PART A: ARTICLES

THE USE OF ALTERNATIVE REGULATORY INSTRUMENTS TO PROTECT MINORS IN THE DIGITAL ERA: APPLYING FREEDOM OF EXPRESSION SAFEGUARDS

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Abstract

Since the mid-1990s, it has become increasingly clear that legislation, used to protect minors against harmful content in traditional media, is not suitable to regulate the drastically transformed digital media landscape in an efficient manner. In response to this situation, alternative regulatory instruments (ARIs), such as self- and co-regulation, have been incorporated in regulatory strategies to protect minors against harmful digital content. Notwithstanding the common misconception that ARIs function within a legal vacuum, the use of such instruments should comply with the broader legal framework, and more importantly, must respect a number of fundamental rights, such as the rights to freedom of expression, privacy, a fair trial and an effective remedy. This article focuses on the right to freedom of expression and aims to assess with which freedom of expression safeguards the ARIs must comply in order to guarantee the protection that this right entails. To achieve this, the article examines, on the one hand, the applicability of Article 10 ECHR with respect to ARIs, and, on the other hand, the fundamental rights issues that may arise both with respect to the involvement of private actors and the incorporation of technological tools in ARIs.

1. INTRODUCTION

The emergence of new digital technologies, such as the Internet in the 1990s, has had a significant impact on the availability, accessibility and quantity of media content. In addition, the production, distribution and consumption of media content has changed considerably due to the convergence of different technologies. Convergence, which

entails the ability of different network platforms to carry essentially similar kinds of services,\(^1\) has led to the phenomenon of ‘networked media’, implying that media content is produced, distributed, shared, managed and consumed through various networks in a converged manner. This has influenced media consumption patterns and means that content can now be accessed on an ‘anywhere-anytime-anything’ basis. Consumers and users can exercise much more control over their media use and, in addition, have a wide range of opportunities in terms of content production (‘user generated content’). Notwithstanding the many benefits that these evolutions have brought, in particular with regard to the enjoyment of the right to freedom of expression and the free flow of information, concerns regarding the exposure of children to harmful digital content – which arise every time a new (mass) medium appears – have been at the top of many national as well as European policymakers’ agendas for the past decade. Whereas legislation that aims at protecting minors is traditionally created, implemented and enforced by the government, since the mid-1990s, it has been suggested that alternative regulatory instruments (ARIs) such as self- and co-regulation might be more efficient to deal with these concerns than traditional legislation. Self-regulatory instruments are instruments in which the addressees of regulation draft and implement certain regulatory principles, co-regulation refers to types of regulatory instruments where government and other actors (such as the private sector, but also NGOs or interest groups) cooperate in the different phases of the regulatory process.

The aim of this article is to assess which freedom of expression safeguards the ARIs must comply with in order to guarantee the protection that this right, as laid down in the European Convention on Human Rights (ECHR), entails. Whereas a number of other fundamental rights are also relevant to the analysis of the compliance of ARIs with the broader legal framework, such as the right to privacy (Article 8 ECHR), the right to a fair trial (Article 6 ECHR) and the right to an effective remedy (Article 13 ECHR),\(^2\) this article explores in particular the tension between protecting children from harmful content in digital media and protecting the right to freedom of expression of both children and adults. Accordingly, this article will examine how ARIs reconcile this tension.


\(^1\) Compliance with these other human rights, with internal market regulation such as free movement of goods and services, with competition rules, and with general European Union (EU) legislative requirements such as Article 288(3) Treaty on the Functioning of the European Union concerning the implementation of directives, was also studied by the author in the course of her PhD research (Lievens, Eva, *Protecting children in the digital era: the use of alternative regulatory instruments*, Martinus Nijhoff Publishers, Leiden, 2010).
Convention on the Rights of the Child – UNCRC, and confirmed by case law,\(^3\) also with regard to the Internet.\(^4\) However, on the other hand, the right to freedom of expression cannot be restricted in a disproportionate manner. The establishment of measures to protect minors against harmful content is thus a delicate balancing exercise which should aspire to minimise spill-over restrictions to adults. Adding another layer of complexity, children also have a right to freedom of expression, included in Article 13 UNCRC, and hence, the measures that are put in place should respect this right, and thus be not too restrictive. Bearing in mind these different aspects, it is of the utmost importance to ensure that any instrument that addresses the issue of harmful digital content, be it traditional legislation, or an ARI, takes into account the safeguards that Article 10 ECHR encompasses so that that the freedom of expression of all parties involved, children as well as adults, is duly protected. Considering the particularities that arise with regard to this protection when an ARI is established will allow to draw conclusions as to how these kinds of regulatory instruments may be structured in order to guarantee an optimal protection.

Firstly, this article will briefly clarify the concept of harmful content and introduce the rationale behind the protection of minors against harmful digital media content. The second section will describe the policy history behind the use of ARIs, as well as clarify and illustrate what exactly is understood by this notion. Third, this article presents an analysis of the compliance of the use of ARIs with the safeguards laid down in Article 10 ECHR, with particular attention to two elements that are especially relevant in the field of the protection of minors against harmful content, namely the involvement of private actors in regulation and the use of technological tools.

2. PROTECTING CHILDREN AGAINST HARMFUL NEW MEDIA CONTENT

2.1. HARMFUL CONTENT

‘Harmful content’ is a concept that is difficult to grasp. There is no uniform interpretation of this concept, and uniform legal definitions do not exist. Since ‘harmful content’ is a fluid concept which not only evolves continuously in time but

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\(^3\) ECJ, Dynamic Medien vs Avides Media AG, 14 February 2008, C-244/06, paras. 42 and 47; and ECtHR, Handyside vs the United Kingdom, 7 December 1976, Application No. 5493/72, para. 52.

