

The Power of Positive Thinking

Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression

by Aleksandra Kuczerawy*

Abstract: The Internet intermediary liability regime of Directive 2000/31/EC places hosting providers in the role of private gatekeepers. By providing an incentive in the form of a liability exemption, the EU legislature has ensured that hosting providers cooperate in the policing of online content. The current mechanism results in a situation where private entities are co-opted by the State to make decisions affecting the fundamental right to freedom of expression. According to the theory of positive obligations, States not only have to refrain from interfering with fundamental human rights, but also actively protect them, including in relations between private individuals. This

paper analyses whether the doctrines of positive obligations (under the European Convention on Human Rights) and effective protection (under the Charter of Fundamental Rights of the European Union) may require the States to take additional measures to protect the right to freedom of expression from interference online. In particular, the paper analyses whether the Charter may require the EU legislature to take additional measures to ensure that the right to freedom of expression can be effectively enjoyed online, for example by introducing procedural safeguards in the legal framework regarding removal of online content.

Keywords: Intermediary liability; right to freedom of expression; theory of positive obligations; fundamental rights; EU legislation; removal of online content; ECHR; CJEU

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A. Introduction

1 Article 14 of the E-commerce Directive (2000/31) contains a conditional liability exemption for hosting providers.¹ Under this provision, hosting service providers can benefit from a liability exemption provided they: 1) do not have actual knowledge of

illegal activity or information and, as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent; 2) upon obtaining such knowledge or awareness, they act expeditiously to remove or to disable access to the information.²

2 The provider of a hosting service can obtain knowledge about the illegal character of hosted content in a number of ways. For example, the provider could find such content through his own activities or he could be notified about the situation

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1 Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive), OJ L 178, 17.07.2000, 1.

2 Article 14.1 of the E-Commerce Directive 2000/31/EC.

by a third party. Notifications could stem either from public authorities – i.e. courts – or from private entities. In the latter case, the provider of the hosting service is called upon directly by a private individual to remove or block access to the content in question. The mechanism is commonly referred to as ‘notice-and-take-down’. It is the provider’s task to assess whether such a complaint is credible and make a decision about the infringing character of the content.

- 3 The E-Commerce Directive laid the groundwork for notice-and-take-down but did not provide any additional guidelines with regard to its implementation. Instead, the Directive left the subject matter to the discretion of the Member States.³ Article 16 and recital (40) of the Directive encourage self-regulation in this field. Certain Member States have developed more detailed, formal notice-and-take-down procedures, but the majority of the Member States opted for a verbatim transposition of the Directive, hoping that self-regulation would emerge.⁴ This however proved to be inefficient – most of the countries never introduced any self-regulatory measures.⁵ The result is a lack of any firm safeguards for the content removal procedures in most of EU countries.⁶
- 4 As a result, the E-Commerce Directive and most national implementing laws place hosting providers in a position to decide which content can remain online and which should be removed. They may be considered as private ‘gatekeepers’, who are able to

regulate the behaviour (and speech) of their users.⁷ By providing conditional liability exemptions for third parties’ illegal content or activities, the States enlist the intermediaries to enforce the public policy objectives (i.e. to remove unlawful content).⁸

- 5 The E-Commerce Directive is currently under review. The review process started in 2010, with a public consultation on the future of electronic commerce in the internal market.⁹ Most respondents to the consultation agreed that there was no need for a revision of the E-Commerce Directive as a whole.¹⁰ Many considered, however, that certain aspects of the Directive, particularly the intermediary liability regime, would benefit from further clarification. A more in-depth analysis of the identified issues was developed in the Commission Staff Working Document on Online Services.¹¹ In May 2015, the Commission announced a plan to assess the role of online platforms in the Communication on a Digital Single Market Strategy for Europe (DSM).¹²

7 The concept of a ‘gatekeeper’ refers to ‘private parties who are able to disrupt misconduct by withholding their cooperation from wrongdoers’. Through the concept of vicarious liability, these gatekeepers can be incentivized to prevent misdeeds by withholding their support, in the form of specific good, service or certification that is crucial for the wrongdoer to succeed. See H.R. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, *Journal of Law, Economics, and Organization*, Vol. 2, No. 1, 1986, pp. 53-105. See also E. Laidlaw, Internet gatekeepers, human rights and corporate social responsibilities. PhD thesis, 2012, The London School of Economics and Political Science (LSE).

8 See more on the practice of designating corporate actors to enforce rules on the Internet in N. Tusikov, *Chokepoints – Global Private Regulation on the Internet*, University of California Press, November 2016.

9 European Commission, Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC), <http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm>.

10 European Commission, Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC), <http://ec.europa.eu/internal_market/consultations/docs/2010/ecommerce/summary_report_en.pdf>.

11 Commission Staff Working Document Online services, including e-commerce, in the Single Market (n 6). For a more comprehensive discussion of these documents see A. Kuczerawy, *Intermediary Liability & Freedom of expression: Recent developments in the EU Notice & Action Initiative*, *Computer Law and Security Review* 2015, vol. 31, Issue 1, 46-56.

12 European Commission, Commission Communication to the European Parliament, The Council, The Economic and Social Committee and The Committee of Regions, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*, Brussels, 25.5.2016 COM(2016) 288 final <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0288&from=EN>>.

3 Article 14.3 of the E-Commerce Directive and Recital 46 E-Commerce Directive.

4 T. Verbiest, G. Spindler *et al.*, *Study on the Liability of Internet Intermediaries*, Markt/2006/09/E, 12 November 2007, p. 14-16. For a more recent analysis of the national approaches to the problem of content regulation on the Internet see country reports accompanying the study by the Swiss Institute of Comparative Law, *Comparative Study on Filtering, blocking and take-down of illegal content on the Internet – comparative considerations*, Report commissioned by the Council of Europe, 20 December 2015 <<http://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>>.

5 P. Van Eecke, M. Truyens, *Legal analysis of a Single Market for the Information Society, New rules for a new age? A study commissioned by the European Commission’s Information Society and Media Directorate-General*, November 2009. Chapter 6: *Liability of Online Intermediaries*, p. 19. See also *First Report on the Application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on the Directive on Electronic Commerce*, COM(2003) 702 final, Brussels, 21.11.2003.

