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Freedom of expression and Artificial Intelligence:  
on personalisation, disinformation and (lack of)  
horizontal effect of the Charter

by Maja Brkan

# Freedom of expression and Artificial Intelligence: on personalisation, disinformation and (lack of) horizontal effect of the Charter

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## 1 Introduction

The question whether the use of Artificial Intelligence can interfere with the freedom of expression and information has attracted a considerable amount of attention on both sides of the Atlantic.<sup>1</sup> This paper contributes to this debate by questioning whether the Charter of Fundamental Rights of the EU can be considered as an appropriate instrument to solve this tension – a perspective which has hitherto been neglected in the doctrine. The paper argues that the freedom of expression in an online environment can be endangered through the use of machine learning for personalisation, demotion of fake news (disinformation), automated blocking of illegal content and automated enforcement of the right to be forgotten. However, the application of Article 11 of the Charter to these interferences faces insurmountable obstacles due to its personal scope of application. Given that the text of this provision prevents only interferences by public authorities and thus seems to expressly exclude those by private companies such as (social) media, it is questionable whether the Charter can prevent such interferences at all. Indeed, the Charter in principle protects the citizens only against actions of public authorities (vertical direct effect) and not against other private entities (horizontal direct effect). Despite the recent recognition of horizontal direct effect of non-discrimination, effective judicial protection and the right to paid annual leave in *Egenberger*<sup>2</sup> and *Bauer*,<sup>3</sup> this paper argues that a similar conclusion cannot be made for freedom of expression and information. In the absence of comprehensive EU secondary legislation on freedom of expression which could compensate for such a lack of horizontal effect, citizens seem to be left without adequate protection of their rights in cases of unjustified removal of content wrongfully labelled as disinformation or illegal. This calls for further legislative action on the level of the EU.

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<sup>1</sup> See for example Teresa Quintel, Carsten Ullrich, 'Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond', in Bilyana Petkova and Tuomas Ojanen (eds), *Fundamental Rights Protection Online: The Future Regulation Of Intermediaries* (Edward Elgar Publishing forthcoming 2019), paper currently available on SSRN <<https://ssrn.com/abstract=3298719>> accessed 20 February 2019; Privacy International and Article 19, 'Privacy and Freedom of Expression In the Age of Artificial Intelligence' (April 2018) <<https://www.article19.org/wp-content/uploads/2018/04/Privacy-and-Freedom-of-Expression-In-the-Age-of-Artificial-Intelligence-1.pdf>> accessed 20 February 2019; Jack M. Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation', 51 UC Davis Law Review 1149-1210.

<sup>2</sup> C-414/16 *Egenberger* ECLI:EU:C:2018:257, paras 76-78.

<sup>3</sup> C-569/16 *Bauer* ECLI:EU:C:2018:871, paras 79-91.

## 2 Types of interferences with freedom of expression and information

### 2.1 Personalisation

Potential AI-related interferences with the freedom of expression and information can be categorised into four groups: personalisation, automated blocking or removal of illegal content, demoting and diluting legal yet harmful content (disinformation) and automated implementation of the right to be forgotten.

The first potential interference with freedom of expression and information originates from personalisation of users online with algorithms deployed by search engines that rank search results displayed to the users. These algorithms, which rank not only commercial content, but also other items such as news, create a profile of users based on their past searches and other data gathered about the user.<sup>4</sup> Through such personalised ranking, search engines determine which type or which source of news will appear among top search results, and can therefore have a major impact on the information that the users receive. As a result, users could potentially be exposed to a less diverse information and media environment. This risk is reinforced by the circumstance that the internet users usually consult only the first few search results and rarely those displayed on the second or even third page of results. It has been argued that personalisation could even reinforce the negative impact of disinformation (fake news) as it could lead to non-exposure of competing truthful news.<sup>5</sup>

A similar personalisation problem arises with regard to social media where curation algorithms<sup>6</sup> determine the way social media feeds and more specifically newsfeeds are organised.<sup>7</sup> The information that is closer to the user's beliefs and interests according to the user's profile based on her social media activity will be displayed higher and more often in her social media feed. Moreover, social media users are not only limited by receiving information in a certain personalised order, but also by receiving only information posted by other users and not from the entire web as in the case of search engines.<sup>8</sup>

Allegedly, such ranking of internet searches or organisation of social media newsfeed could lead to creation of 'filter bubbles'. 'Filter bubble' is a term coined by Eli Pariser that describes

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<sup>4</sup> More precisely about the process of personalisation, see for example Engin Bozdog, 'Bias in algorithmic filtering and personalization' (2013) 15 Ethics Inf Technol, 209-227.

<sup>5</sup> Sarah Eskens, Natali Helberger and Judith Moeller, 'Challenged by news personalisation: five perspectives on the right to receive information' (2017) Journal of Media Law <<https://www.tandfonline.com/doi/full/10.1080/17577632.2017.1387353>>, accessed 26 November 2018, 23.

<sup>6</sup> Curation algorithms are algorithms that automatically select, rank and organise the information displayed to users; for the use of this term, see for example Ron Berman, Zsolt Katona, 'Curation Algorithms and Filter Bubbles in Social Networks' (2018) NET Institute Working Paper No. 16-08, <<https://ssrn.com/abstract=2848526>> accessed 26 November 2018.

<sup>7</sup> Council of Europe study 'Algorithms and Human Rights: Study on the human rights dimensions of automated data processing techniques and possible regulatory implications', DGI(2017)12, 17.

<sup>8</sup> Zuiderveen et al. distinguish between personalisation as a consequence of connections of social media users and personalisation due to a social media feed algorithm. See Frederik J. Zuiderveen Borgesius et al., 'Should we worry about filter bubbles?' (2015) 5 Internet Policy Review, <<https://policyreview.info/articles/analysis/should-we-worry-about-filter-bubbles>> accessed 26 November 2018, 7.

the effects of search and classifications algorithms on the type of information users receive.<sup>9</sup> These algorithms supposedly lead to exposure to less diverse sources of information online<sup>10</sup> and involuntary isolation from opposing views.<sup>11</sup> A similar concept are 'echo chambers' that entail 'the tendency of like-minded individuals engaged in discussion with one another to fortify their pre-existing views'.<sup>12</sup> For example, due to curation algorithms, the supporters of a particular political candidate might be exposed only or mostly to the information and arguments in favour of that candidate, being ignorant about the arguments in favour of the opponent.<sup>13</sup>

However, the actual existence of filter bubbles has been questioned by several empirical studies.<sup>14</sup> Flaxman et al. for example found that, in US, social media and search engines indeed lead to increasing the ideological gap between users, but these users also benefit from exposure to information from the other spectrum of (political) opinions.<sup>15</sup> Similarly, a study by Reuters Institute found that users of social media and search engines are generally exposed to more diverse sources than non-users.<sup>16</sup> It has also been claimed that, in Europe, the risk of creation of filter bubbles is less present due to a higher degree of diversity of media.<sup>17</sup> Numerous software tools have been developed to counter the potentially undesired effects of personalisation; these tools increase users' awareness of their (non-)exposure to differing views, show search results that would otherwise not be visible to the user or offer a platform for deliberation among users.<sup>18</sup>

## 2.2 Automated blocking and removal of illegal content

The second type of potential interference with freedom of expression relates to the automated blocking and removal of content online. Online platforms<sup>19</sup> could use automated means to

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<sup>9</sup> Eli Pariser, *The Filter Bubble: What The Internet Is Hiding From You* (Penguin 2011).

