

A freedom of expression perspective on AI in the media – with a special focus on editorial decision making on social media platforms and in the news media

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Abstract

AI-driven tools play an increasingly important role in the media: from smart tools that assist journalists in producing their stories to the fully automated production of news stories (robot journalism), from audience analytics that inform editorial decisions to AI-driven news recommendations. As such, AI-driven tools are more than simple tools. Within newsrooms, AI-driven tools exemplify potentially far-reaching structural changes in internal routines and divisions of responsibility between humans and machines. Within European media markets, the introduction of AI-driven tools brings with it substantial structural shifts and transformations of power. And from the perspective of users and society, AI-driven tools could result in new, smarter and more responsive ways of informing the public, but when applied wrongly, also have potentially a detrimental effect on the public sphere, on pluralism, privacy, autonomy and equal chances to communicate.

The right to freedom of expression in Article 10 ECHR is an important basis to inform law and policy makers on possible approaches to regulating AI in the media (including the European Commission's ambitious plans for regulating AI), but can also more broadly inform our thinking about the potential and threats from AI for the realisation of freedom of expression, and the role of the media in that context. After an introduction to some of the recent developments around AI and algorithms in the news media, we will highlight some of the most pressing freedom of expression implications stemming from AI-driven tools in the news media. We will also show that the protection afforded under Article 10 ECHR comes with specific duties and responsibilities for the news media and reflect on the question of how to deal with AI-driven tools in a way that is compatible with fundamental rights and freedoms. Finally, we will explain that, while the introduction of AI-driven tools can create new opportunities for users to exercise their freedom of expression rights, the

application of automated filtering and sorting can also result in new digital inequalities and unequal opportunities of access to information.

Keywords: Freedom of Expression; Artificial Intelligence; media; platforms; editorial responsibility

1 Introduction

“The power of speech is what distinguishes us from other animals and from any machines yet invented. If we cannot express our thoughts and feelings, we can never realise our full humanity.”¹ This quote from historian Timothy Garton Ash captures well the central role of freedom of speech for our democratic society and us as individual citizens. As a central tenet of democratic societies, free speech is powerfully protected as a fundamental right. According to Article 10 ECHR, “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” The fundamental right to freedom of expression is also central to – even constitutive for – the task of the media in our democratic society. The media – old and new – have an important role, grounded in Article 10 ECHR, as sources of information and platforms for public deliberation, and in acting as a critical watchdog of the powers that rule a society. Technology, again, plays an important role in shaping the way the media exercise their democratic role and responsibility.² The right to freedom of expression is central to informing our thinking about the potential of and threats from AI for the role of the news media in a digital society.³

AI and its impact on society and public values is attracting considerable attention from regulators and law makers in Europe and around the world. A plethora of institutions, – public, private or a combination of both – are currently drafting ethical and legal standards for the responsible use of AI in a range of sectors, from medicine to education and public service. In its AI White Paper, the European Commission left no doubt that one of its key priorities in the years to come is to ensure that “European AI is grounded in our values and

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¹ Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (Atlantic Books Ltd 2016) 119.

² Jack M Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation’ (2017) 51 U.C. Davis Law Review <https://lawreview.law.ucdavis.edu/issues/51/3/Essays/51-3_Balkin.pdf>; John Pavlik, ‘The Impact of Technology on Journalism’ (2000) 1 Journalism Studies 229.

³ Note that the European Court of Justice requires Article 11 of the European Charter to be interpreted consistently with ECtHR case-law, as long as this does not undermine the autonomy of EU law. Moreover, because EU law on the fundamental freedoms under the charter is still relatively underdeveloped, the ECtHR case law and CoE standards give important normative guidance on the factors that should be taken into account in developing EU law on AI.

fundamental rights....”⁴, and also the European Commission’s initiatives to reforming the regulation of internet intermediaries, including search engines and social media platforms, are characterised by a clear commitment to fundamental rights.⁵ One of the fundamental rights that has received comparatively less attention on the European AI regulatory agenda so far is the right to freedom of expression.⁶ Though referred to frequently in the Commission’s draft proposal and also emphasised by the European Parliament in its resolution on the fundamental rights issues posed by the Digital Services Act, those references are often rather generic, and mostly framed in terms of the freedom of expression implications of automated content moderation on large social media platforms (and the issue of political micro targeting that, however, is not subject to this contribution).⁷

The goal of this article is threefold. It aims to contribute to the development of a more comprehensive understanding of AI’s implications for the realisation of the right to freedom of expression by providing some background to the way Article 10 ECHR has been conceptualised, and applied by the European Court of Human Rights to the use of AI in the media (and as such also informs the interpretation of the Charter of Fundamental Rights of the European Union). This would include providing a better understanding of both the potential threats as well as opportunities stemming from the use of AI-driven tools in the media. The analysis will show that the use of new technologies to advance the functioning of the media can be an important element for the protection under Article 10 ECHR. Secondly, while much of the current focus on the freedom of expression implications of the use of AI in the media has centred around a few core social media platforms, the article will make the argument that AI-driven tools are also increasingly being used by the news media, and that the way the news media uses AI also deserves attention from a freedom of expression perspective. In so doing, the article will focus on two particularly widespread applications of AI so far for both social media platforms and the news media, namely AI-driven recommendations and content moderation, and compare the Article 10 ECHR implications. The third goal is to draw attention to the rich case law of the European Court of Human Rights in Art 10 ECHR cases as well as the relevant recommendations of the Council of Europe (CoE) that further concretise the courts’ interpretation and should

⁴ ‘White Paper On Artificial Intelligence - A European Approach to Excellence and Trust’ (European Commission 2020) COM(2020) 65 final <https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf>.

⁵ ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2003/31/EC’ (European Commission 2020a) COM(2020)825 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>>; ‘Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)’ (European Commission 2020b) COM(2020)842 final <<https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608116887159&uri=COM%3A2020%3A842%3AFIN>>

⁶ ‘Mapping Regulatory Proposals for Artificial Intelligence in Europe’ (Access Now 2018) <https://www.accessnow.org/cms/assets/uploads/2018/11/mapping_regulatory_proposals_for_AI_in_EU.pdf> accessed 10 February 2020.

⁷ ‘Digital Services Act and fundamental rights issues posed’ (European Parliament 2020) P9_TA(2020)0274 <https://www.europarl.europa.eu/doceo/document/A-9-2020-0172_EN.html>

inform ongoing initiatives to regulate the use of AI in the media at the level of the Member States of the Council of Europe, as well as the European Union. In so doing, the article reports the findings of a study that tapped into the CoE's long experience of reflecting on the fundamental rights implications of digital technology for the news media, and issuing guidance to the Member States – guidance that has shaped media laws in Europe for decades.⁸ The CoE's rich experience of Article 10 ECHR can be useful to – and inform and broaden – the debate on creating a regulatory framework for AI in Brussels.

