CHAPTER 5

Eternally vigilant

Protecting freedom of expression and media freedom in the age of platforms

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ABSTRACT
The right to freedom of expression and its corollaries, media freedom and media pluralism, are under constant pressure. Threats to the right and to the pluralistic public debate it nourishes come from all quarters, targeting public debate at different levels: its epistemic underpinnings, its participants, its structure and modalities, its scope and content, and its overall ecosystemic health. In this chapter, I examine those threats, in particular Big Tech's power to control the flow of information and ideas online. I recall that the first principles of human rights protection of freedom of expression, developed by the European Court of Human Rights, form the matrix for EU regulation of media and platforms. Those principles must constantly prove their resilience, not least in fierce narrative battles over the nature and scope of freedom of expression. The vast array of threats targeting freedom of expression and public debate call for eternal vigilance.

KEYWORDS: freedom of expression, media freedom and pluralism, public debate, platform regulation, Big Tech

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Introduction – freedom of expression and eternal vigilance

Discussions and debates about the scope of the right to freedom of expression and its limits may seem as old as time itself, yet they never seem to lose their urgency. Technological breakthroughs, ideological flashpoints, political scandals, societal controversies, and other factors ensure the perpetual and prominent presence of freedom of expression on political agendas. The emphases vary at different moments, but the broader discussions remain constant. The important roles of "the media" in a democratic society are a recurrent focus in such discussions.

In this chapter, I set out to examine regulatory and policy dimensions of the constant assailing of freedom of expression and media freedom. The effective exercise of the right to freedom of expression is curtailed by an array of familiar measures such as political censorship, ideological and religious intolerance, and market-driven constraints. These limitations on, and threats to, freedom of expression are part and parcel of European communications and media history and they are as acute as ever today. So, what has changed?

The familiar threats remain, but in an utterly transformed multimedia ecosystem in which new threats have also come to the fore. This transformation has been caused by the development of new information, communication, and media technologies; the rapid and wholesale uptake of those technologies; and the resultant societal dependency on them. More specifically, the platformisation of societies (van Dijck et al., 2018) has raised the potential for restricting freedom of expression and media freedom to new levels. The dominant global position of so-called Big Tech – the giant digital intermediaries – has created new conditions for private censorship, control of distribution of content, surveillance capitalism, and personalised recommendation systems (Moore & Tambini, 2018, 2021). Most recently, generative AI – the newest opaque and unaccountable technology – is being rolled out largely unchecked, paving the way for a full-blown epistemic crisis.

This array of new technology-driven threats is shaping the narrative of the latest chapter in the long history of the right to freedom of expression. In the face of such a massive concentration of power in a tech broligarchy (Cadwalladr, 2024), it is proving very difficult to regulate effectively for freedom of expression and its corollaries, media freedom and media pluralism.

The right to freedom of expression can empower individuals, groups, and entire societies. When misused or abused, however, it can just as easily lead to the disenfranchisement, repression, and even oppression of individuals, groups, and entire societies. This leads to a regulatory conundrum: How do we calibrate regulatory measures that provide robust protection for the effective exercise of the right, while also putting in place adequate safeguards against the misuse or abuse of the right?

I attempt to answer these questions in broad strokes, focusing on European regulatory and policy frameworks. The chapter opens with a functional, summary overview and analysis of the multitude and magnitude of threats to freedom of expression in the multimedia ecosystem. I then make the case for a return to the first principles of freedom of expression, arguing that the right to freedom of expression, as conceptualised in the European Convention on Human Rights (Council of Europe, 1950), remains the authoritative legal model for contemporary Europe. These first principles continue to guide the regulation of media and online communications through uncharted waters. I posit that a sharper understanding of the first principles could help to fortify fundamental rights protection in media and platform regulation. In the final substantive part of the chapter, I underscore the need for eternal resilience of human rights principles in democratic societies, as well as the need for eternal vigilance towards the growing threats to those principles in practice.

Multitude and magnitude of threats to freedom of expression in the multimedia ecosystem

The big-picture view of threats to freedom of expression, media freedom, and pluralism is overwhelming. Many of the threats are all too familiar. Some are new and spawn from shifting dynamics of power in the multimedia ecosystem and the systemic digital disruption of democratic systems and processes. These threats target the values underpinning public debate, participants in public debate, the structures and modalities of public debate, the substance and quality of public debate, and the ecosystemic health of public debate. It is important to differentiate between the different levels at which these threats operate in order to devise tailored strategies to counter them effectively. At the same time, it is also important to keep sight of the overall picture and to develop the counterstrategies at each level in a coherent way.