<sup>10</sup> William H. Dutton et al., 'Social Shaping of the Politics of Internet Search and Networking: Moving Beyond Filter Bubbles, Echo Chambers, and Fake News' (2017) Quello Center Working Paper No. 2944191, 3.

<sup>11</sup> See in this sense Council of Europe study 'Algorithms and Human Rights: Study on the human rights dimensions of automated data processing techniques and possible regulatory implications', DGI(2017)12, 18.

<sup>12</sup> Cass Sunstein, *Echo Chambers: Bush v. Gore, Impeachment, and Beyond* (Princeton University Press 2001).

<sup>13</sup> Cass R. Sunstein, *Republic.com 2.0* (Princeton University Press 2007), 116.

<sup>14</sup> For an overview of different studies see Frederik J. Zuiderveen Borgesius et al., 'Should we worry about filter bubbles?' (2015) 5(1) Internet Policy Review, <<https://policyreview.info/articles/analysis/should-we-worry-about-filter-bubbles>> accessed 26 November 2018, 1-16.

<sup>15</sup> Seth Flaxman, Sharad Goel, Justin M. Rao, 'Filter Bubbles, Echo Chambers, and Online News Consumption' (2016) (80) Public Opinion Quarterly, 298-320, at 318.

<sup>16</sup> Nic Newman with Richard Fletcher, Antonis Kalogeropoulos, David A. L. Levy and Rasmus Kleis Nielsen, Reuters Institute Digital News Report 2017 (2017) <[https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf)>, accessed 27 November 2018, 9, 15.

<sup>17</sup> Judith Moeller, Natali Helberger, 'Beyond the filter bubble: concepts, myths, evidence and issues for future debates', (2018) Report drafted for the Dutch Media Regulator (Commissariaat voor de Media), 25.

<sup>18</sup> For an overview, see for example Engin Bozdog, Jeroen van den Hoven, 'Breaking the filter bubble: democracy and design' (2015) 17 Ethics Inf Technol, 249-265.

<sup>19</sup> The European Commission defines that term broadly, encompassing 'online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy'; see 'Communication from the Commission to the European Parliament, the Council, the European Economic and

block or remove extremist content, content inciting violence or comprising hate speech.<sup>20</sup> Moreover, automated taking down of online material could infringe EU copyright rules. While removal of such content might be welcome to preserve democratic values of the European society or ensure compliance with EU copyright legislation, it can also impair freedom of expression if not exercised in a proportionate manner. The danger of automation of removal process is that algorithms might remove broader online information that does not fall into any of these categories. Admittedly, a human editor can equally wrongfully remove content that should have remained online, such as in the case of taking down the 'Napalm Girl' photograph by Facebook editors.<sup>21</sup> Nevertheless, potential lack of human supervision of algorithmic online content removal bears the risk of a larger scope of wrongful removals as well as a potentially greater degree of error. Notably, algorithms cannot discern emotions and tone behind content, including cynicism, criticism, humour or irony.<sup>22</sup> The potentially larger scale of removals due to automation could present an even greater risk for the freedom of expression.

While the EU adopted a set of hard law and soft law instruments to regulate the removal and blocking of illegal content, it is doubtful whether these instruments provide for sufficient or even any safeguards to protect freedom of expression in case of automated over-blocking or unjustified removal. Article 14 of the E-Commerce Directive<sup>23</sup> alleviates hosting service providers of responsibility for third party content, yet imposes on them the obligation to remove or block illegal content as soon as they obtain knowledge of such content. Even though the Directive expressly requires that the removal of content has to observe freedom of expression,<sup>24</sup> it does not provide for any procedure for restoring of content that later proves to be legal. The appropriate safeguards to protect this right seem to be currently lacking.<sup>25</sup>

More recent non-binding instruments, such as the Code of conduct on countering illegal hate speech online,<sup>26</sup> Commission Communication on tackling illegal content online<sup>27</sup> and

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Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market: Opportunities and Challenges for Europe', COM(2016) 288 final.

<sup>20</sup> Council of Europe study 'Algorithms and Human Rights: Study on the human rights dimensions of automated data processing techniques and possible regulatory implications', DGI(2017)12, 18-22.

<sup>21</sup> Aarti Shahani, 'With 'Napalm Girl,' Facebook Humans (Not Algorithms) Struggle To Be Editor' *National Public Radio* (10 September 2016) <<https://www.npr.org/sections/alltechconsidered/2016/09/10/493454256/with-napalm-girl-facebook-humans-not-algorithms-struggle-to-be-editor>>, accessed 20 February 2018.

<sup>22</sup> Compare Council of Europe study 'Algorithms and Human Rights: Study on the human rights dimensions of automated data processing techniques and possible regulatory implications', DGI(2017)12, 21.

<sup>23</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.

<sup>24</sup> Recital 46 E-Commerce Directive.

<sup>25</sup> Aleksandra Kuczerawy, 'The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression' (2017) 8 JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law 226, 237.

<sup>26</sup> Code of conduct on countering illegal hate speech online (2016) <[https://ec.europa.eu/newsroom/just/document.cfm?doc\\_id=42985](https://ec.europa.eu/newsroom/just/document.cfm?doc_id=42985)> accessed 19 February 2018.

<sup>27</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms, COM(2017) 555 final.

Commission Recommendation on measures to effectively tackle illegal content online,<sup>28</sup> encourage online platforms to develop effective processes to detect, identify and remove illegal content, especially through automatic detection and filtering technologies driven by algorithms.<sup>29</sup> Even though the Commission does express concerns over the possibility of too extensive removal and stresses the importance of adequate safeguards in this regard,<sup>30</sup> these measures remain voluntary, as they are not imposed by a binding legal instrument. The possibilities of content providers to contest the removal or request restoring of content<sup>31</sup> thus remain optional measures that do not necessarily need to be observed by online platforms.

