become specifically interested in the past events covered in the article.

³⁴ Biancardi v Italy App no 77419/16 (ECtHR, 25 November 2021).

³² See the criteria when balancing Article 8 and Article 10 rights as developed and applied in *Axel Springer AG v Germany* App no 39954/08 (ECtHR Grand Chamber, 7 February 2012) paras 78–84. These criteria are: the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication and, where appropriate, the circumstances in which the information or photograph was obtained. See also Dirk Voorhoof, 'Freedom of Expression *versus* Privacy and the Right to Reputation. How to Preserve Public Interest Journalism', in Stijn Smet and Eva Brems (eds), *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony*? (OUP 2015) 148.

empowered to restrict access to news articles concerning themselves, except when such information has an essentially private or defamatory character or when the publication of such information is not justified for other reasons.³⁵ The ECtHR concluded, however, that the finding by the domestic jurisdictions that the editor-in-chief had breached another person's right to respect for his reputation by virtue of the continued presence on the Internet of the impugned article and by failure to deindex it constituted a justifiable restriction of the editor's freedom of expression.

5. THE LIABILITY OF ONLINE MEDIA PLATFORMS FOR USER-GENERATED CONTENT AND FOR HYPERLINKS

One issue the ECtHR has been frequently confronted with relates to the liability of online (news) platforms for user-generated content.³⁶ *Delfi AS v Estonia* concerns the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles.³⁷ The news portal was found liable for violating the personality rights of a plaintiff (L), although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The ECtHR explicitly mentioned that this was 'the first case in which the Court has been called upon to examine a complaint of this type in an evolving field of technological innovation', while reiterating that it was 'undisputed' that user-generated expressive activity on the Internet provides an 'unprecedented platform for the exercise of freedom of expression.' The Grand Chamber of the ECtHR found that the news portal was not exempt from liability for grossly

³⁵ See the Taxes and Prices Index in *Biancardi v Italy* by the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, Reporters' Committee for Freedom of the Press, Media Lawyers Association and Media Legal Defence.

³⁶ This issue is also much debated within EU law. See Aleksandra Kuczerawy, Intermediary Liability and Freedom of Expression in the EU: From Concepts to Safeguards (Intersentia 2018); Anja Hoffmann and Alessandro Gasparotti, Liability for illegal content online. Weaknesses of the EU legal framework and possible plans of the EU Commission to address them in a "Digital Services Act" (CEP Studie 2020), https://www.cep.eu/fileadmin/user_upload/cep.eu/Studien/cepStudie_Haftung_fuer _illegale_Online-Inhalte/cepStudy_Liability_for_illegal_content_online.pdf accessed 1 December 2021, and Tambiama Madiega, Reform of the EU liability regime for online intermediaries (European Parliamentary Research Service 2020), https://www .europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404 EN.pdf accessed 1 December 2021.

³⁷ Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015).

insulting remarks in its readers' online comments. As Delfi's involvement in making public readers' comments on its news portal went beyond that of a passive, purely technical service provider, the provisions on the limited liability of internet service providers did not apply.³⁸ Delfi's activities reflected those of a media publisher, running a commercially organised Internet news portal.³⁹ It was therefore held liable for the manifest expressions of hatred and threats to other persons' physical integrity as expressed in its readers' online comments. The ECtHR referred to the finding that Delfi's automatic word-based filter had 'failed to filter out odious hate speech and speech inciting violence posted by readers.⁴⁰ It held that the rights and interests of others and of society as a whole may entitle Contracting States to the ECHR 'to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.^{'41} Building on these principles and findings, the ECtHR came to the conclusion that the Estonian courts' imposition of liability on Delfi AS was based on relevant and sufficient grounds and that this measure did not constitute a disproportionate restriction on Delfi's right to freedom of expression. Accordingly, the Grand Chamber found that there had been no violation of Article 10 ECHR. The judgment contains an important disclaimer, by clarifying that the case and the

³⁸ See E-Commerce Directive 2000/31/EC Articles 12–15 (no liability in case of expeditious removal after obtaining actual knowledge of illegal content and no duty of pre-monitoring by internet service providers).