Threats targeting the underlying epistemic values of public debate

Public debate, as nourished by freedom of expression, rests on firm epistemic foundations, including a shared societal commitment to the sharing of knowledge, facts, truthful, accurate and reliable information, and the development of opinions based on such knowledge and information. In recent years, rising populist tides have caused waves of aggressive disparagement of journalists, the media, and public service media, involving accusations (without basis and in bad faith) of being dishonest, biased, or corrupt, or of peddling "fake news", disinformation, or (foreign) propaganda. Smear campaigns and fabricated charges against journalists and other media actors (e.g., for tax evasion or for being foreign agents) are designed to undermine the reputation and credibility of public watchdogs. While such verbal attacks especially target the individual and institutional actors in public debate,

they also erode the epistemic underpinnings of public debate. When plain facts are twisted as a matter of course, when accurate, factual information is aggressively and routinely discredited, and when lies and disinformation are turned into common currency in political discourse, then the essential epistemic fabric of public debate becomes ruptured (Baehr, 2000: 568).

Threats targeting participants in public debate

The most egregious threats to freedom of expression are those directed at the safety and security of journalists, the media, and other actors participating in public debate. Censorship by violence and killing are the most extreme examples. The impact of threats of violence and acts of violence is exacerbated when those responsible for such crimes go unpunished, creating a culture of impunity. Threats of violence, and acts of violence, are typically perpetrated by criminals and criminal organisations, but also – as monitoring shows – by private individuals and public figures, and even by state authorities and officials. A growing body of research draws attention to the scale and severity of threats, hate speech, and other abuse that is gender-related or that targets individuals specifically because they (are perceived to) belong to the LGBTQIA+ community, ethnic, or other minority groups.

The different types of threats personally targeting public watchdogs can have a chilling effect on their contribution to public debate. That is why protection is increasingly understood as a 360-degree concept and is no longer solely focused on physical safety and security.

Threats targeting the structures and modalities of public debate

Robust, pluralistic, and inclusive public debate requires strong structures of pluralistic and independent media, but those structures are also under sustained threat. Concentration of media ownership across different media sectors is the antithesis of the pluralistic media offer that ought to characterise public debate, according to European human rights and media law. A regime of transparency concerning the ownership and beneficial ownership of media companies and media-related interests is an important step towards effective monitoring and regulation of media concentration.

Public service media are a structural feature of pluralistic media environments, but they, too, are confronted with sustained threats and challenges. To effectively fulfil the public service remit, public service media must have editorial independence, operational autonomy, and financial stability. Governments should therefore remain "at arm's length", but they often fail to respect that distance in practice.

Recent years have seen the growth of media capture – the control of the media by governments and vested interests aligned with governments (Shiffrin, 2021) – in different EU member states. The problem is exacerbated

when there is also political capture of independent national media regulatory authorities, notwithstanding well-established legally-binding guarantees for their independence in EU law. When political capture spans both the media (public service and commercial) and the regulatory authorities, we can speak of a complete capture of the entire media sector. And as we will see presently, the super-imposition of Big Tech capture, which has been dubbed "The Tech Coup" by Marietje Schaake (2024), creates added complexity and risks.

Threats targeting the scope and content of public debate

Another set of threats concerns restrictions on the ability of media to disseminate information, ideas, and opinions, thus affecting the scope and content of public debate. They manifest themselves in general contexts, but also in specific contexts when objective and accurate information is at a premium, for example, during election periods, in war and conflict situations, and in crisis or emergency situations. Such threats often arise from legislation that regulates what can be said about particular topics, or how such legislation is applied in practice. Examples include laws on defamation, privacy and data protection, hate speech, counterterrorism, anti-extremism, national security, and disinformation. In these cases, the threats are often enabled by legislative deficiencies. There is a very real risk that legislation will be politicised and exploited when it contains loopholes or key terms are vaguely delineated. Such drafting shortcomings can leave legislation susceptible to discriminatory or overzealous interpretation and application, resulting in a chilling effect on freedom of expression.

Threats targeting the ecosystemic health of public debate

The platformisation of public debate, facilitated by earlier digital developments, is the source of a new generation of threats. Online platforms have been described as "programmable digital architecture designed to organize interactions between users" and which are "geared toward the systematic collection, algorithmic processing, circulation, and monetization of user data" (van Dijck et al., 2018: 4). When they operate at scale (as they typically do), they wield enormous influence over their users and their content. This influence has led to the platformisation of society, a process by which online platforms have become an integral part of society. This has enabled platforms to "shape *every* sphere of life, whether markets or commons, private or public spheres [emphasis per original]" (van Dijck et al., 2018: 46). Specifically in the context of public debate, platformisation has led to the dislodging of the mass media as the central institutional actors (Baker, 2009: 654). Digital platforms have become the new gatekeepers of freedom of expression online; controlling the flow of information and ideas that irrigate public debate. They set the rules for access to and use of their fora and they moreover enforce

those rules, making them both "governors" and "police" of speech (Kaye, 2019; Klonick, 2018).