In absence of a clear legal obligation to restore wrongfully removed content, the platforms might prefer to over-remove rather than under-remove content to escape liability under the E-Privacy Commerce that applies in case of knowledge or awareness of illegal content.<sup>32</sup> It would need to be seen, however, whether introducing of such an obligation for online platforms is reconcilable with the (non-)liability regime from the E-Commerce Directive. In practice, this would mean that the platforms could be liable if they do not remove certain content, but also if they excessively remove legal content.

### **2.3 Demoting and diluting legal yet harmful content (disinformation)<sup>33</sup>**

Under the current EU legal regime, online platforms do not have an obligation to remove harmful *legal* content, such as disinformation, also known as fake news. Article 14(1)(a) of the E-Commerce Directive namely does not extend to such content<sup>34</sup> and the recent Commission soft law instruments equally do not prompt its removal.<sup>35</sup> Since this field remains to be largely self-regulated – save for voluntary and non-binding acts such as EU Code of Practice<sup>36</sup> – platforms have adopted various approaches towards combatting disinformation. These range from deploying (human or artificial) fact-checkers, flagging of disinformation, surrounding disinformation with truthful information, browser extensions to detect disinformation,<sup>37</sup>

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<sup>28</sup> Commission Recommendation on measures to effectively tackle illegal content online, C(2018) 1177 final.

<sup>29</sup> Commission Recommendation on measures to effectively tackle illegal content online, 12-13.

<sup>30</sup> Commission Communication: Tackling Illegal Content Online, 6.

<sup>31</sup> Commission Communication: Tackling Illegal Content Online, 17.

<sup>32</sup> Article 14(1)(b) E-Commerce Directive.

<sup>33</sup> This part has been previously included into a blog by the author; see Maja Brkan, 'Fake news, algorithms and democracy protection: can David beat Goliath?', Law Blogs Maastricht, 15 March 2019, <<https://www.maastrichtuniversity.nl/blog/2019/03/fake-news-algorithms-and-democracy-protection-can-david-beat-goliath>>.

<sup>34</sup> Article 14(1)(a) E-Commerce Directive specifically refers to '*illegal* activity or information'. Emphasis added.

<sup>35</sup> See for example the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: a European approach, COM(2018) 236 final, 7-8, where removal or blocking of disinformation does not appear among the objectives of tackling such disinformation.

<sup>36</sup> 'EU Code of Practice on Disinformation' <<https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>> accessed 13 February 2019.

<sup>37</sup> Such as Fake News Detector <<https://fakenewsdetector.org/>> accessed 13 February 2019.

demoting such information in the social media feed<sup>38</sup> or closing down fake accounts or bots spreading fake news.<sup>39</sup> In addition, the use of ‘inoculation’ or pre-emptive warnings about ‘politically motivated attempts to spread misinformation’ has been suggested in the literature.<sup>40</sup>

Given the scope of news to be verified and the increasing amount of untruthful news, the AI tools seem to be the key instrument to detect and tackle disinformation.<sup>41</sup> To that end, the Commission proposes for example the use of cognitive algorithms to enhance reliability of search results.<sup>42</sup> Indeed, the use of algorithmic tools to detect and combat disinformation could lead to improved efficiencies in combating disinformation. Automatic detection, demotion and information to the public about the fake nature of information could increase the speed and extent of combating fake news. However, it is not excluded that the use of such automated means could lead to inadvertently incorrect results and that unlikely, yet truthful, news would be wrongfully labelled as disinformation. Moreover, automated means could be deliberately misused to downplay allegedly undesirable content such as condemnatory, challenging, surprising or distressing opinions.<sup>43</sup> This could lead to a potentially unjustified impairment of freedom of expression<sup>44</sup> and could hence affect democratic political structures.

## 2.4 Automated implementation of the right to be forgotten

The right to be forgotten, recognised in the *Google Spain*<sup>45</sup> judgment, is not only relevant in the framework of the fundamental right to data protection, but also with regard to freedom of expression and information. The tension between the two rights is epitomised in Article 17(3)(a) GDPR, which specifically provides that the right to be forgotten does not apply if ‘processing is necessary for exercising the right of freedom of expression and information’. Even though in *Google Spain* the CJEU seemed to tilt the balance more in favour of data protection and privacy,<sup>46</sup> the later codification of this right in Article 17 GDPR seems to remain

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<sup>38</sup> Facebook, for example, initially used a red warning flag, but later turned to demoting disinformation in the news feed; ‘Facebook will not remove fake news - but will “demote” it’ (BBC News, 13 July 2018) <<https://www.bbc.com/news/technology-44809815>> accessed 13 February 2019.

<sup>39</sup> For a more comprehensive overview over different measures, see Carol Soon and Shawn Goh, ‘Fake News, False Information and More: Countering Human Biases’ (2018) IPS Working Papers No. 31 (September 2018), 21 et seq.

<sup>40</sup> Sander van der Linden, Anthony Leiserowitz, Seth Rosenthal and Edward Maibach, ‘Inoculating the Public against Misinformation about Climate Change’ (2017) *Global Challenges* 1-7. See further also Jon Roozenbeek and Sander van der Linden, ‘The fake news game: actively inoculating against the risk of misinformation’ (2018) *Journal of Risk Research* <<https://doi.org/10.1080/13669877.2018.1443491>> accessed 13 February 2019.

<sup>41</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: a European approach, COM(2018) 236 final.

<sup>42</sup> Commission Communication: Tackling online disinformation, 11.

<sup>43</sup> See in this sense Commission Communication: Tackling online disinformation, 8.

<sup>44</sup> Contrary to justified impairment of this freedom in case of disinformation.

<sup>45</sup> C-131/12 *Google Spain* ECLI:EU:C:2014:317.

<sup>46</sup> The CJEU did not leave the balancing exercise to the national court or judge that privacy and data protection *can* override freedom of expression, but rather decided that the former rights ‘override, as a rule’ the latter. See *Google Spain*, para 99.

neutral as to which right should prevail.<sup>47</sup> Obviously, balancing can also be performed by humans only, but this question, together with a more general analysis of the balancing between the two rights, falls outside the scope of this chapter.<sup>48</sup> Rather, the analysis in this chapter is limited to automated implementation of the right to be forgotten with the help of algorithms that perform such balancing instead of humans or at least offer those humans considerable technical support. One of such tools proposed to automate the right to be forgotten is 'Oblivion', which allows for indexing with automated eligibility mechanism to determine whether the person making the request is 'indeed affected by an online resource'.<sup>49</sup>

Similarly as with the automated removal of illegal content or disinformation mentioned above, algorithms are ill-equipped to perform such balancing which would call for a certain degree of human involvement, at least in form of a final verification of algorithmic suggestion. The potential risk for freedom of expression and information is also similar: if the removal or de-indexing of content strikes the balance too much in favour of data protection and disproportionately encroaches upon freedom of expression of content provider or freedom of information of 'content receivers'.