\(^4\) ECtHR, Perrin vs the United Kingdom, 18 October 2005, Application No. 5446/03: ‘As to the applicant’s further argument that websites are rarely accessed by accident and normally have to be sought out by the user, the Court notes that the web page in respect of which the applicant was convicted was freely available to anyone surfing the internet and that, in any event, the material was, as pointed out by the Court of Appeal, the very type of material which might be sought out by young persons whom the national authorities were trying to protect’; and ECtHR, K.U. vs Finland, 2 December 2008, Application No. 2872/02 (concerning the State’s failure to take measures to protect child victims from being exposed as targets for paedophiliac approaches via the Internet).
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is also culture and country dependent, the adoption of strict legal definitions would not even be desirable. Courts, however, have confirmed that the ‘protection against harmful content’ is a legitimate interest on the basis of which national measures can be taken.6

Despite the fact that in the area of harmful content, references are often made to illegal content, it is crucial to differentiate between the two, as they require totally separate approaches. Contrary to illegal content, harmful content is content which is legal for adults to access, but which may harm vulnerable persons, such as children. Examples are sexual content, violent material, information promoting anorexia, drugs, suicide, misleading advertising and gambling. Given that the concept of harmful content covers such a wide array of content, it is not surprising that regulation in this field is challenging, especially in a digital or online media environment where borders or programming schedules are increasingly irrelevant.

2.2. HARMFUL MEDIA EFFECTS AND THE PRECAUTIONARY PRINCIPLE

Even though there is no consensus in social science literature on the exact effects of media, let alone on the effects of new media, most scholars seem to agree that exposure to with certain types of content may have a negative impact on a child’s development.7 It has been argued that although the risks children run in the new media landscape are often comparable to those found in the offline, linear media environment, new media possess certain characteristics which may have a significant impact on children’s media use and exposure to certain content. An important factor with respect to the issue of harmful content in new media is that of ‘context’. Whereas linear media, such as television or film, offer content within a context ‘that tells a story or establishes a framework of expectations that is recognised by and makes sense to the consumer’, non-linear technologies permit content to be seen out of context, for example short clips on YouTube, or images received via mobile phone.8

Millwood Hargrave and Livingstone have observed that, from research on children’s

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5 Handyside vs the United Kingdom, supra note 3, para. 48: ‘In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.’

6 Dynamic Medien vs Avides Media AG, supra note 3, paras. 42 and 47; and Handyside vs the United Kingdom, supra note 3, para. 52.


8 Millwood Hargrave, Andrea and Livingstone, Sonia, Harm and offence in media content: a review of the evidence, Intellect, Bristol, 2006, p. 205.
accidental exposure to pornographic images on the Internet, it can be deduced that ‘unexpected and decontextualised content can be particularly upsetting’. Other significant differences, which may have an impact on the effect of new media, include easy-to-access more extreme forms of content, the growing element of ‘choice’ and the lowered threshold for content production. This last difference makes it possible to, for instance, take pictures and disseminate them across the whole world by uploading them to the Internet.

One could wonder whether regulation is at all necessary if there is little conclusive scientific evidence that children’s development can be harmed by certain media content. Regulation imposes restrictions on certain behaviours or actors and, hence, there should be a compelling reason to regulate. However, with respect to delicate issues, such as the protection of children, the ‘precautionary principle’ should apply. Simply put, this concept, which finds its origins in environmental policy, embraces a ‘better safe than sorry’ approach. The precautionary principle compels society to act cautiously if there are certain – but not necessarily absolute – scientific indications of a potential danger and if not acting upon these indications could inflict harm. Based on this principle, the potential for harm might be considered a sufficient trigger for regulation in this area.

3. ALTERNATIVE REGULATORY INSTRUMENTS

3.1. POLICY HISTORY

At the European Union (EU) level, from the mid-1990s onwards, policymakers realised that legislation might not be the most suitable means to protect minors in the digital media environment. This realisation fitted in with a broader regulatory trend from centralised to decentralised forms of regulation. Over the past decades, the former type of regulation, also dubbed ‘command-and-control regulation,’ which entails that the State performs all regulatory tasks (creation, implementation and monitoring, and enforcement), increasingly displayed a number of shortcomings, especially in complex sectors such as the media sector. Such shortcomings were, for instance, the territoriality of traditional legislation, slow legislative processes, and a lack of expertise and involvement of knowledgeable actors. Hence, decentralised forms of regulation, which are much more open to the involvement of different actors in the regulatory process, grew in importance. It is this development which can also be credited with the growing enthusiasm for the use of ARIs, such as self- and co-regulation. This enthusiasm was reflected in numerous international, EU and Council

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9 Idem.
of Europe (CoE) policy documents within the framework of the ‘Better Regulation’ discourse.\textsuperscript{12}

In the media sector, and certainly with respect to the protection of minors against harmful new media content, the use of ARIs was put forward as being particularly appropriate early on. In a number of EU documents issued in 1996,\textsuperscript{13} practical instruments, such as parental control software, filtering technology and rating systems, and the use of self-regulation, for instance by means of codes of conduct, were proposed as measures that would provide the solution to concerns regarding the protection of minors. This trend peaked in 1998 with the adoption of the \textit{Recommendation on the protection of minors and human dignity}.\textsuperscript{14} From 2001 onwards, increasing emphasis was placed on the use of co-regulation,\textsuperscript{15} and in 2003, this instrument was judged to be more flexible, adaptable and effective than legislation, particularly with respect to the sensitive issue of protecting minors.\textsuperscript{16} Later, however, the focus shifted again, this time more towards awareness, information, media literacy and education.\textsuperscript{17} The same tendencies were noticeable in CoE documents.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{14} Council Recommendation 98/560/EC of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity, \textit{Of 1998/L 270/48}.
\item \textsuperscript{17} For instance European Parliament and Council, Decision No. 854/2005/EC of the European Parliament and of the Council establishing a multiannual Community programme on promoting safer use of the Internet and new online technologies, 11 May 2005, \textit{Of 2005/L 149/1}.
\item \textsuperscript{18} For instance: Council of Europe, \textit{Recommendation Rec(2001)8} on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), wcd.coe.int/; Council of Europe, Democracy, human rights and the rule of law in the Information Society, wcd.coe.int; Council of Europe, \textit{Recommendation CM/Rec(2009)5} on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment, wcd.coe.int.
\end{itemize}
3.2. CONCEPTUAL FRAMEWORK

Self- and co-regulation are the ARIs that are most often employed to protect minors against harmful digital media content. These instruments are closely linked, even to the extent that in certain instances it is very difficult to distinguish between them. However, in order to assess the level of protection of freedom of expression that these ARIs entail, it is important to gain a better insight into their inherent characteristics. Hence, in this section, this section will define these two ARIs, clarify the existing interpretations, and identify their assets and drawbacks.