The dominant positions enjoyed by several leading Big Tech companies with flagship platforms such as Amazon, Apple, Google, Meta, Microsoft, TikTok, X, and so on, intensify the impact that their activities can have on their users' freedom of expression and information. Content moderation policy decisions for a particular platform at the global level are quick to percolate down to concrete decisions at the hyperlocal level. Big Tech CEOs moreover wield immense power within their corporations and largely determine platforms' policies.

After Elon Musk purchased Twitter, he proclaimed that Twitter should be preserved as "a common digital town square, where a wide range of beliefs can be debated in a healthy manner, without resorting to violence" (widely quoted, e.g., in Garrity, 2022). Instead, he orchestrated the further toxification of Twitter, turning it into X, a virulent online cesspool, or the kind of "free-for-all hellscape" he had declared it could "obviously" not become (quoted in Garrity, 2022). He bent Twitter/X to his own will and his own ideological design.

Mark Zuckerberg described the November 2024 presidential election in the US as "a cultural tipping point towards, once again, prioritising speech" and made very clear that Meta would be going with this particular flow (widely quoted, e.g., in Booth, 2025). In January 2025, he announced that Meta would abolish its fact-checking programmes in the US; "dramatically reduce the amount of censorship" on its platforms by "get[ting] rid of a bunch of restrictions on topics like immigration and gender that are just out of touch with mainstream discourse"; and "work with President Trump to push back on governments around the world that are going after American companies and pushing to censor more" (quoted in Booth, 2025). These are just two examples of how Big Tech CEOs have voluntarily aligned their platforms' policies with the political policies and priorities of the day.

As Big Tech dominance is concentrated in a coterie of mega-corporations, any collective alignment of platform and political policies – whether concerted or not – can have a huge impact on the entire online environment.

A return to the first principles of free expression

As we watch on while the right to freedom of expression is being bruised and battered from all sides, we should return to basic human rights principles and refresh our understanding of how the right to freedom of expression is conceptualised. In the next two sections, I explain the primacy of these first principles, and then I explore their content and the context in which they have been developed.

A clarification of the primacy of first principles

There are myriad definitions and visions of freedom of expression, born in different religious and philosophical traditions; shaped by different political worldviews; and analysed through different academic disciplines (for a synthesis of the main rationales for freedom of expression, see Barendt, 2005).

The definitions that must be staunchly defended are those provided for by, or derived from, international and European human rights law. This body of law is binding in nature: It recognises and articulates obligations for states towards individuals; it guarantees rights for individuals against (the power of) states. This means that definitions of rights elaborated under international and European human rights law are legally consequential, thus impacting how we organise our societies. It is of utmost importance that the authoritative judicial interpretation of rights contributes to legal consistency and predictability, under the doctrine of legal certainty. While the meaning of terms necessarily evolves, such evolution must take place within a complex set of legal, hermeneutic, and epistemic parameters. Treaties are living instruments; they are to be interpreted in an evolutive manner (ECtHR, 1979b), based on the doctrine of precedent.

European and international legally binding definitions cannot be bent to national political wills that are not consistent with the purpose, spirit, and letter of the human rights treaties ratified by states. Nor can they be modified to expediently match the views of new presidents or governments. If that were the case, it would undermine the agreed baseline of universal protection for human rights – the common standard of achievement which the community of nations has avowed to uphold. The playbook of anti-democratic or populist leaders cannot trump the rulebook of European and international human rights law.

In the same vein, it is not for any individual, however rich and influential or politically and commercially powerful, or however large their platform is, to authoritatively designate the meaning of rights. Such an approach would leave law susceptible to the vagaries of arbitrary interpretation, viral dissemination, and pounding amplification.

Yet, that is what is happening in plain view and in real time. Political leaders and platform leaders are overtly seeking to claim and frame free speech in narratives that serve their own worldviews. They tend to style free speech as being about more speech and fewer (or no) restrictions or responsibilities.

So, when Mark Zuckerberg prophesised after the 2024 US presidential election that speech would once again be prioritised, it is important to critically question how he was framing free speech. It is important to measure his brand of free speech against the legally authoritative standards of international and European human rights law and also the European regulatory framework for platforms that Zuckerberg and other leading figures in the tech broligarchy are actively lobbying to undermine (Ryan, 2025).

The examples discussed reveal that these are not theoretical concerns. They have real-life and concrete consequences in a democratic society. There is both inherent creative and censorial power in the ability and authority to name and frame (Curry Jansen, 1991: 20). When political and platform power are closely intertwined, platforms can propel and amplify political ideologies, harnessing informational and opinion power in the process. Such a concatenation of power can influence which definitions or frames will become best-sellers in the online marketplace of ideas. When political and platform leaders pummel the public with their self-shaped interpretations of freedom of expression which are at odds with legal reality, any ensuing discussion becomes skewed, with deleterious effects for democracy.