³⁹ Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) para 144.

⁴⁰ Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) paras 152–157. The ECtHR also referred to the finding that the comments at issue mainly constituted hate speech that directly advocated acts of violence and that therefore the establishment of their unlawful nature did not require any linguistic or legal analysis since the remarks were on their face manifestly unlawful: para 117.

⁴¹ Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) paras 158–159 and Robert Spano, 'Intermediary Liability for Online User Comments under the European Convention on Human Rights' (2017) 1 Human Rights Law Review 1. For a critical analysis of the Delfi judgment see Lisl Brunner, 'The Liability of an Online Intermediary for Third Party Content: The Watchdog Becomes the Monitor: Intermediary Liability after Delfi v Estonia', (2016) 1 Human Rights Law Review 163; Matthias C. Ketteman, The Normative Order of the Internet (OUP 2020); Wolfgang Benedek and Matthias C. Ketteman, Freedom of expression and the Internet, Strasbourg (Council of Europe Publishing 2020) 114–116; and Dirk Voorhoof, 'Delfi AS v. Estonia: Grand Chamber confirms liability of online news portal for offensive comments posted by its readers' (18 June 2015) Strasbourg Observers Blog, <http:// strasbourgobservers.com/2015/06/18/delfi-as-v-estonia-grand-chamber-confirms -liability-of-online-news-portal-for-offensive-comments-posted-by-its-readers/#more -2891> accessed 1 December 2021.

ECtHR's judgment only concerned the liability of a professionally managed Internet news portal, run on a commercial basis, and not

'other fora on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topics without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby.'⁴²

Furthermore the *Delfi* judgment does not mean that the Contracting States of the ECHR are under an obligation to impose (strict) liability on Internet news platforms for comments containing illegal hate speech: the judgment explicitly mentions that the Contracting States in such circumstances 'may be entitled' to impose liability on Internet news portals, without contravening Article 10 ECHR, if these portals fail to take (effective and efficient) measures to remove clearly unlawful comments without delay, even without being notified by victims or third parties. Although this is an important first judgment by the ECtHR with regard to Internet intermediaries' liability for users' comments, the motivation and finding by the Grand Chamber left many open questions on how to deal with this issue in other cases. This was also observed in the concurring opinion of four judges of the Grand Chamber, pointing out that the ECtHR should have seized the opportunity to state more clearly the principles relevant to the assessment of the *Delfi* case. They emphasised that the ECtHR

'should have stated more clearly the underlying principles leading it to find no violation of Article 10. Instead, the Court has adopted case-specific reasoning and at the same time has left the relevant principles to be developed more clearly in subsequent case-law.'⁴³

In its subsequent case law the ECtHR has indeed taken the occasion to further elaborate on its *Delfi* judgment and to develop additional principles and criteria in determining the nature of the liability for user-generated online content. In *Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt v Hungary* the ECtHR decided that a self-regulatory body (MTE) and an Internet news portal (Index.hu) were not liable for offensive comments posted by their readers on their respective websites. In contrast with *Delfi*, the offensive

⁴² Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) para 116.

⁴³ Delfi AS v Estonia App no 64569/09 (ECtHR Grand Chamber, 16 June 2015). Joint concurring opinion of Judges Raimondi, Karakas, De Gaetano and Kjølbro (annex to the judgment). See also the joint dissenting opinion of Judges Sajó and Tsotsoria.

comments in MTE were not considered as clearly unlawful hate speech. The ECtHR clarified that regard must be had to the specificities of the style of communication on certain Internet portals and it observed that the expressions used in the comments at issue, albeit belonging to a low register of style, are common in communication on many Internet portals-a consideration that reduces the impact that can be attributed to those expressions. It also noticed that the applicants had taken certain measures to prevent defamatory comments on their portals or to remove them: they had a disclaimer in their general terms and conditions and had a notice-and-takedown system in place, whereby anybody could indicate unlawful comments to the service provider so that they be removed. Most crucially the ECtHR stated that holding the applicants strictly liable merely for allowing unfiltered comments that might be in breach of the law would require 'excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.' The ECtHR also referred to the negative impact of holding Internet portals liable for third-party comments, clarifying that 'such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the ECtHR, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet.'