Self-regulation means the creation, implementation and enforcement of rules by a group of (private) actors with no, or at least minimal, involvement of actors that do not belong to this group, such as the government. An example of self-regulation is a code of conduct drawn up by a number of industry actors, without government involvement. Here the code of conduct that was drawn up by a number of UK mobile phone operators in 2004 can be thought of.\(^{19}\) This ARI has a number of assets – certainly in comparison with traditional legislation – such as its flexibility, adaptability, higher degree of expertise and greater incentives for compliance because of, on the one hand, the actors’ involvement in the creation process, and, on the other hand, peer pressure. However, there are also a significant number of drawbacks. These drawbacks, such as a lack of effective enforcement, a low level of transparency, the fact that private interests are put before public interests, the unaccountability of private actors to the public, and, as a result, the inadequate protection of fundamental rights, are particularly problematic with regard to a delicate issue such as the protection of minors.

Co-regulation is a regulatory strategy which consists of elements of State regulation and elements of self-regulation.\(^{20}\) A possible co-regulatory construction, for instance, can entail that the State or government takes an initiative to set up an ARI or provides a legal basis to do so, and that private actors are responsible for the actual implementation. In most cases of co-regulation, a government safety net in case of failure of the self-regulatory elements is established. An often cited example of co-regulation is the Dutch cross-media classification system, Kijkwijzer, which aims to provide parents with age recommendations and information about the content of television programmes, movies shown in cinemas, DVDs, and mobile content.\(^{21}\) This

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\(^{20}\) Rand Europe, ‘Options for effectiveness of Internet self- and co-regulation – Inception report’, Study commissioned by the European Commission, ec.europa.eu/dgs/information_society/evaluation/data/pdf/studies/s2006_05/inception_final.pdf, p. 39: ‘The term co-regulation encompasses a range of different regulatory phenomena, which basically have in common the fact that the regulatory regime is made up of a complex interaction of general legislation and a self-regulatory body’.

system has a basis in the Dutch Media Act but the implementation is in the hands of a co-regulatory body (NICAM) to which content providers are affiliated. These content providers label their content on the basis of a standard questionnaire. The government monitors the functioning of the system and the Dutch Media Authority can regulate providers who are not affiliated to the co-regulatory body. Other examples of co-regulatory instruments can be found in Germany and Australia.  

Many interpretations of co-regulation exist, causing some confusion. In an attempt to remedy this confusion, a study commissioned by the European Commission and carried out by the Hans-Bredow-Institut and the European Media Law Institute developed a balanced framework which contains a definition: ‘a combination of non-State regulation and State regulation in such a way that a non-State regulatory system links up with State regulation.’ Moreover, a number of criteria were included in this framework that can be used to identify co-regulatory systems. This study emphasised that both sufficient incentives for the industry to participate and proportional deterrents to enforce regulation are indispensable to achieve a successful result. As a ‘middle road’ between command-and-control regulation and self-regulation, co-regulation combines the advantages of both these instruments, whileremedying their drawbacks. Co-regulation offers flexibility, fast adaptation, expertise and engagement of the industry, as well as legal certainty, democratic guarantees and more efficient enforcement. Hence, co-regulation is a more refined instrument, and one that has been argued to be especially suitable with respect to a delicate issue such as the protection of minors against harmful content in digital media.

The obvious differentiating factor between self- and co-regulation is the intensity of the level of government involvement in a given system. Objectively establishing the required level of government involvement for an instrument to be categorised as self- or co-regulation, however, is not feasible, since so many different nuances can be incorporated into ARIs which, incidentally, is one of the assets of the use of ARIs. Moreover, strict classifications of ARIs may simply be irrelevant. Instead, the various regulatory instruments can be situated along a ‘regulatory continuum’, differentiated by the actual involvement of different actors and the role they play in the different phases of the regulatory process: creation, implementation and enforcement. Far more important than strict classifications, is the compliance of these different ARIs with the legal framework within which they function. All too often, relevant

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legal provisions are not taken into account when creating and structuring ARIs. This, however, stands in stark contrast with the fact that the use of these ARIs does not occur in a legal vacuum.

4. ARIs AND THE LEGAL FRAMEWORK

The use of ARIs to protect minors against harmful content may raise a number of normative concerns – at the supranational as well as the national level – stemming from conventions, constitutions, laws, jurisprudence and soft law instruments. Areas where concerns can arise are, for instance, the protection of fundamental rights, such as freedom of expression, privacy and procedural guarantees, internal market regulation and competition rules. The compliance of ARIs with the fundamental right to freedom of expression will be examined below.

4.1. ARIs AND FUNDAMENTAL HUMAN RIGHTS

Fundamental or constitutional rights are the cornerstone of democratic legal systems. Thus, it is of the utmost importance that ARIs respect these rights. This is even more crucial in delicate matters, such as the protection of minors against harmful content, in which a balance needs to be found between various goals of public interest.

From the very beginnings of the fascination with the use of ARIs, warnings have been raised about the compatibility of using such systems with safeguarding certain fundamental rights. The delegation of regulatory power to non-State bodies where fundamental rights are – potentially – at stake has always been regarded with scepticism. In this context, it has been argued that the State should remain the primary guarantor of human rights. In the first documents broaching co-regulation, for instance, such as the White Paper on European Governance, the European Commission stressed that co-regulation was not to be used in cases where fundamental rights are called into question. The rationale behind this was, of course, the concern that private actors should not decide upon the scope of regulations which may restrict fundamental

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25 Prosser, loc.cit. (note 22), at p. 112.
26 See note 2.
27 O’Connell and Bryce refer to the necessity of ‘human rights proofing’ all key actions, decisions and technologies affecting the Information Society, O’Connell and Bryce, op.cit. (note 5), p. 86.
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rights. However, since the adoption of the White Paper in 2001, it has been argued that the unsuitability of the use of co-regulation in situations where fundamental rights are at stake should not be interpreted quite so strictly. Moreover, it has also been suggested that collaboration between the State, industry and civil society can safeguard certain fundamental rights in a more complete way. Hence, a mixture of concerns as well as opportunities regarding the interplay of ARIs and human rights can be discerned.

4.2. ARIs AND FREEDOM OF EXPRESSION

In democratic societies, any regulation of ‘communication’ needs to comply with the fundamental right to freedom of expression. Article 10 ECHR, the cornerstone of the right to freedom of expression at the European level, ensures the protection of this right and determines under which conditions this right may be restricted. This section will assess whether ARIs that are used to protect minors against harmful content can provide a sufficient level of protection of freedom of expression and which characteristics of the ARIs may play a role in this protection.