A clarification of the content and context of the first principles

The individual arguments sketched above coalesce into an overall case for the primacy of the definitions and visions of the right to freedom of expression that have been developed under international and European human rights law. But what do those definitions and visions actually entail in substantive terms, and what is so distinctive about them? Five observations can help to answer these questions and unpack the completeness and nuance of the right to freedom of expression under European human rights law: 1) the right to freedom of expression is a compound right with different constitutive elements; 2) the exercise of the right is governed by duties and responsibilities and may be subject to limitations, when necessary in a democratic society; 3) the contours of the right are also shaped by interplay with other rights; 4) the right is interpreted in a dynamic way; and 5) states have negative and positive obligations to protect and promote the right, and to ensure a safe and favourable environment for its exercise.

A compound right

The right to freedom of expression is a composite right with several distinct, but complementary, component freedoms. Simply stated, under Article 10 of the European Convention on Human Rights (the central guarantee of freedom of expression in Europe), the right comprises the freedom to hold opinions, the freedom to impart information and ideas, and the freedom to receive information and ideas without interference by public authority.

There is no general hierarchy between the different constituent freedoms of the right. The freedom of one person to impart information will not ordinarily or without good reason override the freedom of another person to receive information. If two or more of those freedoms are implicated in the circumstances of a given case, the European Court of Human Rights (ECtHR), through fair balancing, assesses all of the facts of the case and determine which freedom should prevail in those particular circumstances.

Duties, responsibilities, and limitations

The right to freedom of expression enjoys strong protection under Article 10 of the Convention, but it is not unconditional or unlimited (ECtHR, 1976). The exercise of the right is accompanied by duties and responsibilities. The nature and scope of those duties and responsibilities vary, depending on the role or position of the speaker in society and on the technical means used to disseminate their message. Thus, a journalist will have heightened duties and responsibilities to provide accurate, fact-based reporting than ordinary individuals (ECtHR, 1999a, 1999b). This is a logical consequence of the roles of journalists as public watchdogs and purveyors of information and ideas to the public (ECtHR, 1979a), and the freedoms they enjoy in order to fulfil those roles. The particular duties and responsibilities accompanying the use of different media or communications technologies will vary (ECtHR, 1994), depending on factors such as reach, amplification, dissemination, and impact. The greater the expected or actual impact, the more exacting the duties and responsibilities will be.

The exercise of the right to freedom of expression can, moreover, be limited in certain circumstances. A limitation on the right must always be prescribed by law and be necessary in a democratic society to achieve one or more of the purposes enumerated in Article 10.2 of the Convention. A limitation should thus be necessary, for example, in the interests of national security, territorial integrity, or public safety, or for the protection of the reputation or rights of others.

Interplay with other rights

The scope of the right to freedom of expression is also shaped by its interplay with other human rights, such as the right to private life, guaranteed under Article 8 of the Convention. Both rights carry equal weight, and should friction arise in practice between the freedom to disseminate or to receive information pertaining to someone's private life, both rights will have to be fairly balanced in the particular circumstances of the case (ECtHR, 2012a).

The interplay between the right to freedom of expression and other human rights is also important, as freedom of expression often performs an enabling role for other rights. Freedom of expression enables freedom of religion, freedom of assembly and association, the right to vote, and educational and cultural rights. The ability to receive information is an essential component of the right to health and the right to a healthy environment (ECtHR, 2021b).

Dynamic interpretation

The European Convention on Human Rights is a "living instrument"; it is interpreted by the Court in a dynamic and evolutive manner (Mowbray,

2005). This enables it to grow with the times and to retain its relevance in changed societal and technological contexts. Such an approach helps to ensure that the rights enshrined in the Convention are not merely theoretical or illusory but practical and effective (ECtHR, 1979b). It helps to ensure that rights formally formulated in the aftermath of the World War II can hold their own in the contemporary online world.

Negative and positive obligations

Many of the rights guaranteed by the European Convention on Human Rights create negative obligations for states – that is, obligations to *not* take measures that would interfere with rights. But in order to ensure that rights are exercised in an effective manner, it is not always enough for the state to simply refrain from interfering with individuals' human rights: Positive or active measures will often be required as well. Under Article 10 of the Convention, the Court has recognised that states have positive obligations to ensure the safety of journalists and other public watchdogs contributing to public debate (ECtHR, 2000) and to guarantee true and effective pluralism in the (audiovisual) media sector (ECtHR, 1993, 2022).

The Court has progressively developed and expanded its positive obligations doctrine in relation to freedom of expression. This has culminated in the Court's affirmation of a positive obligation for states to create a safe and favourable environment for participation in public debate by everyone and to enable the expression of opinions and ideas without fear (ECtHR, 2010; McGonagle, 2015). In terms of a safe environment, this entails putting in place legislative frameworks to prevent and punish crimes against journalists and other media actors and to ensure that those frameworks are implemented effectively. In terms of a favourable environment, the positive obligation implies far-reaching measures to create epistemic and structural conditions that facilitate free, inclusive, and pluralistic public debate through a range of media.