After an introduction to recent developments around AI and algorithms in the media, we will highlight some of the – in our view – most urgent freedom of expression implications for two central AI-driven tools for both social media platforms and the news media: recommendations and content moderation. We will also show that the protection afforded under Article 10 ECHR comes with specific duties and responsibilities for both the news media and social media platforms, and reflect on some of the differences in the way the ECHR and the CoE have treated both so far. In the next step, we will zoom out and ascertain possible lessons to be learned for dealing with the growing competition between news media and social media platforms, and the need to protect and promote diverse news media markets and equal opportunities of access to information. The article concludes with some reflections on possible policy implications and lessons learned for the European AI regulatory agenda.

2 Journalism, democracy and freedom of the news media

AI plays an increasingly important role in European media.⁹ In the context of the media, AI is defined broadly as “computer systems able to perform tasks normally requiring human intelligence”.¹⁰ More specifically, AI-driven tools “display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals”.¹¹ In the context of media and journalism, two aspects are of particular interest for our analysis, because they have potential for conflict: the degree of autonomy, and the goals AI-driven tools are being optimised for. The degree of autonomy potentially distinguishes AI from other forms of automation: whereas automation does not go beyond predefined rules, AI can learn from such rules and develop its actions accordingly. For

⁸ Natali Helberger, Sarah Eskens, Max van Druenen, Mariella Bastiaan and Judith Moeller, 'Implications of AI-Driven Tools in the Media for Freedom of Expression' (Council of Europe 2020).

⁹ Charlie Beckett, 'New Powers, New Responsibilities. A Global Survey of Journalism and Artificial Intelligence' (LSE 2019) <<https://blogs.lse.ac.uk/polis/2019/11/18/new-powers-new-responsibilities/>>; Nic Newman and others, 'Reuters Institute Digital News Report 2018' (Reuters Institute for the Study of Journalism 2018).

¹⁰ Nicholas Diakopoulos, *Automating the News: How Algorithms Are Rewriting the Media* (Harvard University Press 2019) 16; M Hansen and others, *Artificial Intelligence: Practice and Implications for Journalism* (Tow Center for Digital Journalism, Columbia University 2017) <<https://doi.org/10.7916/D8X92PRD>>; Beckett (n 7).

¹¹ 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Artificial Intelligence for Europe' (European Commission 2018) COM(2018) 237 final.

example, AI-driven tools are able to individualise their procedures by adapting to individual user preferences based on data. These learning procedures are usually based on machine learning or deep learning algorithms. Regarding the goals, AI-driven tools are never neutral but are optimised to achieve particular goals.¹² AI-driven news recommendation tools, for example, can be optimised for short-term goals, such as clicks and time spent on a website, or to realise other values, such as exposing users to a particularly rich and diverse news selection. The way AI-driven tools are optimised for particular goals can at times conflict with the realisation of other goals, including freedom of expression interests.¹³

Research into the implementation of AI in the news sector and its impact on media systems remains limited – existing studies generally focus on very specific applications or case studies, use the media as a subordinate theme in a more general analysis of the impact of AI, or assess the journalistic use of AI on a global level without relating the results back to single countries or world regions.¹⁴ The fragmented picture revealed by research indicates that significant differences remain between countries and single news media organisations on the extent of integration with AI and the approaches used.¹⁵

Nevertheless, broadly speaking there are three levels on which AI can be used in the journalistic sphere. First, AI is used to support journalists in research and content production. This includes AI for advanced forms of data analysis for investigative journalism, as well as more routine support such as fact-checking, translation, and transcription tools.¹⁶ Secondly, AI in journalism can be used to (fully or in parts) automate news production. Referred to as software-generated news, automated journalism or robot journalism, the production of journalistic pieces by AI is a growing phenomenon, especially

¹² Seda Gürses and Joris van Hoboken, 'Privacy after the Agile Turn' in Evan Selinger, Jules Polonetsky and Omer Tene (eds), *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018) <<https://www.cambridge.org/core/books/cambridge-handbook-of-consumer-privacy/privacy-after-the-agile-turn/95580B93B4B2446DC5B59166FD2A732F>> accessed 8 December 2020.

¹³ Natali Helberger, 'On the Democratic Role of News Recommenders' (2019) 7 *Digital Journalism* 993.

¹⁴ Beckett (n 7).

¹⁵ Hilde Van den Bulck and Hallvard Moe, 'Public Service Media, Universality and Personalisation through Algorithms: Mapping Strategies and Exploring Dilemmas' (2017) 40 *Media, Culture & Society* 875; Balázs Bodó, 'Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media' (2019) 7 *Digital Journalism* 1054; Mariella Bastian and others, 'Explanations of News Personalisation across Countries and Media Types' (2020) 9 *Internet Policy Review* <<https://policyreview.info/articles/analysis/explanations-news-personalisation-across-countries-and-media-types>>.

¹⁶ Tom George, 'Newsrooms Must Learn How to Use AI: "Trust in Journalism Is at Stake"' (*Journalism*, 12 December 2018) <<https://www.journalism.co.uk/news/lessons-learned-in-the-last-four-years-of-using-artificial-intelligence-at-the-associated-press/s2/a731760/>>; Mark Coddington, 'Clarifying Journalism's Quantitative Turn: A Typology for Evaluating Data Journalism, Computational Journalism, and Computer-Assisted Reporting' (2015) 3 *Digital Journalism* 331.

in specific thematic areas such as finance or sports.¹⁷ Thirdly, AI-driven tools can be used to change the ways in which news media organisations distribute their content. Instead of – or nowadays rather in addition to – delivering the same stories to every single person, more and more news media organisations offer a set of stories individually tailored to each single user.¹⁸ Such news personalisation can, for example, be used for newsletters, in apps or in website areas where users can log in.

News media organisations introduce AI-driven tools not only for economic reasons (adapting to general technological and market developments, increasing efficiency and output, establishing closer ties with a more engaged audience), but also to further their editorial mission (such as distributing more diverse content and/or strengthening quality journalism by redistributing resources).¹⁹ Addressing such editorial issues in the context of AI-driven tools is often a double-edged sword, however, as embedding editorial values and judgment in AI is a difficult task. Automated journalism's relatively high level of integration in sports and finance news is driven by the high amount of structured source data and the factual nature of reporting in this area – problems regarding data access, the employee skills required, and its limited capabilities for sophisticated editorial analysis hamper more widespread adoption.²⁰ Similarly, although recommender systems can deliver a more diverse news selection than human editors, fully ensuring AI's output lines up with a media organisation's editorial mission requires the editorial department to reassess the type of diversity it aims to promote, and to collaborate with engineers on how this can be integrated in the AI-driven recommender it uses.²¹ The introduction of AI-driven tools therefore also leads to new requirements for journalists' training and roles. Thus the introduction of AI-driven tools and digital technologies has an impact on working routines, journalistic output, ethics and media policy, but also on other dynamics affecting the newsroom, including the creation of new roles and positions in news media organisations, and reciprocal influence and cooperation between different professional groups.²²

¹⁷ M Carlson, 'The Robotic Reporter: Automated Journalism and the Redefinition of Labor, Compositional Forms, and Journalistic Authority' (2015) 3 *Digital Journalism* 416.

¹⁸ Bodó (n 13).

¹⁹ Beckett (n 7); Stefanie Sirén-Heikel and others, 'Unboxing News Automation: Exploring Imagined Affordances of Automation in News Journalism' (2019) 1 *Nordic Journal of Media Studies* 47, 47.