6 For an overview of issues related to the E-Commerce Directive see: Commission Staff Working Document, *Online services, including e-commerce, in the Single Market*, Brussels, 11.1.2012 SEC(2011) 1641 final, <http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf>.

After another consultation,¹³ the Commission concluded that it would maintain the existing intermediary liability regime while implementing a sectorial, problem-driven approach.¹⁴ This means that the Commission plans to tackle the identified problems without re-opening the E-Commerce Directive.¹⁵ As evidenced in subsequent initiatives – that is the proposed Copyright Directive and the amendment to the AVMS Directive – the plan includes involving online service providers in content regulation. In this paper I explain why the Commission’s approach is problematic. By analysing the case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU), I argue that the European legislature has a legal obligation to ensure effective protection of the right to freedom of expression in the context of online content regulation. This obligation could be met by introducing procedural safeguards for freedom of expression into notice-and-take-down mechanisms. By providing the analysis, I hope to contribute to the ongoing discussion about the review of the E-Commerce Directive.

B. State interference by proxy

6 Under Article 14 of the Directive, the decision to remove or disable access to content has to be expeditious in order to exonerate the service provider from the potential liability. The most cautionary approach is to act upon any indication of illegality, without engaging in any (possibly burdensome and lengthy) balancing of rights that may come into conflict. As a result, any investigation of the illicit character of the content and balancing of rights at stake is usually non-existent.¹⁶ This often leads to ‘over-compliance’ with takedown requests, or in other words, preventive over-

blocking of entirely legitimate content. Article 14 of the E-Commerce Directive, therefore, creates “an incentive to systematically take down material, without hearing from the party whose material is removed”.¹⁷ The current legal situation has been characterised as an “inappropriate transfer of juridical authority to the private sector”.¹⁸ Others consider it a form of private or corporate censorship¹⁹ possibly creating a ‘chilling effect’ on the right to freedom of expression.²⁰ Service providers are placed under such fear of liability claims that they impose on themselves measures “appropriate for making them immune to any subsequent accusation but is of a kind that threatens the freedom of expression of Internet users”.²¹

7 Enlisting private entities to decide about fundamental human rights is far from ideal. The approach, however, does provide certain advantages. In the context of online expression, where information spreads in a flash, the benefits of a swift reaction are clear. Infringing or illegal content which remains online for an extended period of time can cause serious harm – some of it irreparable (e.g., reputational harm). Notice-and-take-down mechanisms provide a quick relief, far quicker than the relief typically provided by the judiciary. The indirect ‘responsibilization’²² of the

13 See European Commission, Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy: Online Platforms Public Consultation Synopsis Report <<https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>>.

14 European Commission, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (n 12).

15 See S. Stalla-Bourdillon, Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the e-Commerce Directive as Well..., in L. Floridi and M. Taddeo, *The Responsibilities of Online Service Providers*, Springer, 2016, p. 277.

16 See discussion in C. Ahlert, C. Marsden and C. Yung, “How Liberty Disappeared from Cyberspace: the Mystery Shopper Tests Internet Content Self-Regulation” (“Mystery Shopper”) at <http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf>.

17 R. J. Barceló and K. Koelman, *Intermediary Liability In The E-Commerce Directive: So Far So Good, But It’s Not Enough*, *Computer Law & Security Report* 2000, vol. 4, p. 231.

18 European Commission, Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (n 10) p. 12.

19 R. J. Barceló, *On-line intermediary liability issues: comparing EU and US legal frameworks*, E.I.P.R. 2000, 111; The Organization for Security and Co-Operation in Europe and Reporters Sans Frontiers, *Joint declaration on guaranteeing media freedom on the Internet*, 17-18.06.2005 <<http://www.osce.org/fom/15657>>.

20 See for examples concerns expressed in: Council of Europe (Council of Ministers), *Declaration on freedom of communications on the Internet*, 28.05.2003 <http://www.coe.int/t/information/society/documents/Freedom%20of%20communication%20on%20the%20Internet_en.pdf>; Council of Europe, *Human rights guidelines for Internet Service Providers* – Developed by the Council of Europe in co-operation with the European Internet Service Providers Association (EuroISPA), July 2008, paras 16 and 24 <[http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf\(2008\)009_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf(2008)009_en.pdf)>; T. Verbiest, Spindler G., et al., *Study on the liability of Internet Intermediaries* (n 4), p.15; OECD, *The Economic and Social Role of Internet Intermediaries*, April 2010, pp. 9-14.

21 E. Montero and Q. Van Enis, *Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle*, *Computer Law & Security Review* 27 (2011) 21-35, p. 34.

22 The concept of ‘responsibilization’ refers to a process “whereby subjects are rendered individually responsible for a task which previously would have been the duty of another – usually a state agency – or would not have

intermediaries nevertheless creates a situation where legislation provides an incentive and gives way to potential interference with the freedom of expression of the Internet users by private entities. The legislature therefore is indirectly contributing to the interference by private individuals – a type of ‘State interference by proxy’.

- 8 According to human rights instruments, such as the European Convention of Human Rights (ECHR)²³ and the Charter of Fundamental Rights of the EU (CFEU),²⁴ States should not interfere with the exercise of protected rights (unless specific requirements are met). The States, however, have an additional obligation to effectively protect fundamental human rights from interferences by other private individuals, perhaps even more so if such interference is accepted, or even encouraged by the States.