This marks a discernible shift from regulation *of* freedom of expression to regulation *for* freedom of expression. This shift may seem subtle in semantic terms, but its impact is palpable and growing (McGonagle, 2022). The shift is driven by the realisation that securing the effective exercise of the right to freedom of expression is not just about ensuring non-interference, it is also about ensuring the broader contextual conditions in which the right can flourish.

From first principles to derivative principles

Having set out in the previous section how important the first principles of free expression are, as well as what they entail and how they are shaped, the present section traces the further development of those principles. I show how the influence of Article 10 of the Convention extends centrifugally throughout

other Council of Europe instruments and activities, and beyond the Council into EU regulation and policy. I also show how more specific principles have been derived from the first general principles.

The centrifugal influence of Article 10 of the European Convention on Human Rights

Legally speaking, the conceptualisation of the right to freedom of expression under Article 10 of the Convention is the touchstone for all European (and national) regulation of media and digital platforms. It is not only the central legal standard for the Council of Europe; its referential value extends to the EU. The Charter of Fundamental Rights of the European Union (European Union, 2012) is the EU's primary legally binding instrument for the protection of human rights; it binds the EU institutions and EU member states when applying EU law. Insofar as the rights enshrined in the Charter correspond to those enshrined in the Convention, and which have been further developed by the Court in its case-law, the latter are carried over into the Charter regime.

Article 11 of the Charter focuses on freedom of expression and is the equivalent provision to Article 10 of the Convention. It should therefore be interpreted consistently with this and relevant ECtHR case law. Article 11 of the Charter is a more modern and succinct articulation of the freedoms set out in Article 10 of the Convention, but unlike Article 10, it makes explicit reference to media freedom and pluralism.

In its case law interpreting Article 10 of the Convention, the Court has elaborated a body of principles on media freedom and pluralism. A core principle is that the public has the right to be informed on matters of general interest and the media have the corresponding task of informing them (ECtHR, 1979a, 1991). The media, journalists, and other public watchdogs benefit from various freedoms and privileges in order to effectively fulfil the roles ascribed to them in democratic society (ECtHR, 2005). Those roles are to disseminate information and opinions on matters of general interest widely, thereby contributing to opinion-forming processes; act as public watchdogs, holding governmental and other powerful actors to account; and provide shared fora for public debate (ECtHR, 2009). The functional freedoms include editorial and presentational freedom (ECtHR, 1994), protection of confidential sources (ECtHR, 1996), and recourse to a degree of exaggeration and provocation (ECtHR, 1995). The enjoyment of those freedoms is subject to the condition that journalists, the media, and other public watchdogs fulfil their duties and responsibilities – that is, that they abide by the (criminal) law (ECtHR, 1999a), adhere to professional ethics (ECtHR, 1999a), strive to provide information that is accurate and reliable (ECtHR, 1999b), and engage with different sides to a story (ECtHR, 2008).

Another core principle is that states are the ultimate guarantors of pluralism, especially in the audiovisual media sector (ECtHR, 1993). The

emphasis on the audiovisual media sector reflects the Court's long-standing position that audiovisual media are more powerful than the printed press, even if this rough distinction feels increasingly dated in an Internet-dominated world (as in ECtHR, 2013).

The above principles primarily concern the right to freedom of expression and media freedom and reflect the instrumental role of the media as actors in, and facilitators of, public debate. These principles formed the backdrop to the Court's later engagement with freedom of expression in an online context. Some of the principles remain relevant in the online multimedia ecosystem, whereas others have been adapted to make them relevant in a process that I have called "adaptive replication" (McGonagle, 2020). The Court has also had to develop new principles to reflect technical features of the Internet and societal use of Internet-based services and applications (ECtHR, 2012b, 2015, 2016, 2018, 2021a, 2023, 2025). This extensive array of principles governs how media and platforms should conduct their activities in accordance with the right to freedom of expression.

EU regulatory frameworks for media and platforms

The media and digital platforms are also subject to comprehensive and detailed specific regulation at the EU level. Within EU regulatory frameworks, human rights values and objectives are an important thematic focus, but not the only one. I now consider three key pieces of EU regulation from the perspective of their contribution to freedom of expression and/or media freedom, including in the online context: the Audiovisual Media Services Directive (AVMSD), the Digital Services Act (DSA), and the European Media Freedom Act (EMFA).

The Audiovisual Media Services Directive

The AVMSD (European Union, 2018) evolved from the former Television without Frontiers Directive (European Union, 1989). It covers traditional television broadcasting, on-demand audiovisual media services, and since the last major revision of the Directive in 2018, video-sharing platform services.