And it added:

'This effect could be particularly detrimental for a non-commercial website, such as the first applicant.'44

It is worthwhile noticing that the ECtHR in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* has developed and applied five relevant criteria for the assessment of the proportionality of the interference in situations of platform liability not involving hate speech or calls to violence. These criteria are: (1) the context and content of the impugned comments; (2) the liability of the authors of the comments; (3) the measures taken by the website operators and the conduct of the injured party; (4) the consequences of the comments for the injured party; and (5) the consequences for the applicants.

By developing, explaining and applying these criteria, the ECtHR has established some valuable guiding principles in dealing with the duties and respon-

⁴⁴ Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt v Hungary App no 22947/13 (ECtHR, 2 February 2016) paras 82 and 86. See also Dirk Voorhoof and Eva Lievens, 'ECtHR confirms and tempers *Delfi* judgment: operators of Internet portals not liable for dissemination of offending – but not "clearly unlawful" – user comments', 15 February 2016 ECHR Blog <http://echrblog.blogspot.dk/2016/02/ offensive-online-comments-new-ecthr.html> accessed 1 December 2021.

sibilities of Internet intermediaries in terms of liability for user-generated content. These guiding principles were also reflected in Jezior v Poland, where the ECtHR found that holding the administrator of a local website liable for defamatory third-party comments, which upon notice had been immediately removed, amounted to a violation of the right to freedom of expression under Article 10 ECHR.⁴⁵ The criteria developed in Magvar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungarv were also applied in Rolf Anders Daniel Pihl v Sweden,⁴⁶ Pavam Tamiz v the United Kingdom⁴⁷ and Høiness v Norway.48 These cases concern complaints for alleged violations of the applicants' right to privacy or reputation by an Internet portal and the findings by the domestic courts that there was no need for further action against or compensation by the Internet intermediaries. In each of the cases the ECtHR observed that the impugned comments did not amount to hate speech or incitement to violence, hence limiting, as the domestic courts had done, the liability of an Internet platform or the operator of a blog when it (only) concerns defamation, and not incitement to violence.

With *Delfi AS v Estonia* and the succeeding judgments and decisions on liabilities for user-generated content the ECtHR has tried to find a subtle balance and develop some relevant criteria in applying Article 10 ECHR. However, the ECtHR did not succeed in fully taking on board the consequence of its consideration that the obligation to monitor, filter and remove certain types of 'clearly unlawful' comments by users on online platforms puts an 'excessive and impracticable' burden on operators and risks obliging them to install a monitoring system 'capable of undermining freedom of the right to impart information on the Internet.'⁴⁹ Two of the dissenting judges in *Delfi AS v Estonia* pointed out that as a consequence, all comments will have to be monitored from the moment they are posted, and that therefore internet inter-

⁴⁵ Jezior v Poland App no 31955/11 (ECtHR, 4 June 2020).

⁴⁶ *Rolf Anders Daniel Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017 (decision)).

⁴⁷ Payam Tamiz v United Kingdom App no 3877/14 (ECtHR, 12 October 2017 (decision)).

⁴⁸ *Høiness v Norway* App no 43624/14 (ECtHR, 17 March 2019).

⁴⁹ For more guidance on this issue, see *Recommendation CM/Rec*(2018)2 of the *Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, 7 March 2018, https://search.coe.int/cm/Pages/result_details.aspx ?ObjectID=0900001680790e14 accessed 1 December 2021. See also Dirk Voorhoof, 'The Court's subtle approach of online media platforms' liability for user-generated content since the "Delfi Oracle", 10 April 2020 Strasbourg Observers Blog, https:// strasbourgobservers.com/2020/04/10/the-courts-subtle-approach-of-online-media -platforms-liability-for-user-generated-content-since-the-delfi-oracle/ accessed 1 December 2021.

mediaries and blog operators will have considerable incentives to discontinue offering a comments feature. They emphasised that 'the fear of liability may lead to additional self-censorship by operators.'⁵⁰