²⁰ Sirén-Heikel and others (n 17).

²¹ Judith Möller and others, 'Do Not Blame It on the Algorithm: An Empirical Assessment of Multiple Recommender Systems and Their Impact on Content Diversity' (2018) 21 *Information, Communication & Society* 959; Helberger (n 11).

²² Jannick Kirk Sørensen and Jonathon Hutchinson, 'Algorithms and Public Service Media', *RIFE@ 2016* (2018); Balázs Bodó and others, 'Interested in Diversity: The Role of User Attitudes, Algorithmic Feedback Loops, and Policy in News Personalization' (2019) 7 *Digital Journalism* 206; Sylvain Malcorps, 'News Website Personalisation: The Co-Creation of Content, Audiences and Services by Online Journalists and Marketers' (2019) 16 *Journal of Media Business Studies* 230; Mariella Bastian, Mykola Makhortykh and Tom Dobber, 'News Personalization for Peace: How Algorithmic Recommendations Can Impact Conflict Coverage' (2019) 30 *International Journal of Conflict Management* 309.

AI-driven tools can be used by actors *other* than traditional news media, such as social media platforms. According to findings from the Reuters Institute for 2018, “two-thirds of online news users surveyed across 37 different markets worldwide identified distributed forms of discovery as their main way of accessing and finding news online”, with searches and social media being by far the most influential.²³ Social media platforms’ ability to make the vast amount of content on their services into an accessible and attractive service requires them to selectively manage the visibility of this content.²⁴ They increasingly rely on AI-driven content moderation and distribution tools to achieve this. In the context of content moderation, AI is used to make judgments on what content to remove, either by matching known illegal content, or by predicting whether content should be removed on the basis of training data consisting of known violative content. In both cases, AI’s current inability to detect contextual nuances that distinguish known unlawful content from lawful content is a key concern.²⁵ Conversely, in the context of AI-driven distribution, AI is used not to decide what should be removed, but what should be made visible to users. In this way, social media platforms perform tasks which are similar to editorial tasks in journalistic newsrooms. The limited research available, however, indicates stark differences between the editorial values often referred to in journalistic contexts and the commercial and engagement-oriented values that drive distribution on social media platforms.²⁶

There is a complex interplay between the various ways in which AI is used to automate editorial decision-making, and the various parties that use AI to do so. AI-driven personalised distribution can, for example, limit the visibility of journalistic pieces which have been created using AI-driven tools or distribute the large volume of news that can be automatically generated to a highly segmented audience. Similarly, social media platforms’ use of AI challenges traditional business models of the news sector, and forces news media organisations to adapt their concepts and routines to their audiences’ changing news consumption patterns by considering whether, and if so in what ways, to distribute their own content through these additional channels. In addition to such strategic concerns, algorithmic filtering impacts journalism’s relationship not only with the stakeholders with whom they interact on social media platforms, including their audiences, but also with sources, other journalists and politicians.²⁷

²³ Newman and others (n 7).

²⁴ Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018).

²⁵ Robert Gorwa, Reuben Binns and Christian Katzenbach, ‘Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance’ (2020) 7 *Big Data & Society* <<https://doi.org/10.1177/2053951719897945>> accessed 29 November 2020; Reuben Binns and others, ‘Like Trainer, Like Bot? Inheritance of Bias in Algorithmic Content Moderation’ in Giovanni Luca Ciampaglia, Afra Mashhadi and Taha Yasseri (eds), *Social Informatics* (Springer International Publishing 2017).

²⁶ Michael A DeVito, ‘From Editors to Algorithms’ (2017) 5 *Digital Journalism* 753.

²⁷ E Bell, ‘The Dependent Press. How Silicon Vallue Threatens Independent Journalism’ in M Moore and Damian Tambini (eds), *Digital Dominance. The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018); Gerret von Nordheim, Karin Boczek and Lars Koppers, ‘Sourcing the

3 Freedom of Expression and AI

The news media have a special role in the realisation of European freedom of expression principles and values. The ECtHR has repeatedly confirmed the democratic role of the news media as a ‘purveyor of information’, a public watchdog²⁸ and a creator of forums for public debate.²⁹ These roles as recognised in legal doctrine correspond to the functions of news media proposed by journalism studies (see Section 2).

In Europe, the fundamental right of freedom of expression is guaranteed most importantly by Article 10, paragraph 1, of the ECHR.³⁰ The scope of the rights protected by Article 10 is wide. The ECtHR has established that Article 10 ‘protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed’.³¹ In addition to the content and form of communication, Article 10 ECHR applies to the means of dissemination or reception of communication, ‘since any restriction imposed on the means necessarily interferes with the right to receive and impart information’.³² Therefore, neither national nor supranational courts or regulatory authorities may tell journalists and media organisations what reporting techniques they should use.³³ Journalists, news media, social media, search engines, and other media actors are thus in principle free and protected to use AI for the production and distribution of content, as long as doing so does not conflict with the enjoyment of fundamental rights by others. The ECtHR has repeatedly confirmed that Article 10 ECHR ‘guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed’.³⁴ The Court has also emphasised the importance of the internet and social media platforms for the exercise of these rights, as they provide “essential tools for participation in activities and discussions concerning political issues and issues of general interest”.³⁵ The Court has thus held that interference with the exercise of freedom of expression on social media platforms could restrict the right to freedom of expression of the individuals that use these services as well

Sources’ [2018] Digital Journalism

<<https://www.tandfonline.com/doi/abs/10.1080/21670811.2018.1490658>> accessed 29 January 2020; Logan Molyneux and Rachel R Mourão, ‘Political Journalists’ Normalization of Twitter’ (2019) 20 Journalism Studies 248.

²⁸ *Barthold v Germany* [1985] ECtHR 8734/79 [58].

²⁹ *Társaság a Szabadságjogokért v Hungary* [2009] ECtHR 37374/05 [27].

³⁰ This provision provides that ‘[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’.

³¹ *Oberschlick v Austria* [1991] ECtHR 11662/85 [57].

³² *Autronic AG v Switzerland* [1990] ECtHR 12726/87 [47].

³³ *Schweizerische Radio- und Fernsehgesellschaft SRG v Switzerland* [2012] ECtHR 34124/06 [64].

³⁴ Sarah Eskens, Natali Helberger and Judith Moeller, ‘Challenged by News Personalisation: Five Perspectives on the Right to Receive Information’ (2017) 9 Journal of Media Law 259; *Sunday Times v United Kingdom (No 1)* [1979] ECtHR 6538/74 [66].