The AVMSD seeks to ensure a minimum level of harmonisation across the EU of national legislation governing audiovisual media services, with a view to removing obstacles to the free movement of such services within the EU's internal market. The directive's central principles – the country of origin principle (Article 2) and the freedom of reception principle (Article 3) – help to obviate the need for double regulation and double supervision of cross-border audiovisual media services within the EU. To achieve its main aims, the directive coordinates a number of areas: general principles; jurisdiction; incitement to hatred; accessibility for persons with disabilities; major events; the promotion and distribution of European works; commercial communications; and protection of minors.

The AVMSD is heavily conditioned by the goals and logic of the internal market. While it contains several provisions that support or contribute to freedom of expression and/or media freedom, those provisions are incidental to its overall purpose. Across its coordinated areas, the AVMSD seeks to ensure access for the general public to certain public-interest content (e.g., events of major importance for society in Article 14 and short news reports on events of high interest to the public otherwise broadcast on an exclusive basis in Article 15), and specifically for persons with disabilities to programmes and services (Article 7). Furthermore, it seeks to ensure protection for minors and consumers, and it creates transparency obligations for providers of audiovisual media services (Article 5.1).

These provisions in the AVMSD are best summarised as provisions which can contribute to freedom of expression and media freedom, insofar as they strengthen access to certain types of information and offer protection against harmful content, but which are not expressly concerned with ensuring freedom of expression and media freedom.

The Digital Services Act

The main aim of the DSA (European Union, 2022) is to contribute to the proper functioning of the internal market for intermediary services. It sets out harmonised EU-wide "rules for a safe, predictable and trusted online environment that facilitates innovation" while protecting fundamental rights enshrined in the Charter, including consumer protection (Article 1.1). The DSA sets out a framework for the conditional exemption from liability of providers of intermediary services (Chapter II, Articles 4–10). This framework is built on the premise that the providers of intermediary services should not, in principle, be held liable for illegal content of third parties on their services, provided they lack knowledge of the illegal nature of such content, and upon obtaining such knowledge, act expeditiously to block access to it.

The DSA contributes to the overall regulatory shaping of freedom of expression online in Europe. It includes various references to the EU Charter, sometimes explicitly underscoring freedom of expression and media freedom and pluralism.

The mainstay of the DSA is Chapter 3, which focuses on due diligence. The obligations apply to different types of service providers, with additional obligations applying cumulatively to all providers of intermediary services (§1), providers of hosting services, including online platforms (§2), providers of online platforms (§3) and providers of online platforms allowing consumers to conclude distance contracts with traders (§4), and providers of very large online platforms (VLOPs) and of very large online search engines (VLOSEs) to manage systemic risks (§5).

All providers of intermediary services are required to: provide points of contact for 1) national and EU authorities (Article 11) and 2) recipients of

their service (Article 12); indicate in their terms and conditions any restrictions to the use of their service and information on policies, procedures, measures, and tools for content moderation, as well as information on their internal complaint-handling system (Article 14); and conduct (annual) transparency reporting (Article 15). All providers of intermediary services, when applying or enforcing their terms and conditions, must have "due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media" (Article 14).

Hosting service providers, including online platforms, have an additional obligation to put in place "notice-and-action" mechanisms: easy-to-access, user-friendly, electronic mechanisms to allow anyone to notify them of (suspected) illegal content (Article 16.1). Hosting service providers must process notices received via these mechanisms and take decisions on the information to which the notices relate in a timely and diligent manner (Article 16.6).

VLOPs and VLOSEs – that is, the largest digital services, which have an average of more than 45 million monthly active users in the EU – must comply with the most detailed and far-reaching due diligence obligations. This is because of the sheer scale of their operations and the systemic nature of their influence on the online environment. VLOPs and VLOSEs are required to "diligently identify, analyse and assess any systemic risks" in the EU arising from "the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services" (Article 34.1). They must conduct such risk assessments at least once a year. The envisaged systemic risks include, first, the dissemination of illegal content via their services (Article 34.1.a) and, second, "any actual or foreseeable negative effects for the exercise of fundamental rights" (Article 34.1.b), such as freedom of expression and information, including the freedom and pluralism of the media. The third systemic risk is "any actual or foreseeable negative effects on civic discourse and electoral processes, and public security" (Article 34.1.c). The fourth and final listed example concerns "any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being" (Article 34.1.d). VLOPs and VLOSEs must use their risk assessments to devise "reasonable, proportionate and effective mitigation measures, tailored to" the identified systemic risks, while having particular regard for the impact of strategies on fundamental rights (Article 35).

The risk-centric approach is one of the major legal innovations of the DSA. It is more circumspect than the expansive safe and favourable environment approach embraced by the ECtHR and the Council of Europe.

The European Media Freedom Act

The EMFA (European Union, 2024) was born into a media regulatory environment that had already been largely shaped at the centre by the AVMSD and at the edges by the DSA. Even though the short title of the regulation frames it as such, the regulation is not in point of fact a full-fledged "European Media Freedom Act". Its actual ambition is more modest and specific: it "lays down common rules for the proper functioning of the internal market for media services [...] while safeguarding the independence and pluralism of media services" (Article 1.1).