C. Positive obligations under the ECHR

I. Do the States have positive obligations to actively protect the right to freedom of expression?

- 9 The right to freedom of expression constrains governments’ ability to interfere in the circulation of information and ideas. In this sense, it is first and foremost a ‘negative’ right. However, the right to freedom of expression also contains a ‘positive’ dimension. According to the European Court of Human Rights, “in addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, ‘there may be positive obligations inherent’ in such guarantees”.²⁵
- 10 The concept of positive obligations is based on Article 1 of the Convention, which requires that the States “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.²⁶ The concept appeared in the Court’s

reasoning in the late 1960’s, following the *Belgian Linguistic case*.²⁷ It is considered to be a result of “the dynamic interpretation of the Convention in the light of changing social and moral assumptions”²⁸ and “the general evolution and ‘socialising’ of the Convention rights and freedoms”.²⁹ Since the appearance of the concept, the Court has constantly broadened this category of obligations by adding new elements. Now almost all the standard-setting provisions of the Convention have a dual aspect in terms of their requirements.³⁰ The Court has not provided an authoritative definition of positive obligations.³¹ The concept is described as a ‘requirement to take action’³², an ‘obligation to protect’, or an ‘obligation to implement’.³³ In practice, positive obligations require national authorities to take the necessary measures to safeguard the right in question. The protection of rights provided by States should be practical and effective and not merely theoretical.³⁴ Moreover, positive obligations continue to exist even if the state ‘outsources’ regulation, for example to alternative regulatory bodies.³⁵ As the Court held in *Costello-Roberts v. the UK*, “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals”.³⁶

- 11 The obligation to take necessary measures to protect freedom of expression is drawn from Article 10 in conjunction with Article 1. The duty to protect

been recognized as a responsibility at all”. A. Wakefield, J. Fleming, SAGE Dictionary of Policing, SAGE Publications Ltd, 14.01.2009.

23 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), CETS No. 005, 04.11.1950, Rome, <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>.

24 Charter of Fundamental Rights of the European Union (CFEU), 2000/C 364/1, 18.12.2000, <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>.

25 ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, 28 June 2001, para. 45.

26 Article 1 ECHR.

27 ECtHR, *Belgian Linguistic case*, 23 July 1968. See also ECtHR, *Marckx v. Belgium*, 13 June 1979.

28 D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn., Oxford, OUP, 2002, p. 55.

29 D. Voorhoof, *Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights* (Mass media files No. 10), Strasbourg, Council of Europe Press, 1995, p. 54.

30 J.-F. Akandji-Kombe, *Human rights handbooks*, No. 7. *Positive Obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention of Human Rights*, Council of Europe, 2007, p.6.

31 A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford – Portland Oregon, 2004, p. 2.

32 Dissenting Opinion of Judge Martens in ECtHR, *Gul v. Switzerland* 1996-I 165.

33 J.-F. Akandji-Kombe, *Human rights handbooks*, No. 7. (n 30) p.5.

34 See ECtHR, *Airey v. Ireland*, 11 September 1979, para. 24.

35 D. Voorhoof, *Co-regulation and European basic rights*, Presentation at the Expert Conference on Media Policy “More trust in content – The potential of self- and co-regulation in digital media”, Leipzig, 9-11.05.2007, as referred to by E. Lievens, *Protecting Children in the Digital Era – the Use of Alternative Regulatory Instruments*, Leiden, Martinus Nijhoff Publishers, *International Studies in Human Rights*, 2010, 584 p. 388, footnote 38.

36 ECtHR, *Costello-Roberts v. the United Kingdom*, 25 March 1993, para. 27; see also, ECtHR, *Van der Musselle v. Belgium*, 23 November 1983, paras. 29-30.

the right to freedom of expression involves an obligation for governments to promote this right and to provide for an environment where it can be effectively exercised without being unduly curtailed. Such protection and promotion can take different forms. For example, it may require introducing certain measures protecting journalists against unlawful violent attacks³⁷, or observing the obligation of States to enact domestic legislation.³⁸ Perhaps the most far-reaching positive obligation in relation to freedom of expression was pronounced in *Dink v. Turkey*.³⁹ Here the Court considered that States are required to create a favourable environment for participation in public debate for everyone and to enable the expression of ideas and opinions without fear.⁴⁰

- 12 The European Court of Human Rights accepts that Article 10 ECHR can be invoked not only in vertical relations but also in horizontal relations between individuals.⁴¹ In such cases the horizontal effect is indirect, meaning that individuals can only enforce human rights provisions against other individuals by relying on the positive obligations of the State to protect their rights.⁴² Interference by private individuals is linked, therefore, to a failure of the State to prevent the interference. This could happen, for example, in situations “where a State had taken or failed to take certain measures”.⁴³ In *Fuentes Bobo v. Spain* the Court held that “a positive obligation can rest with the authorities to protect the freedom of expression against infringements, even by private persons”.⁴⁴ Similarly, in *Özgür Gündem v. Turkey* the Court stated that “[g]enuine, effective exercise of [the right to freedom of expression] does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...]”.⁴⁵

37 ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000, para. 43.

38 ECtHR, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland*, 28 June 2001, para. 45 and 48.

39 ECtHR, *Dink v. Turkey*, 14 September 2010. See C. Angelopoulos et al., Study of fundamental rights limitations for online enforcement through self-regulation, Institute for Information Law (IViR), 2016, p. 38.

40 C. Angelopoulos et al., Study of fundamental rights limitations for online enforcement through self-regulation (n 39) p. 38, referring to ECtHR, *Dink v. Turkey*, para. 137.

41 For example ECtHR, *Fuentes Bobo v. Spain*, 29 February 2000.

42 P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak (eds), *Theory and practice of the European Convention on Human Rights*, Antwerpen, Intersentia, 2006, p. 29.

43 *Ibid.*, p. 784.

44 ECtHR, *Fuentes Bobo v. Spain*, 29 February 2000. See also: P. Van Dijk, F. Van Hoof, A. Van Rijn, L. Zwaak (eds), *Theory and practice of the European Convention on Human Rights* (n 42) pp. 784-785.

45 ECtHR, *Özgür Gündem v. Turkey*, 16 March 2000, para. 43.

II. The positive obligation to protect the right to freedom of expression vs. other Convention rights

- 13 The positive obligation to ensure effective enjoyment of the right to freedom of expression requires States to protect freedom of expression against infringements by private individuals. In their attempts to comply with their positive obligations, States could possibly interfere with the rights of private entities, such as the right to property or the right to conduct business. In the context of content removals by the hosting service providers, the following question can be asked: does the theory of positive obligations mean that States could force private entities to allow every type of speech on their platforms, as long as it is not prohibited by law? What would such obligation mean for thematic platforms or for content that is not illegal but inappropriate for a certain audience? Fortunately the ECtHR jurisprudence provides several pointers on this matter.