³⁵ *Ahmet Yildirim v Turkey* [2012] ECtHR 3111/10 [54].

as the news organisations that provide content for the social media platforms.³⁶ In other words, the exercise of freedom of expression rights by one party can not only align with but also create tensions with another party's freedom of expression interests or other fundamental rights. For example, AI-driven recommendations can be used to provide users with personalised recommendations, but they will often be based on the collection of data about users' reading behaviour, and as such could also create chilling effects and adversely affect users' freedom of expression interests and right to privacy.³⁷

Because of the way the exercise of freedom of expression can affect the rights of others and society as a whole, not only does Article 10 ECHR confer a right, the exercise of the right to freedom of expression can also "carr[y] with it duties and responsibilities", making it something of an outlier among the Convention rights. These duties and responsibilities apply to whomever exercises their freedom of expression. The Court has further emphasised the duties and responsibilities of a number of specific professions, including the media.³⁸ In this context the Court has highlighted that, while freedom of expression affords journalists wide protection, it "is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism".³⁹ The scope of these responsibilities depends on the situation as well as the technical means used to exercise influence under freedom of expression by the media.⁴⁰

The Court has not yet had an opportunity to judge whether social media platforms also bear duties and responsibilities under Article 10 ECHR. However, the Court has held in *Tamiz* that social media platforms have freedom of expression rights that are separate from their users.⁴¹ The notion of duties and responsibilities is moreover inherent in Article 10 ECHR generally, and the Court has been willing to adapt its case law on the duties and responsibilities of the media to other parties acting in a similar fashion, such as social watchdogs.⁴² The pertinent question may therefore be not whether social media platforms

³⁶ *Cengiz and Others v Turkey* [2015] ECtHR 48226/10 and 14027/11 [52]; *Neij and Sunde v Sweden* [2013] ECtHR 40397/12 10; *Payam Tamiz v United Kingdom* [2017] ECtHR 3877/14 [87].

³⁷ Sarah Eskens, 'A Right to Reset Your User Profile and More: GDPR-Rights for Personalized News Consumers' (2019) 9 International Data Privacy Law 153; JW Penney, 'Internet Surveillance, Regulation, and Chilling Effects Online: A Comparative Case Study' (2017) 6 Internet Policy Review 6 <<https://doi.org/10.14763/2017.2.692>>; Elizabeth Stoycheff and others, 'Online Surveillance's Effect on Support for Other Extraordinary Measures to Prevent Terrorism' [2017] Mass Communication and Society 296 <<http://dx.doi.org/10.1080/15205436.2017.1350278>>.

³⁸ Tarlach McGonagle, 'The Council of Europe and Internet Intermediaries: A Case Study of Tentative Posturing' in Rikke Frank Jørgensen (ed), *Human Rights in the Age of Platforms* (The MIT Press 2019) <<https://direct.mit.edu/books/book/4531/Human-Rights-in-the-Age-of-Platforms>> accessed 12 March 2020.

³⁹ *Bladet Tromsø and Stensaas v Norway* [1999] ECtHR 21980/93 [65].

⁴⁰ *Stoll v Switzerland* [2007] ECtHR 69698/01 [103].

⁴¹ *Payam Tamiz v. United Kingdom* (n 34) para 87.

⁴² *Magyar Helsinki Bizottság v Hungary* [2016] ECtHR 18030/11 [159].

carry duties and responsibilities, but what (given a particular situation, social media platforms' influence, and the technical means used) these are and how far they reach.

Article 10 prohibits public authorities from interfering with the freedom of expression rights of journalists, editors, media users and other media actors, unless the interference is necessary in a democratic society. In addition, Article 10 may entail positive obligations upon states, even in the sphere of relationships between individuals.⁴³ A state's positive obligations regarding media freedom 'include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities'.⁴⁴ The case cited concerned press access to information, yet it is clear that states might have to remove barriers to the exercise of freedom of expression where these arise.

The fact that states have positive obligations regarding freedom of expression is important, because the right to freedom of expression does not have direct horizontal application.⁴⁵ Individual users and media organisations can therefore rely on positive action by the state if other private actors, such as social media or other users, interfere with their freedom of expression and media freedom. Within the European legal framework, states are, for instance, the 'ultimate guarantor' of media pluralism.⁴⁶ The CoE has determined that an important way to guarantee pluralism is to ensure that free and independent news media can fulfil their function in the new media landscape.⁴⁷

Nevertheless, the ECtHR has developed its notion of a 'favourable environment' so far primarily in response to threats to and harassment of journalists, so we should be careful

⁴³ *Fuentes Bobo v Spain* [2000] ECHR 39293/98 [38]; *Özgür Gündem v Turkey* [2000] ECHR 23144/93 [42].

⁴⁴ *Társaság a Szabadságjogokért v. Hungary* (n 27) para 36.

⁴⁵ Maja Brkan, 'Freedom of Expression and Artificial Intelligence: On Personalisation, Disinformation and (Lack of) Horizontal Effect of the Charter' [2019] Maastricht Faculty of Law Working Papers 1; *Dink v Turkey* [2010] ECHR 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 [137]; Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (ed), *Journalism at Risk: Threats, challenges, and perspectives* (Council of Europe 2015).

⁴⁶ *Informationsverein Lentia and Others v Austria* [1993] ECHR 13914/88; 15041/89; 15717/89; 15779/89; 17207/90 [38].

⁴⁷ CoE, 'Recommendation of the Committee of Ministers to Member States on the Remit of Public Service Media in the Information Society' (2007) CM/Rec(2007)3 <https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmral0vvsU/content/recommendation-cm-rec-2007-3-of-the-committee-of-ministers-to-member-states-on-the-remit-of-public-service-media-in-the-information-society>; CoE, 'Recommendation of the Committee of Ministers to Member States on Public Service Media Governance' (Council of Europe 2012) CM/Rec(2012)1 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cb4b4>.

about extending these two judgments of the ECtHR too far.⁴⁸ First and foremost, states have a positive obligation to secure the safety and security of participants in public debate. So far, the Court has not decided on the extent to which states have a positive obligation to create an environment in which news users and media organisations are protected against harmful effects of AI on their freedom of expression rights. We will develop some ideas on that extent in the sections that follow.

In sum, news users and media actors are free to use AI to exercise their freedom of expression rights. However, various uses of AI in the news industry can hamper the realisation of freedom of expression rights and values. As the CoE has observed: “The use of AI tools in content creation and distribution by news media organisations should be transparent and take account of the impact of automation on human rights and freedom of expression in particular.”⁴⁹ The ensuing sections discuss a selection of such issues.

4 Implications of Article 10 ECHR for the rights and responsibilities of the media

AI is increasingly being used to automate instances of editorial decision-making that traditionally fell under the media’s editorial control, such as decisions on what information goes into a story, whether it will be published or removed, or how prominently it will be displayed.⁵⁰ These decisions involve nuanced editorial judgment. This is especially true when they touch on sensitive areas of public policy, such as the line between hate speech and lawful expressions that offend, shock, or disturb. Control over editorial decisions has traditionally been key to determining which actors qualify as news media and bear the associated rights and responsibilities.⁵¹ In *Satamedia*, for example, the Court paid particular attention to the lack of “any analytical input” when determining whether a news organisation’s use of an SMS service to mass publish individuals’ tax data qualified as a solely journalistic activity.⁵²

⁴⁸ *Dink v. Turkey* (n 43).

⁴⁹ CoE, ‘Draft Recommendation of the Committee of Ministers to Member States on Promoting a Favourable Environment for Quality Journalism in the Digital Age (7th Draft)’ (Council of Europe 2019) para 2.2.4 <<https://rm.coe.int/msi-joq-2018-rev7-e-draft-recommendation-on-quality-journalism-finalis/168098ab76>>.