The EMFA provides a regulatory response to various challenges and problems for media freedom within the EU, such as concentrations of media ownership threatening media pluralism, media capture, and regulatory capture (Cole & Etteldorf, 2024).

The EMFA's specific focuses include the right of recipients of media services to a plurality of independent media content (Article 3); editorial freedom and independence (Article 4) and the independence of public service media providers (Article 5); transparency and other duties of media service providers (Article 6); the independence (and modalities of cooperation) of national media regulators (Articles 7 et seq.); and the transparent and fair allocation of public funds for state advertising and procurement (Article 25). There are also specific provisions on the protection of journalistic sources and confidential communications, including a prohibition (with derogations) on using intrusive surveillance software (e.g., spyware) (Article 4).

Article 18 is noteworthy for the privileged position it instates for self-declared media service providers which use the services of VLOPs. The provision allows media to declare that they, inter alia, are media service providers; comply with the transparency duties under Article 6.1; are editorially independent of member states, political parties, third countries, and entities controlled or financed by third countries; are subject to regulatory requirements for the exercise of editorial responsibility in (at least) one EU member state; and do not provide AI-generated content without human or editorial review. When media service providers meet these cumulative requirements, they are entitled to preferential treatment whenever VLOPs intend to or actually do suspend services for, or restrict visibility of content from, a media service provider.

Like the AVMSD, the EMFA protects specific parts of a more comprehensive vision of media freedom. Its most salient focuses are, however, more readily identifiable as relating to media freedom than the relevant focuses in the AVMSD.

Self- and co-regulatory codes

Various self- and co-regulatory instruments and mechanisms operate in the penumbra of legally binding frameworks. For present purposes, the Code of Conduct on Countering Illegal Hate Speech Online + (European Commission, 2025) and the Strengthened Code of Practice on Disinformation (European Commission, 2022) are most relevant. They, too, reference and follow European human rights law. The code on hate speech was initially developed in 2016 under the auspices of the European Commission and signed by leading tech companies; it was revamped in January 2025. The code on disinformation was developed in a similar fashion in 2018 and was revamped in 2022. Both codes comprise extensive lists of commitments for signatories, designed to effectively counter illegal online hate speech and disinformation, respectively. The code on hate speech was integrated into the DSA regulatory framework in January 2025 and the strengthened code on disinformation in February 2025. This means that, amongst other things, adherence to the codes may be considered an appropriate risk mitigation measure for signatories which have been designated as VLOPs or VLOSEs under the DSA.

The resilience of principles and the need for eternal vigilance

So far, I have documented and analysed the vast range of threats to the safe and favourable environment for freedom of expression and public debate that states are obliged to ensure. Those threats play out at different levels and they emanate from different quarters. Traditionally, the foes of freedom of expression have been overbearing and repressive governments, and other powerful – political, commercial, religious, and criminal – actors with vested interests in muzzling the media. Their ranks have now been swollen by a new adversary – Big Tech. The dominance of a coterie of Big Tech multinational corporations has created sharp tensions between the public character of debate on matters of general interest and the private nature of the platforms and services through which that debate is increasingly conducted. This has led to new pressure points for freedom of expression in the multimedia ecosystem. With their dual roles as online gatekeepers and arbiters of public debate, Big Tech actors can block, disrupt, and redirect the (free) flow of information and ideas online. They have in effect usurped public debate.

It stands to reason, then, that democratic societies should be eternally vigilant when determining the outer limits of the right to freedom of expression. When users agree to the terms of service of VLOPs, they entrust a large measure of their freedom to the platform providers. They allow those platforms to shape the discursive environment in which matters of public interest are debated. This is a game-changing reconfiguration of power. This is not just about giving away little drops of our freedom – Big Tech actors have

become the custodians of users' freedom. As the Big Tech CEOs' collective kowtowing to US President Trump shows, it is about the would-be custodians of our freedom offering our freedom wholesale to repressive leaders. This is what Timothy D. Snyder (2017: 18) has called "anticipatory obedience" – when individuals pro-actively relinquish their freedom in anticipation of what a repressive government or leader will later demand. Snyder has found this behaviour particularly dangerous (it is his first lesson in *On Tyranny*), as it teaches power what it can do (Snyder, 2017: 17).

As Thomas I. Emerson (1970: 724) has noted: "repression has no stopping place"; "once begun, it can quickly move all the way to a totalitarian system". The Big Tech broligarchy (Cadwalladr 2025) is a catalyst in this process, helping repressive leaders undermine the epistemic foundations of public debate at scale and with force. The broligarchy espouses and is aggressively pushing a version of freedom of expression that is anathema to how the right to freedom of expression has been shaped under international and European human rights law. The former version is narrow and speaker-centric, whereas the latter is open and other-regarding. Big Tech's dominance and control of the discursive online environment enables norm-twisting to be carried out across different platforms.