4.2.1. The right to freedom of expression

Article 10 ECHR stipulates that everyone has the ‘freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’. This article covers all means of dissemination of information, since any restriction imposed on the means necessarily interferes with the right to receive and impart information. Consequently, the Internet and any other existing

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31 Craufurd Smith, Rachael, ‘European Community media regulation in a converging environment’, in: Shuibhne, Niamh Nic (ed.), Regulating the internal market, Edward Elgar, Cheltenham, 2006, 105–143, at p. 135. In this context, Craufurd Smith also referred to Article 52 Charter of Fundamental Rights of the European Union which states that ‘[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms’ (Charter of Fundamental Rights of the European Union, OJ 2000/C 364/1).
33 Council of Europe, Pan-European forum (under heading ‘Harmful content’ and ‘Risk of harm’).
and future communication technology fall within the scope of applicability of Article 10 ECHR.\textsuperscript{36} Policy documents by various international and supranational organisations have pointed to the utmost importance of respecting the right to freedom of expression and, for that matter, all rights enshrined in the ECHR, in the information age, regardless of new technological developments.\textsuperscript{37} Governments have been obliged to ensure that ‘freedom of expression and information is fully respected with regard to Internet content with any restrictions not going beyond what is necessary in a democratic society’.\textsuperscript{38} In addition, the European Commission and the CoE have explicitly and repeatedly confirmed that the right to freedom of expression needs to be fully respected with due regard for the issue of harmful (Internet) content and the protection of minors.\textsuperscript{39}

The right to freedom of expression is, however, not an absolute right. Restrictions, that is ‘formalities, conditions, restrictions or penalties’,\textsuperscript{40} such as the seizure of published material, criminal sanctions,\textsuperscript{41} or labelling and filtering of content,\textsuperscript{42} can be allowed, but only if certain – strictly interpreted\textsuperscript{43} – conditions are fulfilled.\textsuperscript{44}


\textsuperscript{38} Council of Europe, Democracy, human rights and the rule of law in the Information Society, wcd.coe.int.


\textsuperscript{40} Idem.


\textsuperscript{42} Hans-Bredow-Institut and EMR, op.cit. (note 20), p. 149.


\textsuperscript{44} With respect to Internet content, see, for instance, Council of Europe, Recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters, wcd.coe.int/: ‘Aware that any intervention by member states that forbids
As such, interference with the right to freedom of expression by public authorities needs to be prescribed by law, must pursue a legitimate aim such as the protection of health or morals, and must be necessary in a democratic society. In order for this last criterion to be fulfilled, there needs to be a pressing social need and the measures must be proportional.45

Within this context, three important questions arise. First, does the fact that Article 10 ECHR targets interferences by ‘public authorities’ preclude the applicability of this article to the use of ARIs, that does not necessarily involve action by public authorities? Second, if Article 10 applies, are there particular difficulties with respect to the three conditions of Article 10(2) ECHR? Finally, are there specific issues related to the use of self-regulation and technology in the context of freedom of expression that policymakers need to take into account?

4.2.2. Interference by ‘Public Authorities’

The first issue regarding the relationship between the use of ARIs and Article 10 ECHR centres around the fact that this article deals with interferences with the right to freedom of expression by ‘public authorities’.46 A public authority has been interpreted as ‘any authority exercising public power and duties or being in the public service, such as courts, prosecutors’ offices, police, any law-enforcement body, intelligence services, central or local councils, government departments, army decision-making bodies, [or] public professional structures’.47 In the case of ARIs, the potential interference with the right to freedom of expression will often – depending on the structure of the ARIs in question – originate from a non-State (self- or co-regulatory) body. Hence, the question is whether Article 10 ECHR is at all applicable when restrictions are part of a self-regulatory or co-regulatory scheme.

The answer to this question depends on the actual level of government involvement in the scheme. If the restrictive measures do stem from a State actor or from an actor which can – according to the circumstances – be considered as a ‘public authority,’ for instance in a co-regulatory scheme, then the applicability of Article 10 ECHR will not...
be questioned.\footnote{See also Hans-Bredow-Institut and EMR, \textit{op.cit.} (note 20), p. 150.} In the case \textit{Casado Coca v. Spain}, for instance, the European Court of Human Rights (ECtHR) decided that the Barcelona Bar Council – a professional association – was, according to Spanish law, a public law corporation, that the purpose of the Bar Council served the public interest, and that the penalty imposed by the Bar Council had been upheld in national courts.\footnote{ECtHR, \textit{Casado Coca vs Spain}, 24 February 1994, Application No. 15450/89, para. 39. See also Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), \textit{op.cit.} (note 40), pp. 783–784.} Hence, the Court decided that the interference originated from a public authority and, consequently, Article 10 ECHR was considered applicable.\footnote{For instance \textit{Casado Coca vs Spain}, supra note 46, para. 39. See also Hans-Bredow-Institut and EMR, \textit{op.cit.} (note 20), p. 150.} However, a purely self-regulatory scheme or ‘soft’ co-regulatory scheme with a limited degree of government involvement may fail this test and, hence, may fall outside of the scope of Article 10 ECHR.

In light of the importance of the right to freedom of expression to what extent is the ECHR applicable to relations between private or non-State actors?\footnote{Clapham, Andrew, ‘The ‘Drittwirkung’ of the Convention’, in: Saint John MacDonald, Ronald, Matscher, Franz and Petzold, Herbert, \textit{The European system for the protection of human rights}, Martinus Nijhoff Publishers, Dordrecht, 1993, 163–206, at p. 163.} A hesitant answer can be found in the ‘horizontal effect’\footnote{Voorhoof, Dirk, \textit{Critical perspectives on the scope and interpretation of Article 10 of the European Convention on Human Rights} (Mass media files No. 10), Council of Europe Press, Strasbourg, 1995, pp. 59–60; and Voorhoof, Dirk, ‘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, 2007, www.leipzig-eu2007.de/en/downloads/dokumente.asp (on file with the author).} or \textit{Drittwirkung} theory.\footnote{Clapham describes the origin of the notion: ‘The word \textit{Drittwirkung} originates from a doctrinal debate in Germany and means ‘third-party effect’. It refers to the possible application of the German Basic Law in cases where both parties are private parties. The ‘third party’ refers to the party outside the classic individual / State relationship who is affected by the constitutional norm;’ Clapham, \textit{loc. cit.} (note 48), p. 165.} The ECtHR developed this theory, and has, in some instances, accepted that Article 10 ECHR can be invoked in horizontal relations, or in other words between individuals, particularly where a State has taken or neglected to take certain measures.\footnote{ECtHR, \textit{VGT Verein gegen Tierfabriken vs Switzerland}, 28 June 2001, Application No. 24699/94, para. 45; and EctHR, \textit{Bergens Tidende and others vs Norway}, 2 May 2000, Application No. 26132/95, paras 33 and 52. See also Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), \textit{op.cit.} (note 40), p. 784.} It is very difficult, however, to make general assumptions about the application of horizontal effect with respect to ARIs, since there is no consensus on its scope.\footnote{Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), \textit{op.cit.} (note 40), p. 28.} Moreover, the ECtHR has even explicitly stated that it does not wish ‘to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals inter se’.\footnote{\textit{VGT Verein gegen Tierfabriken vs Switzerland}, supra note 51, para. 46.}