⁵⁰ CoE, ‘Recommendation of the Committee of Ministers to Member States on a New Notion of Media’ (2011) CM/Rec(2011)7 para 30 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0>; *Saliyev v Russia* [2010] ECtHR 35016/03 [54].

⁵¹ Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Press 2015) <<http://ebooks.cambridge.org/ref/id/CBO9781316162736>> accessed 21 May 2019.

⁵² *Satamedia* [2017] ECtHR 931/13 [175].

Editorial control does not necessarily have to be exercised by a human, and the ECtHR has consistently held that the press is in principle free to choose what reporting technique to use.⁵³ Moreover, the added value of AI lies precisely in its ability to automate analysis previously performed by human journalists, rather than simply disseminate raw data. However, while the use of AI to (partly) automate editorial decision-making falls within the scope of Article 10 ECHR, it simultaneously shapes the responsibilities that come with the exercise of this right. The ECHR is a living instrument, and as the Court has grappled with the interaction between Article 10 ECHR and new technologies, it has pointed to the need to tailor Article 10 ECHR's underlying principles to the specific technology that is used to exercise editorial control.⁵⁴ The resulting responsibility is an interplay between the general characteristics of the technology and the specific editorial activity it is applied for.

AI's scale, speed, and opacity further remove human oversight over individual editorial decisions. This reinforces the trend towards control and responsibility at different levels of the editorial process already started by other forms of automation. The need for due diligence prior to the implementation of technology and oversight over its results has played an important role in both the CoE recommendations and the ECtHR's case law on duties and responsibilities in relation to new technologies.⁵⁵ Specifically, this requires a process that ensures that AI's impact on editorial values is ascertained (e.g. by measuring the diversity of the news stories delivered by AI-driven recommenders), solutions are adopted to counteract the perceived risks (e.g. decisions on how and whether to use AI in certain contexts), and that the effectiveness of such solutions is evaluated.⁵⁶ For these processes to be effective, those who assess the system must have the proper training to enable them to recognise and evaluate the legal, social, ethical and technical dimensions.⁵⁷

In the context of the news media, this requires a reassessment of the role editors and journalists should be expected to play in the newsroom. The overarching need for AI developers to take human rights standards into account involves, in the context of the

⁵³ *Stoll v. Switzerland* (n 38) para 146.

⁵⁴ *Delfi v Estonia* [2015] ECtHR 64569/09 [113]; *Magyar Jeti ZRT v Hungary* [2018] ECtHR 11257/16 [74].

⁵⁵ Jan Oster, *European and International Media Law* (Cambridge University Press 2016) 84.

⁵⁶ CoE, 'Recommendation of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership' (Council of Europe 2018) CM/Rec(2018)1 para 2.5

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13>; CoE,

'Guidelines on Artificial Intelligence and Data Protection' (Council of Europe 2019) T-PD(2019)01

<<https://rm.coe.int/guidelines-on-artificial-intelligence-and-data-protection/168091f9d8>>; CoE,

'Recommendation of the Committee of Ministers to Member States on the Protection of Human

Rights with Regard to Search Engines' (2012) CM/Rec(2012)3 14

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805caa87>.

⁵⁷ CoE, 'Recommendation of the Committee of Ministers to Member States on Human Rights Impacts of Algorithmic Systems' (Council of Europe 2020) CM/Rec(2020)1

<https://search.coe.int/cm/pages/result_details.aspx?objectId=09000016809e1154>; CoE, 'AI Guidelines' (n 54) 3.

media, nuanced editorial judgment that is traditionally the expertise of journalists and editors.⁵⁸ Their ability to exercise this judgment is hampered by the fact that advanced technical skills are needed to develop AI. AI thereby challenges the existing balance of power in newsrooms by moving influence over tools that automate editorial decisions to software engineers, beyond the direct control of journalists and editors.⁵⁹ The responsibilities that required the media to develop nuanced editorial judgment, however, continue to apply. Taking full advantage of the existing knowledge of editors and journalists in the development of AI is crucial to ensuring the media's continued compliance with these responsibilities. This, for example, could mean journalists collaborating with engineers to embed editorial values in AI, evaluating training data that is used to take editorial decisions such as the identification of hate speech, or deciding on the contexts in which AI should not be used. To facilitate this process, the CoE focuses on ensuring that traditional editors and journalists have the skills to continue to play a role in the digital age. It emphasizes that they "should be able to regularly update their skills and knowledge, specifically in relation to their duties and responsibilities in the digital environment".⁶⁰

Social media platforms, in contrast, have long argued that they fulfil a technological rather than an editorial function. This argument is driven partly by a desire to avoid editorial responsibilities and the accompanying need to exercise nuanced editorial judgment.⁶¹ It is increasingly difficult to square this with ECtHR case law and CoE recommendations that recognise that social media platforms do perform editorial functions. Their control differs from control by news media, however, and as such, social media platforms may bear different responsibilities that match their editorial role.⁶² Although social media platforms exercise influence by moderating and ranking content, the impact of their service is inherently also shaped by other stakeholders, especially advertisers, the public and media that upload and share information.⁶³ The CoE accordingly emphasises the need for social

⁵⁸ CoE, 'AI Guidelines' (n 54).

⁵⁹ Seth C Lewis, Andrea L Guzman and Thomas R Schmidt, 'Automation, Journalism, and Human–Machine Communication: Rethinking Roles and Relationships of Humans and Machines in News' (2019) 7 *Digital Journalism* 409.

⁶⁰ CoE, 'Declaration by the Committee of Ministers on the Financial Sustainability of Quality Journalism in the Digital Age' (Council of Europe 2019) Decl(13/02/2019)2 <https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168092dd4d> accessed 9 June 2019.

⁶¹ Philip M Napoli and Robyn Caplan, 'Why Media Companies Insist They're Not Media Companies, Why They're Wrong, and Why It Matters' (2017) 22 *First Monday* <<https://journals.uic.edu/ojs/index.php/fm/article/view/7051>> accessed 31 October 2018.

⁶² CoE, 'New Notion of Media' (n 48); *Payam Tamiz v. United Kingdom* (n 34) para 87; CoE, 'Recommendation of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries' (2018) CM/Rec(2018)2 para 1.3.9 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14>.

⁶³ Natali Helberger, Jo Pierson and Thomas Poell, 'Governing Online Platforms: From Contested to Cooperative Responsibility' (2018) 34 *The Information Society* 1.

media platforms to collaborate with outside stakeholders such as civil society, NGOs and the news media when operationalising public values such as pluralism or credibility.⁶⁴

The following section will first explore how AI generally shapes the responsibility of the media and social media platforms. It will then zoom in on two specific ways in which the media and social media platforms use AI: to moderate (Section 4.1) and recommend (Section 4.2) content.