In the face of all these threats to freedom of expression, the ECtHR's principles for the protection and promotion of freedom of expression and media freedom must continue to prove their mettle and resilience. The Court has developed a set of robust principles, which it has adapted and built upon for a multi-media ecosystem increasingly shaped by (very large) online platforms. The lynchpin of those principles is the positive obligation of states to ensure a safe and favourable environment for effective participation in public debate by everyone, without fear. The principles open up a vast space for states to fill, but the Court is not prescriptive about how states should fulfil their positive obligations in particular. The principles also form the matrix of human and fundamental rights protection in which specific regulation of media and platforms operates, including at the EU level.

In the EU regulatory framework, these principles are a clear, but not the only key, reference point. They have been shoehorned into other regulatory objectives, especially the strengthening of the internal market. This has conditioned how the principles have been articulated within the EU regulatory framework. Specific aspects of freedom of expression, media freedom, and media pluralism are protected in piecemeal fashion, like in the AVMSD and the EMFA, but that is very different to a comprehensive system of protection for freedom of expression, media freedom, and media pluralism. The AVMSD, the DSA, and the EMFA all show an awareness of the need for media content to be available and prominent in the online environment, which is important for sustaining pluralistic public debate. The DSA is committed to making the online world safer and draws explicitly on fundamental rights standards. But

all in all, the ECtHR's principles make for a more holistic approach to the protection and promotion of freedom of expression than the EU's approach, which is largely concerned with harm.

The tentative conclusion that the Court's principles have not been fully incorporated into the EU's specific regulatory framework for media and digital platforms merits further probing. First, it is important to understand that the ECtHR, being the judicial organ of the Council of Europe, did not develop its principles with EU regulation in mind. Second, the very different contexts in which the principles were initially developed (the authoritative interpretation of a legally binding treaty) and subsequently incorporated into regulation (the qualified reflection of the principles in a different legal order) must be borne in mind. If some of the coherence, comprehensiveness, and specificity of the ECtHR's principles have been lost during their unofficial translation into EU regulatory instruments, that can largely be explained by differences of emphasis in normative values and regulatory goals. This could be considered an inter-institutional gap, which has proven difficult for the principles to cross.

One more part of the story of the ECtHR's principles still needs to be told, in order to provide a more complete regulatory picture. The Court's main task is determining whether the rights enshrined in the European Convention on Human Rights have been violated in specific cases. It is not the task of the Court to draft or direct policy for states. However, the principles that the Court develops in its reasoning can and do offer valuable insights into the positive obligations of states under Article 10 of the Convention. The principles are not self-executing and they ideally require further operationalisation by states at the national level.

The Council of Europe's Committee of Ministers – the organisation's decision-making body – also contributes to the operationalisation of the Court's principles. The Committee of Ministers drafts and adopts political recommendations directed at the 46 member states. The recommendations address different themes, such as freedom of expression, and offer detailed guidance to the member states on how to engage with those themes at the national level. Over the past decade, the Committee of Ministers has adopted various recommendations dealing with different aspects of freedom of expression, media freedom and pluralism, and the roles of digital platforms. The recommendations address the various threats to freedom of expression and public debate examined in this chapter (see Table 5.1 for a brief and selective overview). They tease out what states could and should do to fulfil their positive obligation to ensure a safe and favourable environment for freedom of expression and participation in public debate.

Table 5.1 Connecting targets of threats to freedom of expression with focuses of the Council of Europe's Committee of Ministers recommendations

Targets of threats	Focuses of Committee of Ministers' recommendations
Participants in public debate	Protection of journalism and safety of journalists and other media actors (Council of Europe, 2016)
Underlying epistemic values of public debate	Protection of journalism and safety of journalists and other media actors (Council of Europe, 2016) Promotion of a favourable environment for quality journalism in the digital age (Council of Europe, 2022)
Structures and modalities of public debate	Media pluralism and transparency of media ownership (Council of Europe, 2018a)
Scope and content of public debate	Protection of journalism and safety of journalists and other media actors (Council of Europe, 2016)
Ecosystemic health of public debate	Roles and responsibilities of Internet intermediaries (Council of Europe, 2018b)

While it is beyond the scope of this chapter to set out and critically evaluate the detailed guidance offered in the Committee of Ministers' recommendations mentioned above, it is nevertheless important to flag them, their purpose, and their scope. They underscore the dynamic relationship between regulation and policy in relation to states' positive obligation to ensure a safe and favourable environment for freedom of expression and participation in public debate. They moreover serve to fill some of the gaps between different regulatory instruments and provisions. They seek to convert the "generative" power of the Court's principles into a range of measures to fortify freedom of expression and media freedom online (McGonagle, 2022). The pathways set out by first and derivative principles, regulation and policy, will have to be patrolled with eternal vigilance in order to ensure protection against the ever-increasing number of threats targeting freedom of expression at different levels.

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