- 14 In *Appleby and others v. the United Kingdom*, the applicants had lodged a complaint against the UK after they were prevented from setting up a stand and distributing leaflets in a privately owned shopping centre. The Court did not find that the authorities bore any direct responsibility for the restriction on the applicants’ freedom of expression.⁴⁶ The question at stake, however, was whether the UK had failed in any positive obligation to protect the exercise of the applicants’ right to freedom of expression from interference by others – in this case, the owners of the shopping centre.⁴⁷ The Court acknowledged a conflict between the right to freedom of expression of the applicants and the property rights of the owner of the shopping centre under Article 1 of Protocol No. 1.⁴⁸ Despite its relevance, Article 10 does not bestow any ‘freedom of forum’ for the exercise of the right to freedom of expression. The applicants were able to exercise their right through several alternative means; therefore, the Court did not find that the UK failed in its positive obligation to protect the applicants’ freedom of expression.⁴⁹ Nevertheless, the Court pointed out that it “would not exclude that a positive obligation could arise for the State to protect the enjoyment of the Convention rights by regulating property rights”.⁵⁰

- 15 The question of regulating private property to protect the right to freedom of expression was

46 ECtHR, *Appleby and others v. the United Kingdom*, 6 May 2003, para. 41.

47 *Ibid.*, para. 41.

48 *Ibid.*, para. 43.

49 *Ibid.*, para. 49.

50 *Ibid.*, para. 47.

addressed again in *Khurshid Mustafa & Tarzibachi*.⁵¹ The case concerned the termination of a tenancy agreement by a landlord because of the tenants' refusal to dismantle a satellite dish. The dish was installed to receive television programmes from the tenants' native country. The Court acknowledged that it is not its role to settle disputes of a purely private nature. Nevertheless, it cannot remain passive where a national court's interpretation of a legal act, including a private contract, "appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention".⁵² The Court found, in result, that the State failed in their positive obligation to protect that right to freedom of expression.⁵³ This means that in order to comply with the obligation to protect the right to freedom of expression, the State might be required to set certain limits for rules that private owners establish on their property.

- 16 Finally, in *Melnychuk v. Ukraine* the Court clearly stated that privately-owned media, including newspapers, must be free to exercise editorial discretion to decide what articles, comments and letters submitted by private individuals they publish.⁵⁴ Nevertheless, 'exceptional circumstances' may arise "in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case".⁵⁵ This particular case concerned the right to reply, which the Court considered an important element of freedom of expression. It follows from the need to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate.⁵⁶ Such situations, according to the Court, may create a positive obligation for the State to ensure an individual's freedom of expression in such media.
- 17 The Court's recognition of positive obligations in relation to Article 10 is "nascent and piecemeal, but steady".⁵⁷ Especially in *Dink*, the essential obligation

for States to ensure a favourable environment for public debate "gives a new sense of coherence to a disparate set of positive obligations" identified by the Court.⁵⁸ This optimistic note is offset by the fact that the ECHR applies only to the signatories to the Convention and the E-Commerce Directive is an instrument of the European Union. Since the EU is not (yet) a signatory to the ECHR, the ultimate framework for assessing the fundamental rights obligations of EU institutions is not the ECHR but the Charter of Fundamental Rights.

D. Effective protection of the rights in the CFEU

I. Scope of the Charter

- 18 The rights guaranteed by the Charter, similarly as the rights guaranteed by the Convention, can be interfered with by both States (vertical interference) and by private individuals (horizontal interference). The question is whether the Charter creates a positive obligation, in the same way as the Convention, for the States, but also for the EU acting as a legislator, to protect the Charter rights and to create an environment where these rights can be effectively enjoyed.
- 19 First, it should be highlighted that the meaning and the scope of the rights protected by both the ECHR and CFEU, for example the right to freedom of expression, should be the same.⁵⁹ This includes the meaning given through the jurisprudence of the Court of Human Rights which explicitly recognizes the existence of positive obligations.⁶⁰ Moreover, the EU can provide greater protection to the same right, but certainly not less.⁶¹ According to Article 51.1, rights in the Charter must be respected, principles merely observed, but both have to be 'promoted'. Article 53 of the Charter lays down a minimum common denominator for the level of

51 ECtHR, *Khurshid Mustafa & Tarzibachi v. Sweden*, 16 December 2008, para. 45.

52 Ibid., para. 33.

53 Ibid., para. 50.

54 ECtHR, *Melnychuk v. Ukraine*, Decision of inadmissibility of the European Court of Human Rights (Second Section) of 5 July 2005.

55 Ibid.

56 Ibid.

57 C. Angelopoulos et al., Study of fundamental rights limitations for online enforcement through self-regulation (n 39) p. 38. The authors consider that this statement applies not only to Article 10 but also to other 'communication rights'. 'Communication rights' are "a term of convenience that covers a cluster of rights that are indispensable for the effective exercise of communicative freedoms. These rights typically include the right to freedom of expression,

freedom of assembly and association, privacy, etc. They also include the right to an effective remedy whenever the aforementioned rights have been violated, as well as various process rights that serve to guarantee procedural fairness and justice".

58 T. McGonagle, Positive obligations concerning freedom of expression: mere potential or real power? In: O. Andreotti (ed.), *Journalism at risk: Threats, challenges and perspective*, Council of Europe, 2015, pp. 9-37, p. 30.

59 See Article 52.3 CFEU. See also Opinion of Advocate General Kokott in case C-73/16 *Peter Puškár*, delivered on 30 March 2017, para. 122, and CJEU, *Toma und Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci*, C-205/15, 30 June 2016, para. 41.

60 J. Blackstock, *The EU Charter of Fundamental Rights: scope and competence*, Justice Journal, 2012, pp. 19- 31, p. 28.

61 Ibid., p. 28.

protection of the rights. This provision, according to the Explanations of the Charter, is intended “to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law”⁶², with a clear emphasis on the level of protection granted in the ECHR.

- 20 Under the CFEU, the negative obligation (to respect) is clearly articulated. The existence of the positive obligation (to protect), however, is less obvious. Wording such as ‘promotion of application of the rights’ and ‘protection of the rights’, suggests that the scope of application encompasses both the negative and positive obligations. According to Blackstock, “even the most conservative interpretation could not deter an individual bringing an action against the State for failing to prevent the violating act of a private individual (in the exercise of a positive obligation)”⁶³.