The problematic consequence of the ECtHR's approach in Delfi AS v Estonia became obvious in Sanchez v France, a judgment of 2 September 2021.51 The case concerned the criminal conviction of Mr Sanchez, a politician standing for election to Parliament. Sanchez was convicted following his failure to take prompt action in deleting comments containing illegal hate speech posted by others on the wall of his Facebook account. The ECtHR emphasised that it attached the highest importance to freedom of expression in the context of political debate and considered that very strong reasons were required to justify restrictions on political speech and that in the run-up to an election, opinions and information of all kinds should be permitted to circulate freely. In the specific circumstances of the case, however, it found that the domestic courts' decision to convict Mr Sanchez had been based on relevant and sufficient reasons linked to his lack of vigilance and responsiveness. The judgment refers to the ECtHR's approach in Delfi AS v Estonia, in particular the necessity in a democratic society to combat hate speech and the responsibility and duty of care as an Internet intermediary regarding this matter. In Sanchez v France the ECtHR stated that personal attacks by means of insults, ridicule or defamation directed at certain sectors of the population, or incitement to hatred and violence against a person on account of membership of a particular religion, is sufficient for the authorities to make it a priority to combat such behaviour when faced with irresponsible use of freedom of expression that undermines the dignity, or even the safety, of the population groups or sectors in question. The ECtHR agreed with the French judicial authorities that the comments at issue were clearly unlawful, and also in breach of the Facebook terms of use. The ECtHR observed that Mr Sanchez had not been criticised for making use of his right to freedom of expression, particularly in the context of political debate, but had been accused of a lack of vigilance and responsiveness in relation to the comments posted on the wall of his Facebook account. Mr Sanchez had knowingly made the wall of his Facebook account public, thereby allowing his friends to post comments there. He had thus been under a duty to monitor the content of the statements published and he could not have been unaware that his account was likely to attract comments of a political nature, which by definition were polemical and should therefore have been monitored even more carefully by him. Mr Sanchez's status as a political figure required

⁵⁰ *Delfi AS v Estonia* App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) Joint dissenting opinion of Judges Sajó and Tsotsoria (annex to the judgment).

⁵¹ Sanchez v France App no 45581/15 (ECtHR, 2 September 2021).

even greater vigilance on his part. The criminal conviction of Sanchez was solely based on account of specific conduct directly linked to his status as the owner of the wall of his Facebook account. The interference in question could thus be seen as 'necessary in a democratic society' and there had been no violation of Article 10 ECHR.

The reasoning of the ECtHR and the outcome in Sanchez v France not only neglect some part of the Grand Chamber's motivation in Delfi AS v Estonia about the specific features of Delfi's online news platform. The judgment does not consider the impact of the fact that, in contrast to Delfi AS where the posts were anonymous, the authors of the comments had been identified and had also effectively been convicted. It also neglects the disclaimer in Delfi AS v Estonia emphasising that the approach in Delfi AS v Estonia only concerned the liability of a professionally managed Internet news portal, run on a commercial basis, and not 'other fora on the Internet where third-party comments can be disseminated.' The judgment in Sanchez v France also does not contain any reference to the concerns expressed by the ECtHR in Magvar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungarv about the negative consequences of strict liability for an Internet portal for third-party comments. These consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet, while the ECtHR in Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungarv also emphasised that 'this effect could be particularly detrimental for a non-commercial website' (cfr. supra). In her dissenting opinion Judge Mourou-Vikström points to these omissions and deficiencies in the majority's reasoning in Sanchez vFrance, referring to the difference between the commercially run Delfi platform and a Facebook account of an individual, albeit a politician. According to judge Mourou-Vikström imposing strict liability on the holder of a Facebook account is detrimental to the right to freedom of expression. She concludes:

The finding of no violation of Article 10 of the Convention places a very heavy burden on the account holder in terms of monitoring posts, since he or she would otherwise face criminal prosecution. There is a risk that such a fear will cause the account holder to systematically vet and even to censor certain comments posted on his or her "wall". In case of doubt as to the legal consequence of a comment posted by someone else, the account holder will of course be more inclined to delete or report a message by way of precaution. The chilling effect is self-evident, thus entailing a serious threat to freedom of expression.⁵²

⁵² Sanchez v France App no 45581/15 (ECtHR, 2 September 2021), dissenting opinion of Judge Mourou-Vikström (annex to the judgment). Compare with *Delfi AS v Estonia* App no 64569/09 (ECtHR Grand Chamber, 16 June 2015) Joint dissenting opinion of Judges Sajó and Tsotsoria (annex to the judgment). On 17 January 2022 *Sanchez v France* was referred to the Grand Chamber of the ECtHR.