Van Dijk \textit{et al.} distinguish two interpretations of the \textit{Drittwirkung} concept. The first interpretation implies that human rights provisions apply not only to
relations between private actors and public authorities, but to legal relations between private parties as well. A second view suggests that *Dríttwirkung* only entails that individuals can enforce human rights provisions against other individuals. Given that complaints directly aimed at an individual (instead of a State) cannot be brought before the ECtHR, at best, this second interpretation suggests an ‘indirect horizontal effect’ stemming from national law. Hence, if the rights included in the ECHR are recognised in a State’s national law as having direct effect, individuals can – between themselves – invoke these rights before national courts. If a decision in such a case is in conflict with the ECHR, the issue can then be brought before the ECtHR.

However, even if a State does not acknowledge the direct effect of the rights and freedoms included in the ECHR, the Court has, in certain cases, acknowledged that States nevertheless have a positive obligation to protect their citizens against violations of their fundamental rights by other citizens and can, furthermore, be held responsible for the lack of such protection. In the *Fuentes Bobo v. Spain* case, for instance, the Court acknowledged that ‘a positive obligation can rest with the authorities to protect the right to freedom of expression against infringements, even by private persons’. Furthermore, in *VGT Verein v. Switzerland*, the Court stated that ‘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’. Hence, the Court reasoned that:

> [...] in the instant case the Commercial Television Company and later the Federal Court in its decision of 20 August 1997, when examining the applicant association’s request to broadcast the commercial at issue, both relied on section 18 of the Swiss Federal Radio and Television Act, which prohibits ‘political advertising’. Domestic law, as interpreted in the last resort by the Federal Court, therefore made lawful the treatment of which the applicant association complained. In effect, political speech by the applicant association was prohibited. In the circumstances of the case, the Court finds that the responsibility of

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57 Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), *op.cit.* (note 40), p. 29.
58 Idem.
60 Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), *op.cit.* (note 40), p. 30.
63 *Fuentes Bobo vs Spain*, *supra* note 59. See also Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), *op.cit.* (note 40), pp. 784–785.
64 *VGT Verein gegen Tierfabriken vs Switzerland*, *supra* note 51, para. 45.
the respondent State within the meaning of Article 1 of the Convention for any resultant breach of Article 10 may be engaged on this basis.  

Furthermore, it has been argued that this positive obligation to secure the ECHR rights remains valid even when a State ‘outsources’ regulation, for instance to alternative regulatory bodies.  

Considering the complex and rather vague theory of ‘horizontal effect’ or Drittwirkung, it is possible that the ECtHR would not automatically assume that Article 10 ECHR is not applicable because a case concerns non-State bodies involved in self- or co-regulatory schemes. The Court will assess the applicability of Article 10 ECHR based on the exact circumstances of the case, and will, of course, pay particular attention to the level of government involvement and the classification of the body in question as a State or non-State body.

4.2.3. Restrictions on Freedom of Expression and Their Justification

Assuming that Article 10 ECHR is applicable, a further potential hurdle is found in its second paragraph. When an alternative regulatory system is devised to protect minors against harmful content, almost always the right to freedom of expression will be limited to a certain extent. It is possible that these measures will limit adult access to perfectly legal content. In any case the three conditions of Article 10(2) ECHR will need to be fulfilled.

The first condition, that is prescription by law, may not be met when a restriction is imposed on the basis of an alternative regulatory measure. Usually, this condition is assumed to be fulfilled when there is a written and public law adopted by a parliament. However, the ECtHR has accepted other forms of ‘law’, such as common-law rules or principles of international law, as satisfying the requirement. To qualify as ‘law’, the Court requires that the ‘legal’ basis for the interference is accessible and foreseeable. It provided further clarification in the Sunday Times v. the United Kingdom case:

Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate

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65 Ibidem, para. 47.
68 Macovei, op. cit. (note 44), p. 30. Macovei explained this further: ‘[f]reedom of expression is such an important value that its restriction should always receive the democratic legitimacy which is only given by the parliamentary debates and vote’ (p. 31).
69 ECtHR, Sunday Times vs the United Kingdom, 26 April 1979, Application No. 6538/74, para. 47; and ECtHR, Groppera Radio AG and others vs Switzerland, 28 March 1990, Application No. 10890/84, para. 68. See also Macovei, op. cit. (note 44), p. 30.
advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.70

Additionally, the Court has clarified in a number of cases that it is essential that the ‘law’ in question ‘afford[s] a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention’.71 In order to avoid arbitrariness, measures which interfere with the right to freedom of expression should adhere to a number of procedural guarantees.72 Hence, decisions of regulatory bodies need to be duly reasoned and open to judicial review and procedures need to be open and transparent.73 This is an element that should be taken into account when ARIs are structured.