II. Positive obligations under the Charter?

- 21 The role of positive obligations under the Charter is less developed than under the ECHR. The CJEU has, however, provided some useful guidance when interpreting EU secondary law (or implementation thereof) in light of the fundamental rights. In a number of cases the CJEU specifically addressed the issue of effective protection of the Charter rights.⁶⁴
- 22 The argument of effective protection was used, for example in *Promusicae*.⁶⁵ The case was one of the first where the CJEU “relied on fundamental rights as a device of moderation”.⁶⁶ The CJEU found that the disclosure of personal data at issue may be justified as it may fall within the derogation for “the protection of the rights and freedoms of others”.⁶⁷

62 Praesidium of the Convention, Explanations relating to the Charter of Fundamental Rights, (2007/C 303/02) 14 December 2007. Explanation on Article 53.

63 J. Blackstock, *The EU Charter of Fundamental Rights: scope and competence* (n 60) p. 22.

64 For example, the CJEU pointed out the need for effective protection of intellectual property also in *L’Oreal v. E-Bay* case. Case C-324/09 [2011] *L’Oreal and Others* I-06011, para 131 (‘effective protection of intellectual property’). See also Case C-479/04 [2006] *Laserdisken* ECR I-0808, para 62, 64.

65 The ruling was issued before the Charter became binding. Today, it would be resolved under Article 51.1 of the Charter.

66 M. Husovec, *Intellectual Property Rights and Integration by Conflict: The Past, Present and Future*, *Cambridge Yearbook of European Legal Studies*, 00 (2016), pp. 1–31, p. 10.

67 As a result of a joint reading of Article 15(1) of the Directive 2002/58/EC and Article 13(1)(g) of the Directive 95/46/EC. See M. Husovec, *Intellectual Property Rights and Integration by Conflict: The Past, Present and Future* (n 66) p. 10, footnote 52.

The CJEU clarified, however, that if Member States were to introduce such a measure to promote the effective protection of copyright (so the right to property), they must ensure that the measure allows for a fair balance to be struck between the various fundamental rights.⁶⁸ As a result it could be said that, “Union law does not mandate such a disclosure mechanism, but conditionally permits it, if the proportionality between fundamental rights is respected”.⁶⁹

- 23 A similar issue was at stake in *Coty Germany*⁷⁰, which concerned a demand for identifying information from a bank following an instance of trademark infringement. The CJEU referred to its *Promusicae* reasoning but highlighted a major difference. In *Coty Germany*, the provision of the German law at issue allowed for an unlimited and unconditional refusal to disclose the information.⁷¹ The provision therefore prevented the effective exercise of the right to property. As a result, the ruling went further than in *Promusicae*. Instituting a remedy of disclosing personal data is no longer an optional choice for the Member States, as its absence can infringe the fundamental right to an effective remedy and the fundamental right to (intellectual) property.⁷² The CJEU stated that the right to obtain information aims to “ensure the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter”.⁷³ The CJEU went from recognizing the need for effective protection in *Promusicae*, to requiring that effective exercise of a fundamental right is ensured in *Coty Germany*. According to Husovec, the ruling effectively recognized a positive obligation to introduce a protective remedy.⁷⁴
- 24 The need to ensure that protected rights can be exercised without undue limitation is often expressed in terms of striking the fair balance between different rights in conflict. In *Coty Germany*, the CJEU noted that “a measure which results in serious infringement of a right protected by the Charter is to be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights which must be

68 CJEU, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, C-275/06, 29 January 2008, para. 68.

69 M. Husovec, *Intellectual Property Rights and Integration by Conflict: The Past, Present and Future* (n 66) p. 11.

70 CJEU, *Coty Germany GmbH v. Stadtsparkasse Magdeburg*, C-580/13, 16 July 2015.

71 *Ibid.*, para. 37.

72 M. Husovec, *Intellectual Property Rights and Integration by Conflict: The Past, Present and Future* (n 66) p. 19.

73 CJEU, *Coty Germany GmbH v. Stadtsparkasse Magdeburg*, C-580/13, 16 July 2015, para. 29.

74 M. Husovec, *Intellectual Property Rights and Integration by Conflict: The Past, Present and Future* (n 66) p. 19.

reconciled”.⁷⁵

- 25 In *Telekabel Wien*, the CJEU added an interesting twist to the doctrine of effective protection. According to the Court, the measures which are taken by the addressee of an injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is, the right to intellectual property.⁷⁶ At the same time, however, the CJEU reiterated that the right to intellectual property is not inviolable and that nothing in the wording of Article 17.2 CFEU suggests that it must be absolutely protected.⁷⁷ For this reason, when the addressee of an injunction chooses the measures to be adopted, he must ensure compliance with the fundamental right of Internet users to freedom of information.⁷⁸ Effectively, the CJEU imposed the duty to balance the fundamental rights at stake directly on intermediaries, instead of the States.⁷⁹ The CJEU continued to specify that the adopted measures must serve to bring an end to a third party’s infringement of copyright or of a related right but without affecting Internet users who are using the provider’s services to lawfully access information.⁸⁰ If such a result was not achieved, “the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued”.⁸¹

III. Compatibility with the Charter

- 26 Both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter.⁸² Moreover, any possible conflicts with fundamental rights can be tested against the Charter, which provides grounds for judicial review.⁸³ The CJEU can declare a national provision implementing EU law incompatible under Art. 51.1 CFEU.⁸⁴ Upon

a request based on Art. 267 TFEU the CJEU can also directly invalidate a provision or a whole act of secondary Union law, such as a directive.⁸⁵