Apart from liability for user-generated content the ECtHR has also dealt with hyperlinking. On this matter the ECtHR opted for a more categorical approach, excluding as a principle the liability of an online news portal for hyperlinking to illegal content. In Magvar Jeti Zrt v Hungarv the ECtHR found that holding media companies automatically liable for defamatory content hyperlinked in their reports violates their right to freedom of expression under Article 10 ECHR.⁵³ The ECtHR referred to the very purpose of hyperlinks to allow Internet-users to navigate to and from online material and to contribute to the smooth operation of the Internet by making information accessible through linking it to each other. The ECtHR could not accept a strict or objective liability for media platforms embedding, in their editorial content, a hyperlink to defamatory or other illegal content.⁵⁴ It found that liability such as that applied in the case at issue 'may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control', and therefore it 'may have, directly or indirectly, a chilling effect on freedom of expression on the Internet.' The ECtHR, however, did not exclude that, 'in certain particular constellations of elements', the posting of a hyperlink may potentially engage the question of liability, for instance where a journalist does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism.55

6. THE PROTECTION OF JOURNALISTS' SOURCES IN THE DIGITAL ENVIRONMENT

The fifth domain in which the ECtHR is developing its jurisprudence on freedom of expression in the digital environment is that of the protection of journalistic sources. Since its landmark judgment in *Goodwin v. the United*

⁵³ Magyar Jeti Zrt v Hungary App no 11257/16 (ECtHR, 4 December 2018).

⁵⁴ Compare with *Mouvement Raëlien Suisse v Switzerland* App no 16354/06 (ECtHR Grand Chamber, 13 July 2012).

⁵⁵ The ECtHR identifies the following aspects as relevant for the analysis of the liability of the publisher of a hyperlink: (1) did the journalist endorse the impugned content; (2) did the journalist repeat the impugned content (without endorsing it); (3) did the journalist merely insert a hyperlink to the impugned content (without endorsing or repeating it); (4) did the journalist know or could reasonably have known that the impugned content was defamatory or otherwise unlawful; (5) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism? For a more general approach of media liability in a new media landscape, see *Recommendation CM/Rec (2011) of the Committee of Ministers to member states on a new notion of media* https://search.coe.int/cm/Pages/result_details .aspx?ObjectID=09000016805cc2c0 accessed 21 December 2021.

Kingdom,⁵⁶ the ECtHR has amplified in an impressive series of judgments the right of journalists to protect their sources. In particular the requirement for an *ex ante* decision by a judge or an independent and impartial decision-making body and the very narrow exception that interference with journalists' sources can only be justified by 'an overriding requirement in the public interest' have substantially upgraded the protection of journalistic sources under Article 10 ECHR.⁵⁷

In Nagla v Latvia the ECtHR emphasised that any search involving the seizure of data storage devices such as mobile phones, laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a guestion of the journalist's freedom of expression including source protection, and that access to the information contained therein must be protected by sufficient and adequate safeguards against abuse.58 In Görmüs v Turkey the ECtHR considered the seizure, retrieval and storage by the authorities of all of the magazine's computer data, with a view to identifying a whistleblower, as a disproportionate interference with the right to freedom of expression and information.⁵⁹ In Sedletska v Ukraine the ECtHR further clarified that the right for journalists to protect their sources also prohibits the judicial authorities from accessing journalists' data, including geolocation data, stored on the server of a mobile telephone operator. Access to such data can only be justified in order to combat serious crime and when no reasonable alternative measures exists for the authorities.⁶⁰ Most recently, in Big Brother Watch and others v the United Kingdom, the ECtHR found that the bulk surveillance regimes under the Regulation of Investigative Powers Act (RIPA 2000)⁶¹ did not provide sufficient protection for journalistic sources or confidential journalistic mate-

⁵⁶ Goodwin v the United Kingdom App no 17488/90 (ECtHR, 27 March 1996).