4.1 Automated content moderation in the news media and on social media platforms

Social media platforms and news media take a very visible curatorial role by moderating and selectively removing content that others upload to their services. They increasingly use AI-driven tools to do so, as these can operate at a scale and speed that matches the amount of uploaded content.⁶⁵ The key concern from the perspective of Article 10 ECHR is that automated content moderation mistakenly filters out lawful content. This is especially likely when AI by itself predicts whether content is illegal and automatically removes it. However, it also occurs when AI fails to detect contextual cues that distinguish a known illegal expression from legal content that reports on, documents, parodies or argues against it.⁶⁶ The scale and speed at which AI operates moreover allow moderation to shift from ex post removal of content flagged by a user to ex ante control and prior restraint.⁶⁷ AI-driven tools thereby not only affect the freedom of expression rights of individual users, they also shape the public debate and affect the favourable environment for freedom of expression on a societal level.⁶⁸

The ECtHR first assessed the Article 10 ECHR implications of automated content moderation in the context of the news media. In *Delfi*, the Court held that a news organisation can be held responsible for comments that it allows readers to post under its articles if it fails to actively identify and remove illegal comments. The fact that the news

⁶⁴ CoE, 'Recommendation on Pluralism' (n 54); CoE, 'Declaration on the Financial Sustainability of Quality Journalism' (n 58).

⁶⁵ Alex Wright, 'Censoring Sensors' (2017) 60 *Communications of the ACM* 15.

⁶⁶ Daphne Keller, 'Dolphins in the Net: Internet Content Filters and the Advocate General's *Glawischnig-Piesczek v. Facebook Ireland* Opinion' (2019) 19 <<https://cyberlaw.stanford.edu/files/Dolphins-in-the-Net-AG-Analysis.pdf>> accessed 19 December 2019; Joris van Hoboken, 'The Proposed EU Terrorism Content Regulation: Analysis and Recommendations with Respect to Freedom of Expression Implications' (2019) 6 <https://www.ivir.nl/publicaties/download/TERREG_FoE-ANALYSIS.pdf> accessed 19 December 2019.

⁶⁷ David Kaye, 'Report of the Special Rapporteur to the General Assembly on Artificial Intelligence Technologies and Implications for the Information Environment' (UNHRC 2018) A/73/348 64.

⁶⁸ Kate Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2017) 131 *Harvard Law Review* 1598, 1598.

organisation had automatically deleted comments that contained certain words or parts of them was a relevant factor in the Court's assessment of the organisation's duty to avoid harm caused by its readers' comments. However, the filter did not absolve the company from liability, as unlawful hate speech had clearly escaped the filter and had remained available for six weeks.⁶⁹ The Court has since backed away from *Delfi* in a number of ways. Its rejection of strict liability for allowing unfiltered comments in *MTE v. Hungary* is especially relevant to the discussion on AI-driven content moderation. In the words of the Court, "this amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet".⁷⁰

The Court instead emphasises that responsibility results from a number of factors, including the extent to which user-generated content can be connected to an organisation's own editorial conduct. In *Pihl v. Sweden* and *MTE v. Hungary* it thus considered whether the applicants could be considered to have invited unlawful comments under their content. The Court moreover emphasised that, while the comments at issue could be defamatory, they were not "clearly unlawful expressions, amounting to hate speech and incitement to violence" as was the case in *Delfi*.⁷¹ The Court similarly refused to extend *Delfi* to social media platforms or separate fora operated by news organisations, highlighting that the latter were not "integrated in the presentation of news and thus could be taken to be a continuation of the editorial articles".⁷² Thus a distinction emerges between standalone spaces intended to give users the ability to impart and receive information and user-generated content that functions as an extension of a publisher's editorial product, for which the publisher can be expected to assume limited responsibility.

This leaves open the possibility of organisations using AI to comply with their legal responsibility to take down illegal content, or using AI to take down content in accordance with their own policies. Users often have few justiciable rights in this context, and the Court has not yet been asked to rule on these issues. However, CoE recommendations have been able to explore the fundamental rights implications of automated content moderation in more depth. They have so far done so exclusively in the context of social media platforms. In contrast to recent national and EU legislation that emphasises social media platforms' responsibility to swiftly remove illegal content, the CoE analyses their responsibilities through the lens of user rights.⁷³ In its recommendation on Intermediaries, for example, the CoE provides extensive suggestions for the design of complaint system and also draws attention to the problem of conflict of interests, suggesting built-in safeguards to avoid conflicts of interest when the company is directly administering the complaint

⁶⁹ *Delfi v. Estonia* (n 52).

⁷⁰ *MTE v Hungary* [2016] ECtHR 22947/13 [82].

⁷¹ *MTE v. Hungary* (n 68) para 64; *Pihl v Sweden* [2017] ECtHR 74742/14 [32].

⁷² *Høiness v Norway* [2019] ECtHR 43624/14 [71]; *Payam Tamiz v. United Kingdom* (n 34).

⁷³ Heidi Tworek and Paddy Leerssen, 'An Analysis of Germany's NetzDG Law' (Transatlantic Working Group on Content Moderation Online and Freedom of Expression)

<<https://dare.uva.nl/search?identifier=3dc07e3e-a988-4f61-bb8c-388d903504a7>>.

mechanisms, for example, by involving oversight structures.⁷⁴ Interestingly, the CoE also makes explicit recommendations regarding the remedies that should be available to users, including inquiry, explanation, reply, correction, apology, deletion, reconnection or compensation.⁷⁵ It thus highlights the point that social media platforms should operationalise both their own policies and state orders to take down content using the least restrictive means, in order to “avoid the collateral restriction or removal of legal content”.⁷⁶

In general, this approach precludes filters that block specific keywords without taking context into account. However, the CoE notes that some content (such as child sexual abuse material) is illegal regardless of context.⁷⁷ Mirroring the general emphasis on the need for editorial judgment to be retained as AI is used to automate editorial decision-making, the CoE also highlights that social media platforms should ensure human review where appropriate. Though it does not expand on the criteria that determine when human review is appropriate, the underlying rationale indicates that AI’s ability to distinguish lawful from unlawful content is key. Where AI is unable to do so, its role in moderation shifts from automatically removing content to supporting human moderators by flagging or prioritising content. Pursuant to both its general guidelines on AI and its specific recommendation on intermediaries, this requires social media platforms to ensure that both the engineers developing AI and human moderators making the final decisions are aware of the training received on the relevant human rights standards, laws and internal policies so as to address the individual and societal impacts of AI.⁷⁸

As highlighted above, in narrow circumstances the news media may be required to moderate user-generated content more stringently. This obligation applies especially to clearly unlawful content that is integrated in the media’s own editorial products. The news media’s ability to use AI to comply with this obligation depends on AI’s ability to distinguish lawful content from clearly unlawful content. If AI’s inaccuracies only lead it to mistakenly capture unlawful defamatory content as well as clearly unlawful hate speech, the CoE’s core concern that legal content may be mistakenly removed is unaffected. This type of inaccuracy, however, is unlikely in the case of AI that relies on detecting matches with known illegal content without awareness of contextual nuances that also apply to (for example) parodies of clearly unlawful content.⁷⁹ In such cases, AI’s false positives will not be restricted to merely unlawful content. As a result, the need to prevent the collateral

⁷⁴ Recommendation on Intermediaries’ (n 60).

⁷⁵ *Ibid.*, para. 2.5.1.

⁷⁶ CoE, ‘Recommendation on Intermediaries’ (n 60) para 1.3.8, 2.3.5.