- 27 In *Digital Rights Ireland*, the CJEU was called upon to assess the compatibility of the Data Retention Directive (2006/24/EC) with the Charter (specifically with Articles 7, 8, and 11 of the Charter).⁸⁶ First, the CJEU established that the Directive constituted an interference with the right to privacy and data protection.⁸⁷ In the following analysis the CJEU declared that that the interference was prescribed by law and that it did not adversely affect the essence of the rights to privacy and data protection.⁸⁸ The crucial point of the analysis, therefore, was the question of proportionality of the administered measures. The CJEU found that the Directive defined no limits of the scope, and failed to lay down any objective criterion to determine the limits of the access to the retained data.⁸⁹ Furthermore, the Directive did not contain sufficient substantive and procedural conditions relating to the access and reuse of the retained data. Instead, the Directive merely provided that the procedures and the conditions were to be defined by each Member State in accordance with necessity and proportionality requirements.⁹⁰ For these reasons, the CJEU decided that Directive 2006/24 did not provide for sufficient safeguards to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data.⁹¹ The CJEU ruled that “the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 7, 8 and 52(1) of the Charter”⁹² and declared the Directive invalid.⁹³ Arguably, the CJEU did not refer explicitly to positive obligations but pointed out the lack of effective protection, which should have been ensured by providing sufficient safeguards. It is therefore clearly an example of a legislature’s failure to act. The result of the failure was a disproportionate interference which led the CJEU to declare the Directive non-compliant with the Charter and invalidating it entirely.

- 28 Similar arguments were used by the CJEU in 2015 to invalidate the EC Decision 2000/520/EC on the adequacy of the protection provided by the safe

75 CJEU, *Coty Germany GmbH v. Stadtsparkasse Magdeburg*, C-580/13, 16 July 2015, para. 35.

76 CJEU, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, C-314/12, 27 March 2014, para. 62.

77 *Ibid.*, para. 61.

78 *Ibid.*, para. 55.

79 C. Angelopoulos, S. Smet, Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability, *Journal of Media Law*, 2016, 8:2, pp. 266-301, p. 281.

80 CJEU, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, C-314/12, 27 March 2014, para. 56.

81 *Ibid.*, para. 56.

82 K. Lenaerts, Exploring the Limits of the EU Charter of Fundamental Rights, *European Constitutional Law Review*, 2012, Vol.8(3), pp.375-403, p. 376.

83 *Ibid.*, p. 376.

84 See CJEU, *Hernández and Others*, Case C-198/13, 10 July 2014, para. 33-36.

85 Article 267 TFEU, Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-390.

86 CJEU, *Digital Rights Ireland Ltd and Seitlinger and others*, Joined Cases C-293/12 and C 594/12, 8 April 2014, para. 17 – 21.

87 *Ibid.*, para. 34 – 37.

88 *Ibid.*, paras. 39 and 40.

89 *Ibid.*, para. 60.

90 *Ibid.*, para. 61.

91 *Ibid.*, para. 66.

92 *Ibid.*, para. 69.

93 *Ibid.*, para. 71.

harbour privacy principles.⁹⁴ In *Schrems* the CJEU observed that Decision 2000/520/EC enabled interference, founded on national security and public interest requirements or on domestic legislation of the US, with the fundamental rights of the individuals whose personal data is transferred from the EU to the US.⁹⁵ Moreover, Decision 2000/520 did not contain any finding regarding the existence of rules adopted by the US intended to limit such interference⁹⁶ nor did it refer to the existence of effective legal protection against interference of that kind.⁹⁷ Referring to *Digital Rights Ireland*, the CJEU repeated that EU legislation involving interference with the fundamental rights (guaranteed in Articles 7 and 8 CFEU) must lay down clear and precise rules governing the scope and application of a measure and impose minimum safeguards, so that the persons concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use.⁹⁸ Likewise, the CJEU observed that legislation not providing for any possibility for an individual to pursue legal remedies to have access to his personal data, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as provided in Article 47 CFEU.⁹⁹ In light of these findings, the CJEU declared the decision invalid.¹⁰⁰

- 29 Based on the analysis above, I would argue that there exists a positive obligation to ensure that fundamental rights under the Charter can be exercised effectively. Even without an explicit reference to the doctrine of positive obligations, the CJEU is clearly able to achieve a similar result using the principle of proportionality and the requirements of fair balancing and effective protection. Moreover, the CJEU should take into account the meaning and scope of the protection given through the jurisprudence of the European Court of Human Rights. The obligation applies not only to the Member States when they implement EU law, but also the EU acting as a legislator. It would be unreasonable to think that the EU can demand compliance with the Charter rights from the Member States when they implement EU law, but would not itself be obliged to comply. This conclusion finds support also in the CJEU's observations in *Kadi I*, stating that "all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court

to review".¹⁰¹

E. Private enforcement of public policy objectives

- 30 It is evident that EU secondary law can be invalidated for not respecting the Charter rights. In case of *Digital Rights Ireland*, the interference with the fundamental right at issue was rather direct, as the Directive required the retention of data by telecom operators. It was therefore a clear example of State interference. In case of the E-Commerce Directive, the interference with the right to freedom of expression is not direct. The liability exemptions do not require the hosting service providers to remove content. Content removal is, however, often a result of the provision in Article 14 of the E-Commerce Directive. It is a situation of a horizontal interference resulting from a failure of the legislature (EU) to effectively protect the right to freedom of expression – a form of 'State interference by proxy'.
- 31 This type of approach, unfortunately, is becoming a new trend at the EU level. It can be traced in numerous attempts to responsabilize online platforms for regulating content. For example, it is apparent in the Code of Conduct on Countering Illegal Hate Speech Online announced by the Commission in May 2016.¹⁰² The initiative which was launched in cooperation with a select number of IT companies, urges these companies to 'take the lead' on countering the spread of illegal hate speech online.¹⁰³ Delegation of enforcement activities from State to private companies seems even bolder than the limited liability regime in the E-Commerce Directive. Strictly speaking, any interference with freedom

94 CJEU, *Maximillian Schrems v. Data Protection Commissioner*, C-362/14, 6 October 2015.

95 *Ibid.*, para. 87.

96 *Ibid.*, para. 88.

97 *Ibid.*, para. 89.

98 *Ibid.*, para. 91.

99 *Ibid.*, para. 95.

100 *Ibid.*, paras. 97, 98, 104, 105.

101 CJEU, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Kadi I)*, Joined cases C-402/05 P and C-415/05 P, 3 September 2008, para. 285. See also *Schmidberger*, where the CJEU stated that "measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community", CJEU, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, C-112/00, 12 June 2003, para. 73.

