

INTERMEDIARY LIABILITY AND FREEDOM OF EXPRESSION IN THE EU:  
FROM CONCEPTS TO SAFEGUARDS



INTERMEDIARY LIABILITY AND  
FREEDOM OF EXPRESSION  
IN THE EU: FROM CONCEPTS  
TO SAFEGUARDS

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## Intermediary Liability and Freedom of Expression in the EU: From Concepts to Safeguards

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## FOREWORD

It is my pleasure to respond to the request of Aleksandra Kuczerawy and her supervisor to write a foreword to the book.

I was a member of Aleksandra's PhD examination committee. I was able to see how she progressed in her research, undertaken under the able supervision of Peggy Valcke and co-supervision of Eva Lievens. From the very beginning Aleksandra wanted to bring Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression, into the discussion about the role of internet hosting services with respect to content created by their users. What place Article 10 would receive, was not clear from the outset. Aleksandra's ideas developed as she went deeper into the analysis of the various aspects of the conduct expected from hosting services.

In front of the reader is an original study, in which the author applies elements taken from the case law of the European Court of Human Rights (on Article 10 of the European Convention) and the European Court of Justice (on the corresponding Article 11 of the Charter of Fundamental Rights) to a context that is not the "natural" context for the application of Article 10 of the Convention or Article 11 of the Charter.

Indeed, both Articles guarantee a right of individuals vis-à-vis the State (and, in the case of the Charter, vis-à-vis the European Union). Aleksandra recalls that there are three principles with which any interference by the State with freedom of expression must comply (legal certainty, legitimacy and proportionality). On the basis of the case law of the two European courts she then develops five criteria, which she argues should be taken into account by anyone who sets up a mechanism for the removal, by a hosting service, of content placed on the internet by a third party. The five criteria are: quality of the law, protection of the democratic society, tailored response, procedural fairness and effective remedy.

A removal measure is a specific form of interference with the right to freedom of expression, in this case the right of the third party which placed the content on the internet. It is an interference by a private person, the hosting service, not by a State body. The criteria drawn from the case law on freedom of expression are thus receiving a new meaning, as it is obvious that they cannot be applied to actions of private parties in exactly the same way as they are applied to actions of public bodies.

The five criteria are first used as assessment criteria for the evaluation of a number of existing mechanisms of response, by a hosting service, to notice

given to it of allegedly illegal or infringing online content. After having critically examined the existing systems, Aleksandra comes up with a list of safeguards, grouped around the five assessment criteria, which she recommends to include in the EU intermediary liability regime, in order to make that regime compliant with fundamental rights, in particular the right to freedom of expression of the affected third party.

The result is a set of very concrete recommendations for the attention, in particular, of the European Union. The latter has a positive obligation to protect freedom of expression while regulating the relationship between host services – entrusted with the task of controlling online content – and their users. Aleksandra’s recommendations can assist the Union bodies in fulfilling that obligation.

I read this book with great interest. It is a fine example of application of known concepts to new areas, resulting in novel and well-argued findings. The fact that these findings are moreover formulated in such a way that they can be of practical significance, gives an important added value to the book.

At a moment when the contours of freedom of expression and the limits of restrictions of that freedom are subject of sometimes heated debate, it is refreshing to see how a researcher like Aleksandra comes up with solutions that are based on a solid understanding of what freedom of expression implies in an online context. She is guided by the principle that restrictions of that freedom are permissible only to the extent that there is a fair balance between the fundamental right of the person who expresses his or her opinion and the competing interests which the restrictions are intended to protect. As far as I can see, the safeguards which she proposes are realistic, and at the same time capable of contributing to the setting-up of mechanisms that do strike the required faire balance.

One may hope that the competent authorities take due notice of Aleksandra’s recommendations. In the meantime her findings can be used to assess the compatibility with the European Convention and the Charter of any measure taken under a “notice and action” mechanism. Aleksandra’s book is not only an addition to the existing state of the art with respect to the removal of online content, but also a practical instrument for practitioners and policy makers. What more can be said about the merits of a fruit of academic research?

Paul LEMMENS  
Professor, Catholic University of Leuven  
Judge, European Court of Human Rights

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Aleksandra KUCZERAWY  
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