### 3 Freedom of expression and information in the Charter

In the EU, the freedom of expression and information, enshrined in Article 11 of the Charter, constitutes a foundation of pluralist and democratic society and represents one of the values on which the EU is established.<sup>50</sup> As pointed out by the Court of Justice of the EU (CJEU) in *GS Media*, internet is of particular importance for this right as a platform for exchange of opinions and information.<sup>51</sup> Article 11 protects three different yet interrelated aspects of this right. The first aspect encompasses what is commonly understood by the freedom of expression, that is, the right to 'hold opinions' (Article 11(1)) which enables everyone to express their views through different communication channels, including internet and social media. The second side of this freedom entails freedom of information, that is the right 'to receive and impart information' without any interference by public authorities (Article 11(1)).<sup>52</sup> The further distinct part of this right is epitomised in Article 11(2), which mandates the respect of the

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<sup>47</sup> This provision, however, has to be interpreted in the light of the existing CJEU case law which could again tilt the balance towards data protection, but at least the textual interpretation of Article 17 GDPR does not lead to that result.

<sup>48</sup> On the question of balancing between data protection and freedom of expression see for example Rolf H. Weber, Ulrike I. Heinrich, 'Internet intermediaries as judges of conflicts between the right to be forgotten and the freedom of expression' (2015) in András Koltay (ed), *Comparative perspectives on the fundamental freedom of expression* 519-531; Stefan Kulk and Frederik Zuiderveen Borgesius, 'Privacy, Freedom of Expression, and the Right to Be Forgotten in Europe' in Evan Selinger, Jules Polonetsky and Omer Tene (eds), *Cambridge Handbook of Consumer Privacy* (Cambridge 2018) 301-320.

<sup>49</sup> Milivoj Simeonovski et al., 'Oblivion: Mitigating Privacy Leaks by Controlling the Discoverability of Online Information', 19 Jun 2015, <<https://arxiv.org/abs/1506.06033>> accessed 10 March 2019.

<sup>50</sup> Joined Cases C-203/15 and C- 698/15, *Tele2 Sverige*, ECLI:EU:C:2016:970, para 93.

<sup>51</sup> Case C-160/15, *GS Media*, ECLI:EU:C:2016:644, para 45.

<sup>52</sup> In this regard, Woods sees Article 11(1) as 'double-sided', providing for speaker's and audience's right; Lorna Woods, 'Article 11' in Steve Peers at al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014), 323.



'freedom and pluralism of the media'.<sup>53</sup> This paper focuses its analysis mainly on the first paragraph of Article 11 of the Charter.

### 3.1 Article 11(1) of the Charter

#### 3.1.1 Scope of application

Potential interferences with Article 11 of the Charter described above raise several open questions regarding its material and personal scope of application. At the outset, it needs to be examined which of the three sides of this right is triggered *ratione materiae* in the context of deployment of algorithms online. Removal or blocking of content may affect both expression of views of online users as well as receiving of information through online platforms. For example, automated removal of an opinion of an influential social media user that is wrongfully characterised as hate speech would impair the freedom of expression of this user, but could also interfere with the freedom of information of her followers. In *SABAM* and *Scarlet Extended*, the CJEU found that a system that fails to 'distinguish adequately between unlawful content and lawful content' potentially undermines freedom of information since it 'could lead to the blocking of lawful communications'.<sup>54</sup> As specified in *UPC Telekabel Wien*,<sup>55</sup> any blocking or other measures 'must be strictly targeted' as they could otherwise impair users' freedom of information.<sup>56</sup>

Similarly, unjustified demotion of disinformation that has been wrongly labelled as such could impact freedom of expression of the person posting this information as well as of users who are entitled to be informed about the matter. Differently, personalisation of search results or newsfeeds could mainly lead to the impairment of the freedom to receive information, such as selection of news that entirely prevents a proponent of a certain political party to familiarise herself with opposing political views.

However, before even establishing that there has been a restriction of freedom of expression, it needs to be clarified whether the acts exposed above fall within the *personal scope* of application of Article 11(1) of the Charter. This provision namely prevents only interferences 'by public authority' and not by private companies such as search engines and social media platforms. In this regard, the Charter reproduces verbatim the text of Article 10(1) ECHR that should serve as an interpretative basis of the equivalent Charter provision.<sup>57</sup> Differently than with respect to the fundamental right to non-discrimination,<sup>58</sup> effective judicial protection<sup>59</sup> or the right to paid annual leave,<sup>60</sup> freedom of expression and information does not seem to have

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<sup>53</sup> Differently see AG Bot's Opinion in Case C-283/11 *Sky Österreich* ECLI:EU:C:2012:341, para 43, who sees freedom of information and media pluralism as 'components of freedom of expression'.

<sup>54</sup> Case C-70/10 *Scarlet Extended* ECLI:EU:C:2011:771, para 52; Case C-360/10 *SABAM* ECLI:EU:C:2012:85, para 50.

<sup>55</sup> C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192.

<sup>56</sup> *UPC Telekabel Wien*, para 56.

<sup>57</sup> See Article 52(3) of the Charter according to which the meaning of Charter rights should correspond to the ones in the ECHR.

<sup>58</sup> C-414/16 *Egenberger* ECLI:EU:C:2018:257, paras 76-77.

<sup>59</sup> *Egenberger*, para 78.

<sup>60</sup> C-569/16 *Bauer* ECLI:EU:C:2018:871, paras 79-91.

the capacity of horizontal application among private parties, as this would run contrary to the wording of this provision.

### 3.1.2 Positive obligation or horizontal effect?

Nevertheless, Article 11(1) of the Charter can potentially be relevant for abovementioned restrictions if it is established that there is a positive obligation of the EU or its Member States to protect this fundamental right among private parties. Indeed, the ECtHR acknowledged that states have, in certain circumstances, a positive obligation to protect the freedom of expression 'even in the sphere of relations between individuals'.<sup>61</sup> For example, in *Dink v Turkey*, this court established that the states have an obligation 'to create a favourable environment for participation in public debate by all the persons concerned'.<sup>62</sup> The conditions for such a positive obligation, such as the nature of expression at stake and its capability to contribute to public debates, were further elaborated by the Strasbourg court in *Appleby and Others v UK*.<sup>63</sup>

Even though the CJEU has not developed a similar positive obligation framework for EU or its Member States based on Article 11(1) of the Charter, it could potentially be argued that the Strasbourg case law is of relevance for the interpretation of this provision in accordance with Article 52(3) of the Charter. However, does the latter provision truly mandate the introduction of such positive obligation into the EU legal order? A textual interpretation of Article 52(3) does not seem to lead to that result: only the *meaning* and (one could add *substantive*) *scope* of Charter rights must guarantee the same protection, but this does not seem to extend to the addressees of these rights. A purpose-based interpretation would yield the same result: imposing a positive obligation is more about ensuring effective protection and compliance with these rights rather than determining their substantive scope.