102 The Code of Conduct on Countering Illegal Hate Speech Online, <http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf>.

103 For more criticism of the Code by civil society organisations see: EDRI, *Guide to the Code of Conduct on Hate Speech*, 3 June 2016, <<https://edri.org/guide-code-conduct-hate-speech/>>; Article 19, *EU: European Commission's Code of conduct for Countering illegal Hate Speech Online and the Framework Decision – legal analysis*, June 2016, <<https://www.article19.org/data/files/medialibrary/38430/EU-Code-of-conduct-analysis-FINAL.pdf>>; A. Kuczerawy, *The Code of Conduct on Online Hate Speech: an example of state interference by proxy?* 20 July 2016, <<https://www.law.kuleuven.be/citip/blog/the-code-of-conduct-on-online-hate-speech-an-example-of-state-interference-by-proxy/>>.

of expression resulting from the implementation of the Code cannot be attributed directly to the Commission (as the restrictions will be administered by the IT companies ‘voluntarily’¹⁰⁴). Nevertheless, it is clear that the Commission’s role is more than that of a facilitator. The Commission is no longer merely incentivizing content control by intermediaries but actively requesting them to remove certain types of content. By inviting private companies to restrict speech of individuals, the Commission becomes an initiator of the interference with a fundamental right by private individuals. The role of the Commission is confirmed by the statements urging the IT companies to act faster to tackle online hate speech or face laws forcing them to do so.¹⁰⁵ Similar concerns can be formulated in relation to the Commission’s proposals on a new directive on copyright in the Digital Single Market¹⁰⁶ and an amendment to the AVMS Directive.¹⁰⁷ The former requires the service providers to monitor their platforms for copyright-infringing content¹⁰⁸ while the latter requires video-sharing and possibly social media platforms to restrict access to harmful – but not necessarily illegal – content (to protect minors) and to incitement to violence or hatred (to protect all citizens)¹⁰⁹. It seems that the Commission’s solution to the problem of illegal and harmful online content

without re-opening the E-Commerce Directive is to require private entities to take action.¹¹⁰ Yet, private parties, such as intermediaries, “should be made to follow the legal rules provided by national (and supra-national) authorities, not forced to invent them”.¹¹¹ None of these initiatives, however, contain clear safeguards to ensure effective protection to the right to freedom of expression.¹¹² Their compliance with the Charter is therefore highly questionable.

F. Safeguards for freedom of expression

32 To be justified, any interference with the right to freedom of expression must be prescribed by law, administered for a legitimate aim, and proportionate. Notice-and-take-down procedures should contain appropriate safeguards to ensure that these conditions are met. Inspiration for such safeguards could be drawn from the procedures that already exist in countries that implemented more detailed regulations.¹¹³ Moreover, input could be found in the numerous responses provided to the public consultations organized so far by the Commission.¹¹⁴ Below I present examples of safeguards that the Commission could consider. The following selection does not aim to be exhaustive but merely constitutes a preface to a more detailed discussion.

104 Such agreements cannot really be considered as truly voluntary as they often arise under governmental pressure and threats of legal action to compel private companies to adopt non-legally binding enforcement measures. See more in N. Tusikov, *Choquepoints - Global Private Regulation on the Internet* (n 8) p. 4.

105 See European Commission, *Fighting illegal online hate speech: first assessment of the new code of conduct*, 6.12.2016, <http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50840>.

106 Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, Brussels, 14.9.2016, COM(2016) 593 final - 2016/0280 (COD), <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>>.

107 Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, Brussels, 25.5.2016, COM(2016)/0287 final - 2016/0151 (COD), <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1464618463840&uri=COM:2016:287:FIN>>.

108 See more in S. Stalla-Bourdillon et al., *Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society*, 19 October 2016, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483>; and S. Stalla-Bourdillon et al., *A Brief Exegesis of the Proposed Copyright Directive*, 30 November 2016, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296>.

109 See more in M. Fernández Pérez, *VMDS: European Parliament set to vote whether it’s allowed to vote*, 17 May 2017, <<https://edri.org/avmsd-european-parliament-set-to-vote-whether-its-allowed-to-vote/>>.

110 See European Commission, *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe* (n 12).

111 C. Angelopoulos, S. Smet, *Notice-and-fair-balance: how to reach a compromise between fundamental rights in European intermediary liability* (n 79) p. 283.

112 See also M. Schaake et al., *Open letter sent to Commissioner Ansip - MEPs want notice and action directive*, 10 May 2107, <<https://marietjeschaake.eu/en/meps-want-notice-and-action-directive>>.

113 In the EU, several countries chose to use the opportunity provided by Art. 14.3 of the E-Commerce Directive to introduce more detailed measures for removal of online content. For example, such specific laws exist for example in Finland in the *Finish Information Society Code*, in France in the *LCEN Law No. 2004-575 of 21 June 2004 on ensuring confidence in the digital economy*, and in Hungary in *Act CVIII of 2001 on certain issues of electronic commerce services and information society services*.

114 For example, European Commission, *Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce* (n 10); European Commission, *Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries*, *Summary of responses*, <http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet/summary-of-responses_en.pdf>; European Commission, *Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy* (n 13).