With respect to self-regulatory instruments, but sometimes also with regard to co-regulatory systems, often no clear legal basis is available. In the case of Barthold vs Germany, the ECtHR again specified that an interference with a person’s freedom of expression ‘must have some basis in domestic law, which itself must be adequately accessible and be formulated with sufficient precision to enable the individual to regulate his conduct, if need be with appropriate advice’.74 This specific case is relevant to the use of ARIs since, in casu, the question was asked if the ‘Rules of Professional Conduct of the Hamburg Veterinary Surgeons’ Council’ could be considered as ‘prescribed by law’. The Court decided that although these rules did not emanate directly from parliament, but from the Veterinary Surgeons Council,

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70 Sunday Times vs the United Kingdom, supra note 67, para. 49.
72 It can be noted that the European Court of Human Rights has also pointed to the importance of certain ‘procedural guarantees’ (such as the fact that decision-making bodies need issue ‘informed decisions’, on the basis of an acceptable assessment of the facts) under the condition of ‘necessity in a democratic society’. See ECtHR, Steur vs the Netherlands, 28 October 2003, Application No. 39657/98; and ECtHR, Veraart vs the Netherlands, 20 November 2006, Application No. 10807/04.
73 Glas Nadezhda and Elenkov vs Bulgaria, supra note 69, paras 50–51; and Meltex Ltd and Mesrop Movsesyan vs Armenia, supra note 69, para. 81.
74 ECtHR, Barthold vs Germany, 28 March 1985, Application No. 8734/79, para. 45. See also ECtHR, Silver and others vs the United Kingdom, 25 March 1983, Application Nos. 947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; and 7136/75, paras. 85–88.
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[they are] nonetheless to be regarded as a ‘law’ within the meaning of article 10 para. 2 (art. 10–2) of the Convention. The competence of the Veterinary Surgeons’ Council in the sphere of professional conduct derives from the independent rule-making power that the veterinary profession – in company with other liberal professions – traditionally enjoys, by parliamentary delegation, in the Federal Republic of Germany [...].

Hence, it seems that, in certain circumstances, the Court accepts the delegation of a degree of ‘rule-making power’ to a non-State body, and acknowledges its decisions to have a ‘law-like’ status. However, in this specific case, the Court noted that the competence of the Council was ‘exercised by the Council under the control of the State, which in particular satisfies itself as to observance of national legislation, and the Council is obliged to submit its rules of professional conduct to the Land Government for approval [...]’. This statement demonstrates that the Court actually demands a substantial degree of government involvement: not only the control which the State retains over the Council, but also the required approval of the rules by the German Government, was evaluated positively by the Court. Nonetheless, purely self-regulatory measures, with no or a very limited degree of government involvement, cannot be accepted as being ‘prescribed by law’.

The second condition, that is the pursuance of a legitimate aim, will in the majority of cases not be a significant obstacle. The ECtHR has judged the protection of minors to be a legitimate aim under the umbrella of the ‘protection of morals’ or the ‘protection of the rights of others’.

The fulfilment of the third required condition, that is the necessity of the interference in a democratic society, is, especially with regard to the protection of minors against harmful content, the most delicate and, in the majority of cases the core of the Court’s assessment. The ECtHR will check whether there is a pressing social need for the interference, whether the interference is proportionate to the legitimate aim pursued and, whether the reasons for justification are relevant and sufficient. In each case, the Court will take the concrete circumstances into account when assessing whether the measures in question are suitable to attain the objective that is envisaged and do not go beyond what is necessary to achieve this objective. When ARIs are used to protect minors against harmful content, proportionality should thus be the guiding principle in the structuring of these systems. It is improbable that the Court

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75 Barthold vs Germany, supra note 72, para. 46.
76 Idem.
77 Handyside vs the United Kingdom, supra note 3, para. 52.
78 Sunday Times vs the United Kingdom, supra note 67, para. 62; and ECtHR, Observer and Guardian vs the United Kingdom, 26 November 1991, Application No. 13585/88, para. 57. See also Council of Europe, op.cit. (note 40), p. 9; Fenwick and Phillipson, op.cit. (note 33), p. 93 et seq.; and Van Dijk, Van Hoof, Van Rijn and Zwaak (eds), op.cit. (note 40), p. 775.
The use of Alternative Regulatory Instruments to Protect m inors in the d igital Era


will accept regulatory methods to protect children which prevent all adult access to content which is legal, but considered harmful to minors.\textsuperscript{79}

Across the Atlantic, courts have had various opportunities to assess legislative initiatives aiming to protect minors against Internet content which may be considered indecent or harmful to minors. For instance, the United States Congress passed the Communications Decency Act and the Child Online Protection Act.\textsuperscript{80} Several U.S. Court cases\textsuperscript{81} have demonstrated that it is very difficult to tailor a legislative mechanism in such a way that a balance is found between the governmental interest to protect children from harmful materials and a sufficient level of freedom of speech for adults. Elements such as the availability of less restrictive measures,\textsuperscript{82} for instance filtering mechanisms and the potential for a chilling effect,\textsuperscript{83} played an important role in the US Courts’ assessment of the proportionality of the measures that were taken. The latter element implies that if the measures are too restrictive or if certain liabilities or severe penalties are imposed,\textsuperscript{84} people will not be as forthcoming in expressing their thoughts and ideas as would be usual or natural.

4.3. FREEDOM OF EXPRESSION AND SELF-REGULATION

Self-regulation relies on private actors to initiate, create, implement and enforce measures aimed at achieving a goal of public interest. This is also the case when self-regulatory instruments are set up aiming to protect minors against harmful digital content. Private actors or intermediaries, such as Internet Service Providers (ISPs), mobile telephone providers, search engine operators or social network providers, play

\textsuperscript{79} For instance European Commission, Communication Illegal and harmful content on the Internet, op.cit. (note 12): ‘One general conclusion is that any regulatory action intended to protect minors should not take the form of an unconditional prohibition of using the Internet to distribute certain content that is available freely in other media.’


\textsuperscript{81} Reno vs American Civil Liberties Union, 521 U.S. 844 (1997); Ashcroft vs American Civil Liberties Union, 542 U.S. 656 (2004); and American Civil Liberties Union vs Mukasey, 534 F.3d 181 (C.A.3 (Pa.) 2008). For more information, see Barendt, op.cit. (note 32), pp. 458–461.

\textsuperscript{82} Kühling, Jürgen, ‘Fundamental rights’, in: Von Bogdandy, Armin and Bast, Jürgen (eds), Principles of European constitutional law, Hart Publishing, Oxford, 2006, -501–547, at p. 537 (‘no other means available which were equally efficient but less onerous’).


a far greater role in the new information and communication environment compared to the traditional media landscape, which was dominated by a much more limited number of (mostly) broadcasters and newspaper publishers. These private ‘new media’ actors are often indispensable points of access to the new communication technologies and, hence, as the CoE pointed out: ‘their role is a prerequisite for enabling and empowering users to access the benefits of the information society, in particular to seek and impart information and ideas, to create and to access knowledge and education’.\(^5\)

However, this also means that these private actors have the power to restrict access to the services they provide, for instance, by removing, filtering or blocking content. These restrictions carried out by private actors may thus have a significant impact on the right to freedom of expression.