Moreover, even if the CJEU decides to rely on this ECtHR case law in its reasoning and develops positive obligation to protect freedom of expression, this cannot be done without consideration of specificities of the EU legal system. As Beijer suggests, in the EU there is less need for introducing positive obligations based on the general fundamental rights regime since many of these obligations already appear in the EU secondary legislation.<sup>64</sup> Contrary to the system of Council of Europe where no specific legislation is adopted to implement the ECHR, the EU secondary legislation is the driver that implements, concretises and exemplifies EU fundamental rights and sometimes even determines their level of protection.

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<sup>61</sup> See for example *Özgür Gündem v Turkey* App no 23144/93 (ECHR, 16 March 2000), paras 42-46; *Appleby and Others v UK* App no 44306/98 (ECHR, 6 May 2003), para 39.

<sup>62</sup> *Dink v Turkey* App nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 (ECHR, 14 September 2010), para 137.

<sup>63</sup> *Appleby and Others v UK* App no 44306/98 (ECHR, 6 May 2003), para 39 et seq. See also Council of Europe, 'Research Report: Positive obligations on member States under Article 10 to protect journalists and prevent impunity' (2011) <[https://www.echr.coe.int/Documents/Research\\_report\\_article\\_10\\_ENG.pdf](https://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf)>, accessed 20 February 2018, 4-5.

<sup>64</sup> Malu Beijer, *The limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017), 297.

Yet, freedom of expression in the EU is not broadly concretised with the EU secondary legislation. The Audiovisual Media Services Directive<sup>65</sup> could be seen as protecting this right, especially since the CJEU acknowledged in *Mesopotamia Broadcast* that it represents ‘a specific manifestation’ of this right.<sup>66</sup> However, this directive does not offer protection in case of deployment of algorithms for removal or blocking of content discussed above. The current E-Commerce Directive that could apply to automated removal through its Article 14, fails to provide specific safeguards to protect this right, even though it generally mandates the observance of freedom of expression in its recitals.<sup>67</sup> Similarly, the GDPR mandates balancing of data protection with freedom of expression and information within the framework of the right to be forgotten,<sup>68</sup> yet does not contain any specific measures to protect this freedom.<sup>69</sup> The proposed Regulation on preventing the dissemination of terrorist content online<sup>70</sup> does provide for such safeguards, but its scope of application remains limited to terrorist content. Given that general safeguards against over-removal of illegal online content are mandated by a non-binding EU legal instrument,<sup>71</sup> it could indeed be argued that there is a gap in protection of freedom of expression on the level of secondary EU law. In addition, as argued by Quintel and Ullrich, the EU Charter would not be applicable to measures ‘that are to be followed “voluntarily” by private companies’.<sup>72</sup> Could this justify introducing a positive obligation?

On the one hand, introduction of such obligation is risky from the perspective of the general system of competences within the EU. In creating such a positive obligation, the CJEU would not only have to observe the principles of conferral and subsidiarity,<sup>73</sup> but also pay attention not to overstep its own competences by stepping into the shoes of a legislator.

Furthermore, one could wonder whether developing such an obligation within the EU would be appropriate, given that the Member States are not parties to the dispute between individuals where the introduction of such obligations would potentially prove necessary and useful. In most cases where the CJEU imposed on the Member States an obligation to take certain

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<sup>65</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1.

<sup>66</sup> C-244/10 and C-245/10 *Mesopotamia Broadcast* ECLI:EU:C:2011:607, para 33. Note that this case was rendered under a directive that was replaced by the Audiovisual Media Services Directive, that is Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23.

<sup>67</sup> Recitals 9 and 46 E-Commerce Directive.

<sup>68</sup> Article 17(3)(a) GDPR.

<sup>69</sup> The GDPR further mandates the adoption of measures balancing data protection with freedom of expression in its Article 85, especially with regard to ‘journalistic purposes and the purposes of academic, artistic or literary expression’.

<sup>70</sup> Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM(2018) 640 final.

<sup>71</sup> Commission Communication on Tackling Illegal Content Online, 13.

<sup>72</sup> Quintel and Ullrich, *op. cit.*, 9.

<sup>73</sup> Malu Beijer, *The limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017), 300.

measures, such as *Chatzi*,<sup>74</sup> *Abdida*<sup>75</sup> or *Mukarubega*,<sup>76</sup> the dispute was of a vertical and not of a horizontal kind. To recall, *Chatzi* was a case of a public servant in tax office, brought against a Ministry of finance;<sup>77</sup> in *Abdida*, a third country national brought a claim for a social assistance against a public centre for social welfare;<sup>78</sup> and *Mukarubega* concerned a claim of third country national against police authorities.<sup>79</sup>

However, in *UPC Telekabel Wien*,<sup>80</sup> the circumstance that it had to decide in a dispute between two private parties indeed did not prevent the CJEU to require from a Member State to provide for appropriate procedural rules for enforcement of fundamental rights. The case concerned a request for injunction of two film producers against an internet service provider (ISP) to block a website infringing their copyright.<sup>81</sup> According to the Court, while the ISP's measures adopted to end a copyright infringement should not interfere with the user's freedom of information, 'the national procedural rules must provide a possibility for internet users to assert their rights before the court' once the ISP has taken these measures.<sup>82</sup> Even though this latter quote imposes a procedural positive obligation on a Member State,<sup>83</sup> this procedural obligation does not mean that the state has to directly ensure the respect of fundamental rights of one individual that has been encroached upon by another individual. Rather, the state has to ensure this indirectly, by enabling that an individual can enforce her rights against another individual. *UPC Telekabel Wien* thus confirms that the horizontal nature of dispute does not preclude imposing certain obligations on Member States, but does not create a positive obligation *proprio sensu* to protect – or be responsible for violation of – these rights, in particular fundamental right to freedom of expression. Moreover, such obligation presupposes that there is a gap in (procedural) protection in the Member State which was not apparent from the case.