- 33 From a human rights perspective, content removal mechanisms should have a sufficient basis in law. To meet this requirement, the EU legislature should introduce specific legal provisions to clarify removal procedures. Notice-and-take-down procedures should clearly state whether they apply to specific types of content or activities, or whether they take a horizontal approach (as in the E-Commerce Directive).¹¹⁵ Moreover, the procedure should state specifically if it distinguishes any type of ‘manifestly illegal’ content which the service providers should remove after obtaining knowledge of its existence, regardless of how they obtained such knowledge.¹¹⁶
- 34 Legislation providing for a notice-and-take-down procedure should meet the requirement of ‘quality’.¹¹⁷ This means it should be compatible with the rule of law, accessible and foreseeable. The latter requirement means that rules should be clear and sufficiently precise for those subject to them to foresee the consequences and adjust their behaviour accordingly.¹¹⁸ For example, laws providing specific notice-and-take down procedures could clarify the measures which a host may take out on its own initiative and the measures which it may only take after a court order or order by an administrative authority.¹¹⁹ The procedures might further describe whether the request must be first submitted to the content provider¹²⁰ and the following order of events, starting with the notification to the service provider.¹²¹ Moreover, the procedures could specify the timeframes for different actions and the formal requirements for a valid notice.¹²² Especially rules regulating the latter are relevant because the validity of notice often determines the existence of actual knowledge. This approach is consistent with the CJEU ruling in *L’Oreal SA v. eBay*, which stated that notification should be sufficiently precise and adequately substantiated.¹²³
- 35 Safeguards should also introduce elements of proportionality, due process and procedural fairness into the notice-and-take-down procedures. One possible safeguard consists of requiring a notification to content providers informing them that a complaint has been filed. The role of the notification should not be limited to informing the content providers that their content is about to be removed or already has been removed (or made inaccessible), but it should allow them to respond with a defence of the use of the content (a counter-notification).¹²⁴ The notification introduces elements of a fair hearing, but also elements of equality of arms and of adversarial proceedings as it enables both parties involved to have knowledge of and comment on the evidence and the observations made by the other party. The right to due process also requires that decisions about rights and obligations should adequately state the reasons on which they are based. Even if the removal decisions are taken by private entities, it is not unreasonable to expect them to state the reasons for the interference in the notification.¹²⁵
- 36 Safeguards should also ensure that everyone whose rights have been interfered with have a right to effective remedy. This means that they should have at their disposal a measure that would allow for an appropriate relief by stopping the violation, or allowing the victim to obtain adequate redress. In case of content removals from the Internet, the right to effective remedy is equally relevant for both
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- 115 For example the procedure described in the Finnish Information Society Code applies specifically to the content infringing copyright or neighbouring rights while the procedure implemented in France does not contain such delineation and applies to any content in violation with the national law. See Chapter 22 of the Finnish Information Society Code (2014/917), which entered into force on 1 January 2015, Tietoyhteiskuntakaari, 7.11.2014/917, <<http://www.finlex.fi/en/laki/kaannokset/2014/en20140917.pdf>> and Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l’économie numérique, Version consolidée au 15 mai 2017, <<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164>>.
- 116 For example in Finland hosting providers are obliged to act based upon their knowledge when the content in question consists of hate speech, or pictures with child pornography, sexual violence or intercourse with an animal. The content must be “clearly contrary” to the Criminal Code’s provisions on this type of content. See also European Commission, Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy (n 13) p. 17.
- 117 See ECtHR, *Ahmet Yıldırım v. Turkey*, 18 March 2013, para. 57.
- 118 See ECtHR, *Sunday Times v. the United Kingdom*, 26 April 1979, para. 49.
- 119 Swiss Institute of Comparative Law, *Comparative Study on Filtering, blocking and take-down of illegal content on the Internet – comparative considerations* (n 4) p. 798.
- 120 See also European Commission, *Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries*, Summary of responses (n 114) p. 5.
- 121 See for example European Commission, *Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce* (n 10) p. 12.
- 122 See for example European Commission, *Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries*, Summary of responses (n 114) p. 3-7.
- 123 CJEU, *L’Oreal SA v. eBay*, Case C324/09, 12 July 2011, para. 122.
- 124 See more on the counter-notice procedure in European Commission, *Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy* (n 13) p. 17.
- 125 Such a requirement exists, for example, in Finland where the Information Society Code provides that the notification to the content provider must state the reason for removal (or blocking), Section 187 of the Finnish Information Society Code.

sides of the conflict. Victims of infringing expression should have access to an effective remedy to stop the infringement, for example by requesting removal or blocking. Content providers whose content was wrongfully removed should in turn have the possibility to contest the removal and to request that the content be reinstated, for example through the counter-notification and ‘put-back’ procedure.¹²⁶ Moreover, there should always exist a possibility of judicial redress to ensure effective legal protection of the right to freedom of expression.¹²⁷ A possibility of reviewing the removal decisions by independent courts also provide an additional safeguard that the fundamental rights at stake are balanced fairly.

G. Conclusion

- 37 Under the Convention and the Charter, interference with freedom of expression may be permitted if it is prescribed by law, for a legitimate aim, and proportionate. Delegating powers to make decisions regarding fundamental human rights – such as freedom of expression – to private entities should come equipped with certain protective measures in place. The doctrine of positive obligations requires States to take action necessary to ensure effective enjoyment of fundamental rights. The idea of positive obligations in the context of Article 10 ECHR has been developing slowly but, as is evident from the Strasbourg case law, such obligations nevertheless exist. The same could be argued in the context of the Charter, even if the phenomenon is branded differently, as ‘effective protection’.
- 38 At present the E-Commerce Directive is lacking any safeguards that could ensure such protection and fair balance regarding the right to freedom of expression. Moreover, only a handful of countries have introduced any additional safeguards in this matter. The situation resembles the problem of the Data Retention Directive, where the EU legislature failed to provide for adequate safeguards to protect the fundamental rights at stake. Therefore, I would argue that the EU is currently not complying with the positive obligation to protect the right to freedom of expression from disproportionate interference by private entities in the context of the notice-and-take

down mechanisms. Of course the EU is not subject to the jurisdiction of the ECtHR so it cannot be held responsible in Strasbourg for violations by private entities. However, if an instrument of EU secondary law fails to comply with the CFEU, it can be invalidated by the CJEU, as demonstrated in *Digital Rights Ireland*. The requirement to ensure effective protection could be satisfied by implementing procedural safeguards into the legislation which provides a basis for the notice-and-take-down mechanisms. The procedural safeguards could introduce the elements of quality of law, due process and proportionality into the delegated private enforcement system. Since the E-Commerce Directive is currently undergoing a review process, this seems to be the right moment to make a call reminding the EU legislature about the obligation to comply with its own fundamental rights framework.

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¹²⁶ For example, appeal mechanisms are foreseen in Finland (Section 193 of the Finish Information Society Code) and Hungary (Article 13.7 of the Hungarian Act CVIII of 2001 on certain issues of electronic commerce services and information society services). See also European Commission, Full report on the results of the public consultation on the Regulatory environment for Platforms, Online Intermediaries and the Collaborative Economy (n 13) p. 17-18.

¹²⁷ See for example Section 187 of the Finish Information Society Code.