Special mention can be made of search engine operators.\(^6\) It is impossible to imagine certain aspects of life today without search engines. Van Eijk argues that ‘[s]earch engines are becoming the most important gateway used to find content: research shows that the average user considers them to be the most important intermediary in their search for content’.\(^7\) Search engines can also play a role with respect to harmful content, not only because they provide access to such content,\(^8\) but also because they might restrict access to such content by eliminating such content from the search results.

One of the concerns that has frequently been voiced over the past decade is that restrictions on freedom to expression by private actors, for instance by means of filtering or blocking schemes, in fact amount to private censorship.\(^9\) As was mentioned above, according to Article 10 ECHR, States or ‘public authorities’ are prevented

\(^5\) 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)’, www.coe.int/t/informationsociety/documents/HRguidelines_ISP_en.pdf.


\(^8\) Schulz, loc. cit. (note 83), p. 81.

\(^9\) Noorlander, Peter, ‘Freedom of expression and Internet regulation’, in: Hardy, Christiane and Möller, Christian (eds), Spreading the Word on the Internet: 16 Answers to 4 Questions (Reflections
from interfering with the right to freedom of expression of their citizens if no serious justifications can be put forward. However, the applicability of Article 10 ECHR is not as straightforward with respect to private actors. Hence, if questionable actions by private actors do not fall within the remit of Article 10 ECHR, the protection of the right to freedom of expression may be compromised.

Schemes in which private actors carry the full responsibility for filtering, labelling or blocking content, for instance, to protect minors from harmful content, have therefore been regarded with scepticism. Private censorship, just like State censorship, cannot be tolerated. Distinguishing between what is illegal and what is harmful is a very difficult and delicate issue that should not be left to private companies. In this context, the CoE stated in its Human Rights Guidelines for Internet Service Providers that ISPs who provide access services, hosting, applications or content, should not be ‘expected to advise on what content or behaviours are illegal and/or harmful’. Furthermore, with respect to ISPs who offer hosting, applications or content, the CoE stressed that:

[j]n respect of filtering, blocking or removal of illegal content, you should do so only after a verification of the illegality of the content, for instance by contacting the competent law enforcement authorities. Acting without first checking and verifying may be considered as an interference with legal content and with the rights and freedoms of those creating, communicating and accessing such content, in particular the right to freedom of expression and information.

This statement is rather ambiguous. The theory that ISPs should take the utmost care in dealing with alleged illegal content – which can actually be illegal, but can also be ‘simply’ harmful – might in practice prove to be challenging. It is, for instance, not very clear what exactly is meant by ‘contacting the competent law enforcement authorities’. How far should ISPs go to achieve a satisfactory answer to the question whether certain content is illegal? In reality, only a court will be able to decide upon the legality or illegality of certain content. Furthermore, if we also look at the liability regime imposed by the EU Directive in Electronic Commerce, the issue only becomes

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93 Ibidem, para. 21.
more complicated, since this regime requires hosting providers who have an ‘actual knowledge of illegal content’ to block access to that content. This can potentially result in a ‘chilling effect’, as this regime may encourage ISPs to err on the side of caution by taking down content which is not illegal.

At the very least, private companies who are involved in schemes related to filtering and blocking harmful content, should employ transparent procedures and be very open about the criteria they use when deciding upon the potential harmfulness of content. Again, taking the CoE Guidelines into account, which specify that ISPs providing hosting, applications and content should ‘[m]ake sure that any filtering or blocking of services carried out is legitimate, proportional and transparent to [their] customers’. They should:

inform [their] customers of any filtering or blocking software installed on [their] servers that may lead to a removal or inaccessibility of content as well as the nature of filtering that takes place (form of filtering, general criteria used to filter, reasons for applying filters).

Given the dangers of private censorship, self-regulatory schemes in which only private actors are in control of evaluating and removing, filtering or blocking content are not the most appropriate method to protect minors from harmful content. Especially with respect to such a delicate normative goal, balanced co-regulatory schemes in which the government, and hence, the public interest, is represented to a greater extent, are more suitable. The proportionality and transparency of measures, and the accountability of the actors that are involved should be key principles.

4.4. FREEDOM OF EXPRESSION AND TECHNOLOGY

Further issues may arise with respect to the use of technology. In the early policy documents related to Internet content emphasis was often put on technology to deal

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95 Article 14 Directive on Electronic Commerce.
96 Also McIntyre and Scott, loc.cit. (note 87), p. 122.
98 It should be noted that awareness of the importance of complying with such guarantees, especially when fundamental rights are at stake, does exist, also within the industry. See, for example, the ‘Global Network Initiative’, a multi-stakeholder group of companies, civil society organizations (including human rights and press freedom groups), investors and academics, that has drafted a number of principles and implementation guidelines on making sure that the rights to freedom of expression and privacy are respected within the ICT sector. For more information, see Global Network Initiative, ‘Core commitments’, www.globalnetworkinitiative.org/index.php.
100 Idem.
101 Without overlooking, of course, the requirements of Article 10(2) ECHR with respect to restrictions imposed on the freedom of expression by public authorities.
with the growing concerns regarding minors and harmful content. Filtering tools, for instance, for online and mobile content, and ‘child lock’ systems applicable to digital television content, were promoted from the outset of the digital era, and have frequently been hailed as the answer to all fears regarding children and potentially damaging images and information. It is thus not surprising that such tools are often an element of alternative regulatory strategies. However, at the same time, these tools can pose a threat to the protection of right to freedom of expression, for adults as well as children, as they limit access to certain types of content. This is especially the case with respect to filtering tools. As the CoE put it:

"[T]he voluntary and responsible use of Internet filters (products, systems and measures to block or filter Internet content) can promote confidence and security on the Internet for users, in particular children and young people." However, "the use of such filters can impact on the right to freedom of expression and information, as protected by Article 10 of the European Convention on Human Rights."

One issue concerning filtering, which is linked with the previous section regarding private censorship, relates to the filtering process: who is in control of this process, and which criteria are used? In order to uphold a high level of freedom of expression, a number of things are necessary. Firstly, the user (parent or child) must know that content is being filtered. Secondly, the organisation in charge of the filtering (for instance, a private company) must use transparent methods to filter content. Thirdly, the criteria used to classify content as harmful must be made public to the user. Finally there must be a procedure that allows wrongfully filtered content to be accessed. If these requirements are not respected, there is a real threat of arbitrary censorship.