⁵⁷ For an overview of the ECtHR's case law on protection of journalistic sources: Dirk Voorhoof, 'Investigative journalism, access to information, protection of sources and whistleblowers', in Flutura Kusari and Andreas Lamm (ed), *Promoting dialogue between the European Court of Human Rights and the media freedom community. Freedom of expression and the role and case law of the European Court of Human Rights: developments and challenges* (ECPMF 2017) 33, https://ecpmf.eu/files/ecpmf -ecthr_conference_e-book.pdf accessed 1 December 2021. See also Dirk Voorhoof, 'Robust protection of journalistic sources remains a basic condition for press freedom', Strasbourg Observers Blog 10 October 2017, https://strasbourgobservers.com/2017/ 10/10/robust-protection-of-journalistic-sources-remains-a-basic-condition-for-press -freedom/#more-3900 accessed 1 December 2021.

⁵⁸ Nagla v Latvia App no 73469/10 (ECtHR, 16 July 2013).

⁵⁹ Görmüş a.o. v Turkey App no 49085/07 (ECtHR, 19 January 2016).

⁶⁰ Sedletska v Ukraine App no 42634/18 (ECtHR,1 April 2021).

⁶¹ Replaced in the meantime by the Investigatory Powers Act 2016..

rial.⁶² The Grand Chamber of the ECtHR applied its well-elaborated principles regarding the protection of journalistic sources from the offline context into the digital context of bulk interception of electronic communication. The ECtHR found that under the UK regime confidential journalistic material could have been accessed by the intelligence services either intentionally, through the deliberate use of selectors or search terms⁶³ connected to a journalist or news organisation, or unintentionally, as a 'bycatch' of the bulk interception operation. Where the intention of the intelligence services is to access confidential journalistic material - for example, through the deliberate use of a strong selector connected to a journalist – or where, as a result of the choice of such strong selectors, there is a high probability that such material will be selected for examination, the ECtHR considered that the interference will be commensurate with that occasioned by the search of a journalist's home or workplace. Therefore the Grand Chamber required that before the intelligence services use selectors or search terms known to be connected to a journalist, or which would make the selection of confidential journalistic material for examination highly probable, the selectors or search terms must have been authorised by a judge or other independent and impartial decision-making body invested with the power to determine whether they were 'justified by an overriding requirement in the public interest' and, in particular, whether a less intrusive measure might have sufficed to serve the overriding public interest. The UK bulk interception regime did not guarantee such an ex ante review by a judge or other independent and impartial decision-making body. The Grand Chamber also found that there were insufficient safeguards in place to ensure that once it became apparent that a communication which had not been selected for examination through the deliberate use of a selector or search term known to be connected to a journalist nevertheless contained confidential journalistic material, it could only continue to be stored and examined by an analyst if authorised by a judge or other independent and impartial decision-making

⁶² Big Brother Watch and others v the United Kingdom App nos 58170/13, 62322/14 and 24960/15 (ECtHR Grand Chamber, 25 May 2021). Compare with Weber and Saravia v Germany App no 54934/00 (ECtHR, 29 June 2006): the ECtHR observed that the German surveillance law did not contain special rules safeguarding 'the protection of freedom of the press and, in particular, the non-disclosure of sources, once the authorities had become aware that they had intercepted a journalist's conversation.' But the data obtained was 'used only to prevent certain serious criminal offences', and that was considered 'adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum.'

⁶³ Selectors or search criteria can be an email address, a name or a specific term on which basis communications are selected and collected. Analysts then carry out a 'triage process' in relation to collected communications to determine which are of the highest intelligence value and should therefore be opened and read.

body invested with the power to determine whether its continued storage and examination were 'justified by an overriding requirement in the public interest.' In view of these weaknesses, and those identified by the ECtHR in its considerations of the complaint under Article 8 ECHR,⁶⁴ it concluded that there had been a breach of Article 10 ECHR with regard to the protection of journalistic sources.