⁷⁷ CoE, ‘Recommendation on Search Engines’ (n 54) para 16; CoE, ‘Recommendation on Intermediaries’ (n 60) para 1.3.2; Keller (n 64) 23.

⁷⁸ CoE, ‘Recommendation on Intermediaries’ (n 60) para 2.3.3-2.3.4; CoE, ‘AI Guidelines’ (n 54).

⁷⁹ Gorwa, Binns and Katzenbach (n 23).

restriction of legal content would also limit the media's ability to use AI to automatically filter out clearly unlawful content.

4.2 News recommendations in the news media and on social media platforms

AI's ability to recommend and rank content is the second important editorial function for news media and especially social media platforms. By determining which stories users receive at what point in time, AI-driven recommendation technology can create considerable gatekeeping power regarding the information diets of news users and set their personal agendas. This creates increased risks of manipulation, for example through priming. A political party could, for example, pay to prioritise information about a specific topic, thereby creating a false sense of urgency about a topic that voters best trust it to handle.⁸⁰ The automated ranking and selection of news stories by internet intermediaries could also effectively remove low-ranked content from public view. This is unfavourable for public debate and media diversity, as moderation and ranking might disadvantage smaller media, including alternative and community media, which rely on social media platforms for the dissemination of their content.⁸¹ The ECtHR has not explicitly addressed these risks, possibly because users have few justiciable rights regarding the way their content is ranked on social media platforms. The CoE's broader focus has allowed it to engage with the responsibility that comes with using AI-driven recommendation technologies, though it has largely done so in the context of social media platforms.

Where responsibilities for content moderation focus on the need to minimise access to illegal content and the restriction of lawful content, social media platforms' responsibilities for recommendation emphasise the need to actively ensure users are exposed to content that is in the general interest. Specifically, the CoE has argued that internet intermediaries should design their recommendation technologies to increase users' default exposure to diverse content and quality journalism.⁸² As a result, the social media platforms' responsibilities for ranking content could potentially have a large impact on the content users are and are not exposed to. Perhaps to limit increased control by either governments or social media platforms over these processes, the CoE does not argue that governments should require social media platforms to expose their users to certain kinds of content. Rather, it instructs Member States to encourage social media platforms to engage in a multi-stakeholder process through which civil society, NGOs, academia, and in the context

⁸⁰ Jan Kleinnijenhuis and Jan A de Ridder, 'Issue News and Electoral Volatility' (1998) 33 *European Journal of Political Research* 413, 143; Magdalena Wojcieszak and R Kelly Garrett, 'Social Identity, Selective Exposure, and Affective Polarization: How Priming National Identity Shapes Attitudes Toward Immigrants Via News Selection' (2018) 44 *Human Communication Research* 247, 247.

⁸¹ Newman and others (n 7) 12.

⁸² CoE, 'Recommendation on Pluralism' (n 54) para 2.5; CoE, 'Declaration on the Financial Sustainability of Quality Journalism' (n 58).

of quality journalism especially the news media, develop the criteria through which users' exposure to content in the general interest is improved.⁸³

The responsibilities outlined above can only partly be applied to the news media, given that they are driven by a concern over users' lack of exposure to content that supports public values. News media organisations' control over both content production and recommendation lessens the risk that recommended content will fail to meet a minimum standard. However, it does not remove this risk. Even where the quality of the recommended content is safeguarded through control over content production, AI-driven recommendation can continue to adversely affect values such as pluralism by selectively providing users with content that supports a limited range of perspectives.⁸⁴ Similarly, the automatic translation of user consumption patterns into recommendations can advantage well-read content over content editors believe their readers need to know.⁸⁵ In other words, though control over production allows the news media more control over what content is recommended, lack of attention to the impact of AI-driven recommendation technology in the news media can impair the values secured during the production of content.

5 The reorganisation of communication power

In the previous section we investigated the Article 10 ECHR implications of the use of AI-driven tools in the news media and on social media platforms. In the following section, we would like to turn to another broader dimension of the introduction of AI-driven tools in the media. This is the question of how the introduction of AI-driven tools in the media affects the wider quality and diversity of media markets, the competition between news media and social media platforms and the implications for the audience's access to diverse information.

5.1 Pluralism and the distribution of digital media power

To date the main drivers (and users) of AI-driven tools in the media have arguably been social media platforms. While news media organisations across Europe and beyond are increasingly experimenting with the integration of AI-driven tools (see Section 2), social media platforms control not only major technological innovations in this sector but also access to unparalleled amounts of data (especially training data). This is a situation that leads to new positions of 'digital dominance' and also raises important questions about the ecology of future media markets and a productive relationship between the news media

⁸³ CoE, 'Recommendation on Pluralism' (n 54) para 2.5.

⁸⁴ Helberger (n 11).

⁸⁵ Bodó and others (n 20).

and social media platforms.⁸⁶ In the academic and policy discourse so far, these are questions that have often been addressed from the perspective of economic power and competition law.⁸⁷ The Article 10 ECHR perspective and the longstanding commitment of the Court to the importance of a diverse news media landscape adds another important perspective. As the fundamental rights scholar Edwin Baker has so aptly formulated: “Dispersal of media power, like dispersal of voting power, is simply an egalitarian attribute of a system claiming to be democratic”.⁸⁸ And the ECtHR has repeatedly reiterated: “there can be no democracy without pluralism”.⁸⁹

For a pluralistic news media landscape it is not enough that the content people encounter on platforms is in one way or other diverse, or even that various channels and news media outlets exist in addition to platforms.⁹⁰ Instead, pluralism needs to be, in the words of the ECtHR, “effective” in the sense of allowing “effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed”.⁹¹ A situation in which, as mentioned in Section 2, two-thirds of online news users see distributed forms of discovery via searches and social media as their main gateway to accessing and finding news is very problematic from a freedom of expression standpoint.

As the ECHR found, albeit for the audiovisual sector, “[a] situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audio-visual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention”.⁹² Though the ruling concerned the audiovisual media, it resonates with concerns about the impact that

⁸⁶ Martin Moore and Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (2018).

⁸⁷ Aleksandra Gebicka and Andreas Heinemann, ‘Social Media & Competition Law’ (2014) 37 World Competition 149, 149; Inge Graef, ‘Stretching EU Competition Law Tools for Search Engines and Social Networks’ (2015) 4 Internet Policy Review <<https://policyreview.info/articles/analysis/stretching-eu-competition-law-tools-search-engines-and-social-networks>> accessed 29 January 2020; ‘Online Platforms and the Digital Single Market Opportunities and Challenges for Europe’ (European Commission 2016) COM(2016) 288 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288>> accessed 16 January 2019.

⁸⁸ C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge University Press 2006) 14.

⁸⁹ *Centro Europa 7 S.r.l. and Di Stefano v Italy* [2012] ECtHR 38433/09 [129].

⁹⁰ Eytan Bakshy, Solomon Messing and LA Adamic, ‘Exposure to Ideologically Diverse News and Opinion on Facebook’ (2015) 348 Science 1130; Nic Newman and others, ‘Reuters Institute Digital News Report 2017’ (Reuters Institute for the Study of Journalism 2017) <[https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital News Report 2017 web_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf)>.