Another issue is that filters have often been found to be over- or under-inclusive. McIntyre and Scott note in this respect that since filters are applied automatically, without human intervention, ‘[t]here is no scope for argument, no exercise of discretion and (depending on the code) all users are treated alike’. They argue that

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103 Council of Europe, Recommendation CM/Rec(2008)6 on Internet filters.


this leads to a disproportional 'all or nothing approach.' Thus, for instance, an entire website is blocked because of offending material on one page, or, all information related to 'breasts', including valuable information about 'breast cancer' is blocked.\textsuperscript{108} Such an approach may pose legitimacy and proportionality problems, since conduct is inhibited 'beyond what was intended',\textsuperscript{109} and, moreover, has a significant impact, not only on the freedom of expression of adults but also on the freedom of expression of the child. In this context, the CoE recently encouraged Member States to cooperate with the private sector and civil society in order to create 'intelligent filters' that 'take more account of the context in which the information is provided,(for example by differentiating between harmful content itself and unproblematic references to it, such as may be found on scientific websites)'.\textsuperscript{110} If, on the other hand, filters are under-inclusive, they do not function effectively and will not achieve their goal, that is ensuring that children are not confronted with harmful material.

Yet another issue is that in addition to protecting minors, the freedom of expression of adults needs to be respected as well. This raises questions as to who should choose to use a filtering system with respect to harmful content,\textsuperscript{111} and at what level such a system should operate. In order to safeguard the right to freedom of expression, users should be allowed to apply filters on a voluntary basis,\textsuperscript{112} since filtering interferes to a significant extent with the free flow of content. Setting up filtering systems aimed at harmful content at the server level, with no choice for the user to apply this filter, is unacceptable. Instead, filters should be operated at the user level. However, if they are set up at the server level, users should be able to decide freely whether they want to apply them and should have the option to configure the filters to their preferences. Governments should inform about, rather than mandate and enforce, the use of filters aimed at harmful content.\textsuperscript{113} Any use of filtering systems by public authorities, or

\textsuperscript{108} Idem.

\textsuperscript{109} McIntyre and Scott, \textit{loc.cit.} (note 87), p. 117.


\textsuperscript{111} It is useful to note that, according to the Council of Europe, nationwide filtering measures could be allowed for \textit{illegal} content (child pornography might be an example), if certain conditions are fulfilled. Not only should such measures comply with Article 10(2) ECHR, but they should also concern specific and clearly identifiable content, a competent national authority should have taken a decision on the illegality of the content, and the decision can be reviewed by an independent and impartial tribunal or regulatory body. See Council of Europe, Recommendation CM/Rec(2008)6 on Internet filters, Appendix to Recommendation CM/Rec (2008) 6, Guidelines.

\textsuperscript{112} See also The OSCE and Reporters sans Frontières, Joint declaration on guaranteeing media freedom on the Internet, \url{www.osce.org/node/15657}; Council of Europe, Recommendation Rec(2001)8 on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services), \url{wcd.coe.int/}; and UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint declaration: International mechanisms for promoting freedom of expression, \url{www.article19.org/pdfs/igo-documents/three-mandates-dec-2005.pdf}, pp. 1–2.

self- or co-regulatory bodies with a similar status, must adhere to Article 10(2) ECHR. In other words, the use of these filtering systems will need to be prescribed by law, have a legitimate aim, and be necessary in a democratic society, and thus proportional. To be sure, the incorporation of technology into an alternative regulatory mechanism to protect minors against harmful material can be very valuable and can empower users, provided that the technological tool in question is transparent, effective, proportional and legitimate.\textsuperscript{114}

5. **CONCLUDING REMARKS**

The starting point of this article was the proposition that ARIs – conceptualised as an alternative to traditional legislation – do not function within a legal vacuum. On the contrary, the use of such instruments, such as self- and co-regulation, should comply with the broader legal framework.\textsuperscript{115} In particular, these measures should respect a number of fundamental rights. The article focused on the right to freedom of expression against the background of the protection of minors against harmful digital content, and examined, on the one hand, the applicability of Article 10 ECHR to ARIs, and, on the other hand, the issues that may arise both with respect to the involvement of private actors and the incorporation of technological tools in ARIs.

The applicability of Article 10 ECHR, and hence the protection of the fundamental right to freedom of expression that this article guarantees, will depend on the actual level of government involvement in a specific ARI. This means that Article 10 will be more likely to apply when there is a certain degree of government involvement, as is common with respect to co-regulatory systems. Conversely, purely self-regulatory systems may fall outside of the protection of the legal framework, except, for instance, when theories such as the ‘horizontal effect’ theory can be applied. With regard to issues touching on important human rights such as the protection of minors in digital media, this should be avoided.\textsuperscript{116} Hence, to protect minors from exposure to harmful digital content, the use of co-regulatory systems, where there is an actual symbiosis between the involvement of the government and other actors, and where greater guarantees are provided as to the accountability of actors and the actual realisation of the policy objective is preferable. Policymakers must adopt a multi-stakeholder approach in which all responsible actors (governments, industry, parents and


\textsuperscript{115} However, it should be noted that although the broader legal framework needs to be taken into account when ARIs are set up, this should not lead to the adoption of inflexible or rigid instruments. It would not make sense to force the use of ARIs into a straightjacket similar to legislation.

\textsuperscript{116} This finding can also be framed within the current general ‘malaise’ with respect to self-regulation or regulation by the market or the sector (see for instance, the financial crisis). As a consequence, in different sectors, the calls for a renewed and more intense involvement of the government have recently grown louder.
educators) cooperate and take up their responsibilities, possibly supplemented with technology and empowerment mechanisms such as media literacy and education.

Furthermore, ARIs should be carefully structured, taking the competing interests into consideration. When restricting access to potentially harmful content to protect children, policymakers must engage in a complex balancing exercise to safeguard an adequate level of protection of freedom of expression for adults, who may legitimately access this kind of content. In this context, proportionality is of the utmost importance. This general legislative principle should be the guiding principle when ARIs are established: the measures in question should be suitable to attain the objective that is envisaged and should not go beyond what is necessary to achieve this objective. Such an *ex ante* evaluation could be of use in any sector where the use of ARIs is contemplated.