On the other hand, as demonstrated in the recent cases of *Egenberger*<sup>84</sup> and *Bauer*,<sup>85</sup> the CJEU seems to prefer opening the door to the horizontal application of fundamental rights rather than to establish a positive obligation of Member States to protect these rights.<sup>86</sup> In these two cases, where the Court explicitly recognised horizontal effect of Articles 21, 47 (*Egenberger*)<sup>87</sup>

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<sup>74</sup> C-149/10 *Chatzi* ECLI:EU:C:2010:534, paras 68, 75. Elise Muir, 'The Court of Justice: a fundamental rights institutions among others' in Mark Dawson, Elise Muir, Bruno de Witte (eds), *Judicial activism at the European Court of Justice* (Edward Elgar 2013) 76, 89.

<sup>75</sup> C-562/13 *Abdida* ECLI:EU:C:2014:2453, paras 59-60.

<sup>76</sup> C-166/13 *Mukarubega* ECLI:EU:C:2014:2336, para 62.

<sup>77</sup> *Chatzi*, para 2.

<sup>78</sup> *Abdida*, para 2.

<sup>79</sup> *Mukarubega*, para 2.

<sup>80</sup> C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192.

<sup>81</sup> *UPC Telekabel Wien*, paras 11-12.

<sup>82</sup> *UPC Telekabel Wien*, para 57.

<sup>83</sup> Malu Beijer, *The limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Intersentia 2017), 270.

<sup>84</sup> C-414/16 *Egenberger* ECLI:EU:C:2018:257.

<sup>85</sup> C-569/16 *Bauer* ECLI:EU:C:2018:871.

<sup>86</sup> In this sense, the CJEU is moving away from its earlier jurisprudence in *Association de médiation sociale* where it rejected direct horizontal effect of the workers' right to information and consultation. C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, para 51.

<sup>87</sup> *Egenberger*, paras 76-78.

and 31(2) of the Charter (*Bauer*),<sup>88</sup> it moved away from its earlier jurisprudence in *Association de médiation sociale*<sup>89</sup> which rejected direct horizontal effect of the workers' right to information and consultation.<sup>90</sup> There is indeed a marked difference between Article 11(1) of the Charter – which expressly prohibits only interference with a public authority – and the fundamental rights in *Egenberger* or *Bauer* which do not contain such a textual limitation. However, this wording of Article 11(1) of the Charter did not prevent the Court in *UPC Telekabel Wien* and *Mc Fadden*<sup>91</sup> to require respect of freedom of information by an ISP when balancing different fundamental rights. More precisely, according to the Court, the measures taken by the ISP to tackle copyright-infringing content should not affect the freedom of information of users of provider's services.<sup>92</sup> If such measures would affect the possibility of users to lawfully access information, the 'provider's interference in the freedom of information of those users would be unjustified'.<sup>93</sup> While this solution might be appropriate from the perspective of teleological interpretation of Article 11(1) of the Charter and the circumstances of the case, it deliberately disregards the wording of this Charter provision and goes against its textual interpretation.

Therefore, if faced with a gap in protection of freedom of expression and information among private parties, it is not excluded that the Court would accept horizontal application of Article 11(1). In its traditional purpose-based fashion, it could try to manoeuvre around the textual interpretation, claiming that this provision does *not* expressly *exclude* private interferences. In *Bauer*, it used a similar way around the wording of Article 51(1) by claiming that this provision

'does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.'<sup>94</sup>

Among the three possible interpretative routes – following *Association de médiation sociale*<sup>95</sup> and rejecting direct horizontal effect, establishing a positive obligation of EU or its Member States, and accepting horizontal effect – it seems that the last would fit best the Court's activist stance.

Nevertheless, introducing horizontal direct effect of Article 11(1) of the Charter cannot be a *panacea* for all restrictions of this right. In *Egenberger* and *Bauer*, the Court allowed horizontal effect of fundamental rights against the background of EU directives which gave, through Court's interpretation, an individual a particular right it could invoke against another individual. Because directives cannot have horizontal direct effect and because it was not possible to interpret national legislation in the light of these directives, the Court filled the gap with horizontal effect of fundamental rights to which these directives gave expression. In

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<sup>88</sup> *Bauer*, paras 79-91.

<sup>89</sup> C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2.

<sup>90</sup> *Association de médiation sociale*, para 51.

<sup>91</sup> C-484/14 *Mc Fadden* ECLI:EU:C:2016:689.

<sup>92</sup> *UPC Telekabel Wien*, para 56.

<sup>93</sup> *UPC Telekabel Wien*, para 56; *Mc Fadden*, para 93. Emphasis added.

<sup>94</sup> *Bauer*, para 87.

<sup>95</sup> C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2, para 51.

neither of those two cases did the Court decide that an individual was *unjustifiably interfering* with the fundamental rights of the other individual.

Differently, as elaborated above freedom of expression and information are not extensively concretised through EU secondary legislation. In a dispute between individuals, it would therefore be rather difficult to define a concrete obligation of an individual towards another private party – generally, provisions of EU law must be clear, precise and unconditional to produce horizontal effect.<sup>96</sup> Even more importantly, deciding that an individual directly interfered with the freedom of expression or information of another individual could go contrary to the wording of Article 52(1) of the Charter according to which '*[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law*'.<sup>97</sup> The legislative measures examined above which could be used as a basis for such limitation are focused on specific circumstances, such as limitation of this right in case of illegal nature of content or to ensure data protection. Any other limitations not provided by law should be excluded. In words of an absurd example: it cannot be accepted that a child's lawyer would bring an action alleging breach of child's freedom of information against a father who installed an app on child's phone with an algorithm to automatically prevent the child to see certain content online.

An alternative route to horizontal direct effect would be to turn the horizontal relationship into a quasi-vertical one to allow for applicability of fundamental rights against individuals or companies having powers capable to impact interests of a broader public. These private actors could be seen as a special category of fundamental rights addressees, distinct from public authorities or private individuals. For example, search engines are important information gatekeepers that could be seen as curtailing freedom of information of citizens if they disabled the searches of important news items. While such a solution would not solve the problem of lack of precision of obligations from the Charter rights, it could potentially solve the conundrum around a too broad applicability of these rights.

### **3.1.3 Existing and future EU legislative action**

In the light of the discussions above, it would be more appropriate for the EU legislator to take legislative action to protect this fundamental right in the wake of increasing technologisation. With regard to disinformation, the European Commission announced in April 2018 that it will have recourse to regulatory action in this field if the 'self-regulatory approach fail[s]', with the addition that such regulation should 'strictly respect freedom of expression'.<sup>98</sup> The current E-Commerce Directive which serves as a basis for removal of illegal information that service providers have knowledge about,<sup>99</sup> does not provide for any such safeguard. Differently, the

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<sup>96</sup> See C-26/62, *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1, page 13, and the subsequent case law.

<sup>97</sup> Emphasis added.

<sup>98</sup> European Commission - Fact Sheet, 'Tackling online disinformation' (26 April 2018) <[http://europa.eu/rapid/press-release\\_MEMO-18-3371\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-3371_en.htm)> accessed 19 February 2019.