7. CONCLUSIONS AND PERSPECTIVES

Although the Internet confronts the ECtHR with new issues related to the right to freedom of expression and information, the ECtHR's decisions leave no doubt that the basic principles and standards developed in its Article 10 jurisprudence are applicable in the online environment. But the ECtHR's case law also reflects a differentiated approach, due to the fact that the Internet is an information and communication tool particularly distinct from other media, especially as regards the capacity to store and transmit information. The reference to the particular nature of the Internet or its specific technical features is not only used to justify interference with 'problematic speech' such as hate speech, and to legitimise other limitations on the right to freedom of expression on the Internet that support the importance and value of freedom of expression on the Internet and limit the authorities' possibilities to interfere with that freedom.

The ECtHR has qualified the Internet as an important means of exercising the freedom to receive and impart information and ideas, and it considers Internet platforms as complementary to traditional media, fostering the emer-

⁶⁴ The Grand Chamber reached the conclusion that the legal framework on bulk interception in the UK viewed as a whole did not contain sufficient safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse in the light of the right of privacy under Article 8 ECHR. In particular, it identified several fundamental deficiencies in the regime, such as the absence of independent authorisation, the failure to subject selectors linked to an individual to prior internal authorisation. These weaknesses concerned not only the interception of the contents of communications but also the interception of related communications data. The ECtHR found that the legal basis of the bulk interception regime did not meet the 'quality of law' requirement and was therefore incapable of keeping the 'interference' to what was 'necessary in a democratic society.' On this basis it found a violation of Article 8 ECHR.

⁶⁵ See also Nina Vajić and Panayotis Voyatzis 'The Internet and freedom of expression: a "brave new world" and the ECtHR's evolving case law' in Joseph Casadevall, Egbert Myjer, Michael O'Boyle and Anna Austin, *Freedom of Expression. Essays in Honour of Nicolas Bratza* (Oisterwijk Wolf Legal Publishers 2012) 391.

gence of citizen journalism. It has referred to the public-service value of the Internet and its importance for the enjoyment of a range of human rights. It has applied high standards of free speech protection for bloggers and radical or extremist content, and it did not accept the blocking of access to the Internet and the banning of Internet content that was in the public interest or based on overbroad limitations. The ECtHR has also extended the scope of Article 10 protection to online media archives and their integrity: the ECtHR in some exceptional cases only accepted a court order requiring anonymisation or an additional comment or qualification, but not the removal of the online version of the original news articles. The ECtHR clarified that there is no obligation for the media to check on their own initiative their online archives on a systematic and permanent basis in relation to the rights of others under Article 8 ECHR, and in particular the 'right to be forgotten.' Holding online media or Internet platforms strictly liable merely for allowing unfiltered users' comments that might be in breach of the law, is considered by the ECtHR as excessive and impracticable, capable of undermining freedom of the right to impart information on the Internet. The ECtHR has emphasised that strict liability for hyperlinking may have foreseeable negative consequences on the flow of information on the Internet, compelling authors and publishers from refraining altogether from hyperlinking to sites over whose changeable content they have no control. The ECtHR has also clarified how procedural rights are to be respected in cases of interference with online speech and it has applied its proportionality-test in cases of interference with online freedom of expression. In this regard the ECtHR stated that instead of removing defamatory content from the Internet, it is desirable to add a comment to an article on a website informing the public. It is also noteworthy that the ECtHR in several cases based its finding of a violation of Article 10 ECHR on the risk of a chilling effect with regard to some interference with online freedom of expression. Finally in its Grand Chamber judgment in Big Brother Watch and others v the United Kingdom, ECtHR has applied its basic principles in order to safeguard the protection of journalistic sources in the digital environment.

Paraphrasing the partly concurring opinion in *Big Brother Watch and others v the United Kingdom*, one may hope that in future cases raising questions of concrete interference with the right to freedom of expression and information in the digital environment, the ECtHR's case law will interpret and further develop in a way which will properly uphold and stimulate freedom of expression on the Internet in support of a democratic society and the values it stands for. The challenge for the ECtHR is to consolidate and further elaborate on its case law securing the right to freedom of expression online. An even bigger challenge is to make this case law be applied at the domestic level by national legislators and administrative and judicial bodies. But not only public authorities need to implement and integrate the ECtHR-standards in practice: the right

to freedom of expression in the online environment also needs to be respected by corporate organisations and Internet intermediaries, applying the horizontal effect of Article 10 ECHR in private relations.⁶⁶

The recent (controversial) judgments in Akdeniz and others v Turkey (on the denial of victim status of academic human right defenders), Hurbain v Belgium (on the right to be forgotten and the order to anonymise an online archived newspaper article), Biancardi v Italy (on deindexing of an online news article in order to preserve the right to be forgotten) and Sanchez v France (on the liability for hate speech in comments on a politician's Facebook page) reveal that the utmost vigilance is needed and that the ECtHR is not always taking sufficiently into consideration some specific features of the Internet environment combined with some of the basic principles it has formulated in relation to the importance of online freedom of expression and information in a democracy. The judgment in Akdeniz and others v. Turkev applies an overly restrictive approach to victim status and its division between journalistic activities and human rights-related academic activities is regressive. The judgment is a set-back for its progressive development of three partly overlapping sets of freedom of expression principles: the public's right to know, the right to participate effectively in public debate, and academic freedom.⁶⁷ The judgments in Hurbain v Belgium, Biancardi v Italy and Sanchez v France show a certain negligence by the ECtHR to help to secure or guarantee an enabling environment for the right to freedom of expression and information online. As the last three judgments are not final vet at the moment of finalising this chapter, there is still a chance that the Grand Chamber will take the option for an approach which is now only advocated in the dissenting opinions of the chamber judgments, arguing in favour of less interference with the right to freedom of

⁶⁶ See Rikke Frank Jørgensen (ed), *Human Rights in the Age of Platforms* (MIT 2019) 191–316 and Dirk Voorhoof, 'Same standards, different tools? The ECtHR and the protection and limitations of freedom of expression in the digital environment', in Michael O'Boyle (ed), *Human Rights Challenges in the Digital Age: Judicial Perspectives*, (Council of Europe Publications 2020) 46. See also *Recommendation CM/Rec(2018)2 of the Committee of Ministers* (of the Council of Europe) *to member States on the roles and responsibilities of internet intermediaries*, 7 March 2018, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14 accessed 1 December 2021.

⁶⁷ See Tarlach McGonagle, '*Akdeniz v Turkey* – Academics get the short end of the stick in news reporting judgment' 30 August 2020 *EHRC Updates* https://www .ehrc-updates.nl/commentaar/211626?skip_boomportal_auth=1 accessed 1 December 2021; and Ayşe Bingöl Demir, 'The ECtHR adopts a regressive interpretation of victim status in cases concerning injunctions contra mundum' 5 Strasbourg Observers Blog, 5 November 2021 https://strasbourgobservers.com/2021/11/05/akdeniz-and -others-v-turkey-the-ecthr-adopts-a-regressive-interpretation-of-victim-status-in-cases -concerning-injunctions-contra-mundum/ accessed 1 December 2021.

expression online.⁶⁸ These recent cases dealing with significant characteristics of the Internet illustrate that the ECtHR's mission as 'norm entrepreneur' for freedom of expression online is far from being accomplished.⁶⁹

⁶⁸ See n 33 (dissenting opinion of Judge Pavli in *Hurbain v Belgium*) and n 52 (dissenting opinion of Judge Mourou-Vikström in *Sanchez v France*).

⁶⁹ Jan Oster, "On 'Balancing' and "Social Watchdogs": The European Court of Human Rights as a Norm Entrepreneur for Freedom of Expression', in Lee Bollinger and Agnes Callamard (eds), *Regardless of Frontiers? Freedom of Expression and Information in the 21st Century* (Columbia University Press 2020) 175.