<sup>99</sup> Article 14(1)(b) E-Commerce Directive.

proposal for the Regulation on preventing the dissemination of terrorist content online,<sup>100</sup> which promotes the use of automated tools for removal of terrorist content, provides for safeguarding freedom of expression of content providers. It allows content providers to submit a complaint and request reinstatement of removed content<sup>101</sup> and to be informed about the removal and the related reasons.<sup>102</sup> While these measures are welcome, they remain limited only to a particular type of content. Therefore, further regulation could potentially be needed to safeguard this fundamental right in case of automated removal of content or personalisation.

What exactly could such a secondary legislation regulate and which sample obligations could it entail? In terms of automated removal or blocking of content, it could extend to imposing binding legal obligations on online platforms akin to those relating to terrorist content, namely giving the content provider the possibility to contest the removal and requiring the online platform to restore content in case of wrongful removal.<sup>103</sup> Further examples of these positive obligations could be automated notification of content provider about the removal, providing for clear standards as to what qualifies as illegal or legal yet harmful content and offering effective enforcement mechanisms. It is important, however, that these measures strike the right balance between rights of all of the parties involved; they should be neither too burdensome for online platforms nor too difficult to enforce for content providers.

Regarding personalisation, potential obligations of the EU or its Member States, introduced with secondary legislation, are much less straightforward. Such positive obligations could encompass offering measures to empower prosumers. Users could be given a choice to either opt out of profiling entirely or to decide according to which criteria the results are to be displayed – such as time of posting or certain personal or content-related criteria.<sup>104</sup> For example, with a simple click, users could be able to choose different profile types, changing the order in which the results are displayed.<sup>105</sup> While these instruments are currently offered by certain online platforms voluntarily, regulation to that effect would force these platforms to guarantee different personalisation types by default.

From a regulatory perspective, it is tempting to require, in a general fashion, from online platforms to not rank search results or organise newsfeeds in a way that encroaches upon freedom of expression. But what exactly would that mean in practice? How exactly would the feed need to be organised not to encroach upon freedom of information and expression of *any* user? For a particular user, not receiving the latest Euronews tweet on top of her Twitter feed could mean curtailing her freedom of information, whereas for another user, this would be the

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<sup>100</sup> Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM(2018) 640 final.

<sup>101</sup> Article 10 Proposal for a Regulation on preventing the dissemination of terrorist content online.

<sup>102</sup> Article 11 Proposal for a Regulation on preventing the dissemination of terrorist content online.

<sup>103</sup> Commission Communication on Tackling Illegal Content Online, 17.

<sup>104</sup> Harambam et al. give several examples of how users can control the newsfeeds; one of them is Gobo, a social media aggregator that offers users different adjustable criteria to customize their news; see Jaron Harambam, Natali Helberger and Joris van Hoboken, 'Democratizing algorithmic news recommenders: how to materialize voice in a technologically saturated media ecosystem' (2018) 376 *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* <<http://doi.org/10.1098/rsta.2018.0088>>, 11.

<sup>105</sup> Ibid.

case only if the tweet was at the very bottom of ranking. When assessing whether personalisation encroaches upon the freedom of expression, it should also be taken into account whether the user has alternative means to access the same information and how burdensome such access is. For example, if all search engines available to the user systematically fail to display anti-government content and the only way to reach that content would be through paying a costly yearly subscription for an online newspaper, this could potentially pose a threat for freedom of information. It is very dangerous to claim, however, that personalisation *generally* encroaches upon freedom of information. Whether this is the case requires an in-depth analysis not only of the facts of the case, but also of the functioning and technical specifications of curation and personalisation algorithms, requiring technical knowledge on the part of the judges deciding the case. In many cases, personalisation will rather curtail person's freedom of choice and personal autonomy which are not fundamental rights under EU law, but fall more under the domain of ethics.

In any event, the states should not decide how these results should be specifically organised as this would lead to excessive regulation of internet and potentially encroach upon the platforms' freedom to conduct a business. From a technical perspective, it would be desirable to guarantee protection of freedom of expression by design by building fundamental rights standards into curation algorithms.

### **3.2 Article 11(2) of the Charter**

Regarding Article 11(2) of the Charter, it remains open whether and how the deployment of algorithms by online platforms, notably through personalisation/ranking of news and algorithmic editorial choices can impair media freedom and pluralism. Media freedom generally signifies prohibition of interference of the state with media.<sup>106</sup> Media pluralism, to the contrary, is a broad concept that escapes a comprehensive definition.<sup>107</sup> Generally, it encompasses not only diversity and variety of media, but also diversity of ownership over this media and access to opinions that represent different societal views in a particular country.<sup>108</sup> Limitation of media pluralism can impair freedom of information, which can have a negative impact on democracy.<sup>109</sup>

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<sup>106</sup> However, Koltay is of the view that the meaning of this concept is changing in the wake of mass media and internet; see András Koltay. 'What Is Press Freedom Now? New Media, Gatekeepers, and the Old Principles of the Law', in András Koltay (ed), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer 2015), 53-87.

<sup>107</sup> Natali Helberger, Katharina Kleinen-von Königslöw and Rob van der Noll, 'Convergence, information intermediaries and media pluralism - mapping the legal, social and economic issues at hand: A quick scan' (2014) <[https://www.ivir.nl/publicaties/download/Information\\_intermediaries\\_and\\_media\\_pluralism.pdf](https://www.ivir.nl/publicaties/download/Information_intermediaries_and_media_pluralism.pdf)>, accessed 13 February 2019, 3.

<sup>108</sup> See, Andrea Calderaro and Alina Dobрева, 'Framing and measuring media freedom and pluralism across social and political contexts', in Centre for Media Pluralism and Media Freedom, *European Union Competencies in Respect of Media Pluralism and Media Freedom: Policy Report* (EUI 2013), 22, 24; Commission Staff Working Document, 'Media pluralism in the Member States of the European Union', SEC(2007) 32.

<sup>109</sup> Council Guidelines 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' (12 May 2014), <[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/142549.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf)>, accessed 13 February 2019, 17.



Article 11(2) of the Charter imposes on Member States a positive obligation to ensure media pluralism.<sup>110</sup> This again begs the question what kind of behaviour of online platforms the Member States (and the EU institutions) should prohibit or regulate. Woods distinguishes between the obligation to ensure ‘internal pluralism’, that is diversity of content (which, it could be added, implies plurality of sources), and ‘external pluralism’ relating to market structure and ownership over media.<sup>111</sup> Although online platforms can indeed own media outlets, it is unlikely that this would nurture major issues with regard to external pluralism. However, with regard to the impact of these intermediaries on internal pluralism, the (academic) voices differ fundamentally. While some opine that the intermediaries clearly enhance media diversity,<sup>112</sup> others warn against the negative impact of possible editorial control, notably due to deployment of algorithms.<sup>113</sup> Different studies,<sup>114</sup> reports<sup>115</sup> and policy documents<sup>116</sup> sought to assess, either quantitatively<sup>117</sup> or qualitatively,<sup>118</sup> such impact on media diversity. In addition, various studies acknowledged limitations of use of empirical tools and metrics for such measurements.<sup>119</sup>

The complexity of these studies reveals that it is difficult to give a generalised answer regarding the question of impact of online platforms on media pluralism. In each particular case, the specificities of the facts and the media environment in a given state will have to be carefully analysed. In the absence of specific EU secondary legislation on that matter, the CJEU

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<sup>110</sup> Lorna Woods, ‘Article 11’ in Steve Peers at al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014), 335.

<sup>111</sup> Ibid. Woods does not specifically mention ownership, but the reference to market structure implies the former concept.

<sup>112</sup> Peter Barron and Simon Morrison, ‘Pluralism after scarcity: the benefits of digital technologies’ (LSE Media Policy Project blog, 18 November 2014) <<http://blogs.lse.ac.uk/mediapolicyproject/2014/11/18/pluralism-after-scarcity-the-benefits-of-digital-technologies/>> accessed 14 January 2019.

<sup>113</sup> Helberger et al. (n 107), 9, identify five categories of potentially negative impact of intermediaries on media pluralism.

<sup>114</sup> Petra Bárd, Judit Bayer and Sergio Carrera, ‘A comparative analysis of media freedom and pluralism in the EU Member States: Study for the LIBE Committee’ (2016) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL\\_STU\(2016\)571376\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571376/IPOL_STU(2016)571376_EN.pdf)>.

<sup>115</sup> Vaira Viķe-Freiberga et al., ‘A free and pluralistic media to sustain European democracy: The Report of the High Level Group on Media Freedom and Pluralism’ (2013) <<https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>>.

<sup>116</sup> See for example Conclusions of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment, 2014/C 32/04; European Parliament resolution of 3 May 2018 on media pluralism and media freedom in the European Union, 2017/2209(INI).

<sup>117</sup> Helberger et al. (n 107).

<sup>118</sup> For example Elda Brogi, Iva Nenadic, Pier Luigi Parcu and Mario Viola de Azevedo Cunha, ‘Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor 2017 in the European Union, FYROM, Serbia & Turkey: 2018 Policy Report’ (2018) <[http://cmpf.eui.eu/wp-content/uploads/2018/12/Media-Pluralism-Monitor\\_CMPF-report\\_MPM2017\\_A.pdf](http://cmpf.eui.eu/wp-content/uploads/2018/12/Media-Pluralism-Monitor_CMPF-report_MPM2017_A.pdf)> accessed 14 February 2019.

<sup>119</sup> Brogi et al. (n 118), 79; Ofcom, ‘Measurement framework for media plurality’ (2015) <[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0024/84174/measurement\\_framework\\_for\\_media\\_plurality\\_statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0024/84174/measurement_framework_for_media_plurality_statement.pdf)>, 3; Kari Karppinen, ‘The Limits of Empirical Indicators: Media Pluralism as an Essentially Contested Concept’, in Peggy Valcke, Miklós Sükösd and Robert G. Picard (eds), *Media Pluralism and Diversity: Concepts, Risks and Global Trends* (Springer 2015), 287-296.

case law can provide some initial guidance. In *Sky Österreich*,<sup>120</sup> the Court had to balance Article 11 of the Charter with the freedom to conduct a business<sup>121</sup> and the right to property<sup>122</sup> of a satellite broadcaster. In this case, an exclusive satellite broadcaster had to provide excerpts from football matches to the national television broadcaster for the purposes of short news without compensation going beyond actual costs.<sup>123</sup> The freedom to receive information and protection of media pluralism prevailed since requesting television broadcasters to pay additional compensation for access to the satellite signal could prevent them from requesting such access and thus limit information imparted to the public.<sup>124</sup> Just as satellite broadcasters act as gatekeepers between the source of news and the general media, internet intermediaries can play a role of gatekeepers between those media and the public.<sup>125</sup> In both cases, gatekeepers to information should not obstruct access to such information.

#### 4 Conclusion

Inappropriate content, be it hate speech, extremist opinion or disinformation (fake news) are often removed by algorithms with minimal or no human oversight.<sup>126</sup> As established in this paper, this could have detrimental effect on freedom of expression and information and hence on democratic political values. Democracy can thus be negatively affected in two ways. On the one hand, such detrimental effect on democracy can be caused by deliberate spreading of contentious information online, in particular disinformation. On the other hand, excessive removal of such content with automated means and hence curtailing of freedom of expression and information is equally harmful for the proper functioning of democracy. In case of deployment of AI tools to remove, block or demote such content online, it is necessary to previously reflect upon where we want to strike the balance between competing values. Put more concretely, is it more harmful for the overall protection of fundamental rights and democracy that the users are exposed to a certain (hopefully small) amount of untruthful/illegal content or is it worse that a certain amount of truthful content is withheld from them due to excessive removal or demoting? While the answer to this question certainly depends on the type of untruthful/illegal information, it also raises a more philosophical

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<sup>120</sup> Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28.

<sup>121</sup> Article 16 Charter.

<sup>122</sup> Article 17 Charter.

<sup>123</sup> Article 15(6) of the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L 95, p. 1.

<sup>124</sup> *Sky Österreich*, para 55.

<sup>125</sup> On the notion of gatekeeping, compare Damian Tambini and Sharif Labo, 'Digital intermediaries in the UK: implications for news plurality' (2016) <<https://doi.org/10.1108/info-12-2015-0056>>, 33-58; Natali Helberger, Katharina Kleinen-von Königslöw, and Rob van der Noll, 'Regulating the new information intermediaries as gatekeepers of information diversity' (2015) <<https://doi.org/10.1108/info-05-2015-0034>>, 50-71.

<sup>126</sup> See in this sense, for the notice and takedown procedure, Jennifer M. Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (2017), UC Berkeley Public Law Research Paper No. 2755628, <<https://ssrn.com/abstract=2755628>> accessed 17 March 2019, 131.

concern as to the relative importance of values that we seek to protect in our 'post-truth society'.<sup>127</sup>

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<sup>127</sup> For a discussion of this notion, see for example Jayson Harsin, 'Regimes of Posttruth, Postpolitics, and Attention Economies', (2015) 8 *Communication, Culture & Critique* 2, 327–333, doi:10.1111/cccr.12097.