⁹¹ *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (n 85) paras 130, 134.

⁹² *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (n 85) para 133.

platforms have on journalism and the independence of the news media.⁹³ It follows that, from a freedom of expression perspective, the challenge is essentially twofold. On the one hand, for the realisation of freedom of expression and “effective pluralism” it is essential that a diversity of media outlets have the potential to reach viewers and effectively compete for the attention of viewers, which may have implications for the way AI-driven automated content moderation and ranking tools are used (Section 4). On the other hand, it is important to consider the potential impact that the central position of some online platforms can have on the editorial freedom and future viability of news media outlets.

According to the ECtHR, there can be a positive obligation upon Member States to ensure effective pluralism in the sense of healthy competition in the ‘market place of ideas’.⁹⁴ So far, the relevant case law of the Court has concentrated on the problem of pluralism and dominant opinion power in the media, but the CoE has developed this aspect, and in the context of online platforms, in some of its more recent recommendations. In its 2018/1 recommendation on media pluralism, the CoE essentially echoes the reasoning of the Court and notes that “[t]hese trends challenge the traditional media business models and contribute to an increase in media consolidation and convergence. One or a small number of news media owners or groups **can acquire positions of considerable power where they can separately or jointly set the agenda of public debate** and significantly influence or shape public opinion, reproducing the same content across all platforms on which they are present”.⁹⁵ In response, the CoE has developed a two-pronged approach in its recommendations, as follows.

On the one hand, because of their communicative power, the CoE calls for closer scrutiny of platforms’ role and responsibilities in the news media sector, which can include, among other things, transferring value gained by platforms by using the content of news media to harvest user data and attention.⁹⁶ On the other hand, there is a need to identify new sustainable business models within the media and to level the playing field between the news media and platforms in terms of access to, and control over, AI-driven tools.⁹⁷ In other words, there follows from Article 10 ECHR not only a need to reconsider the role and responsibility of platforms for realising overall diversity of media markets, but also a need to protect and promote the existence of countervailing media power, in the form of a diversity of independent news sources. The Article 10 perspective thus adds a further argument for actively reducing the growing dependency of the news media on platforms and lends weight to national initiatives to promote innovation and experimentation with

⁹³ Bell (n 25).

⁹⁴ *Sunday Times v. United Kingdom (No. 1)* (n 32); *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (n 85) para 134.

⁹⁵ CoE, ‘Recommendation on Pluralism’ (n 54) para 7, emphasis added.

⁹⁶ CoE, ‘Declaration on the Financial Sustainability of Quality Journalism’ (n 58).

⁹⁷ CoE, ‘Declaration on the Financial Sustainability of Quality Journalism’ (n 58).

AI in the news media as means of bridging the gap between platforms and the rest of the media ecosystem.

Based on the ECtHR case law, the CoE has developed a long tradition of issuing guidance on the conditions that need to be fulfilled for a pluralist media landscape, including mechanisms to ensure the distribution of opinion power in the form of rules about media concentration.⁹⁸ The CoE, in particular, highlighted that even in the absence of any evidence of real abuse, there is already a risk of potential abuse of the power that strong concentrations in the media can have for political pluralism and the democratic process.⁹⁹ It is equally clear that the existing instruments to control concentrations in media power are only useful to a very limited extent in addressing new challenges that arise from the concentration of power as a result of media control over powerful AI-driven tools.¹⁰⁰ Developing new approaches to the dispersal of media power will form an important challenge for academics and policy makers in the years to come.

The argument can be seen in the context of the positive obligations of states under Article 10 ECHR to create a favourable environment for the exercise of that article (see Section 3). The CoE has further developed the notion of a favourable environment and established that it includes, among other things, the need to provide the news media with financial and non-financial support and to protect them from digital threats and enable digital innovation.¹⁰¹ Note that, in a similar vein, the High Level Expert Group on Fake News and

⁹⁸ CoE, 'Recommendation of the Committee of Ministers to Member States on Measures to Promote Media Pluralism' (Council of Europe 1999) R (99)1

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804fa377>; CoE, 'Recommendation of the Committee of Ministers to Member States on Media Pluralism and Diversity of Media Content' (2007) CM/Rec(2007)2

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6be3>; CoE, 'Recommendation on Pluralism' (n 54).

⁹⁹ CoE, 'Declaration of the Committee of Ministers on Protecting the Role of the Media in Democracy in the Context of Media Concentration' (Council of Europe 2007)

<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d6b78> accessed 29 January 2020.

¹⁰⁰ Luigi Zingales, Fiona Scott Morton and Guy Rolnik, 'Stigler Committee on Digital Platforms Final Report' (Stigler Center for the Study of the Economy and the State 2019)

<<https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>>.

¹⁰¹ CoE, 'Declaration on the Financial Sustainability of Quality Journalism' (n 58); CoE, 'Recommendation on Algorithmic Systems' (n 55) para 6.1; CoE, 'Recommendation on Pluralism' (n 54) para 2.11; CoE, 'Recommendation of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors' (2016) CM/Rec(2016)4 paras 18, 38 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9>.

Online Disinformation set up by the European Commission has also proposed that national governments and the EU institutions should fund projects supporting quality journalism.¹⁰²

5.2 New digital inequalities

The introduction of AI-driven tools in the media leads not only to new forms of media power but also to a deeper structural transformation of the digital public sphere. This again raises new questions about digital citizenship and inclusion in democratic participation. So far, the debate about the potential impact of AI-driven tools on the overall quality of the public sphere has been driven mostly by concerns that users of algorithmic filter systems such as social media primarily receive information that is in line with their ideology, and that information that could challenge their belief system would be automatically excluded, leading to decreasing social cohesion and tolerance.¹⁰³ In the light of the mixed evidence for the existence or creation of the dreaded echo chambers or filter bubbles,¹⁰⁴ the filter bubble argument has distracted the academic and public policy discourse for a long time from a potentially far more pressing problem: while AI technologies used to disseminate political information online and engage audiences can be empowering, they are also creating new vulnerabilities and marginalised groups.¹⁰⁵

First, given the potential of AI technology to amplify existing bias due to its reliance on biased historical training data, it can be difficult for minority groups to find a platform for their ideas in algorithmic systems that are biased against them. This is a problem that is often overlooked, because the discussion of algorithmic bias in news selection is usually confined to ideological sorting and source diversity. Thus, to understand whether and how AI-driven technology affects the opportunities of minorities to engage in a wider public debate, we need to move beyond this limited understanding of bias and focus specifically on the inclusion and portrayal of minority groups in algorithmically selected information. The CoE in its Declaration on the Manipulative Capabilities of Algorithmic Processes therefore explicitly emphasises the need to protect the “cognitive autonomy of individuals” and encourages states to cater to the needs of historically marginalised groups in society, or thus far underserved communities.¹⁰⁶

¹⁰² ‘Final Report of the High Level Expert Group on Fake News and Online Disinformation’ (European Commission 2018) 29–30 <<https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>>.

¹⁰³ Y Benkler, R Faris and H Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford University Press 2018).

¹⁰⁴ Axel Bruns, ‘It’s Not the Technology, Stupid: How the “Echo Chamber” and “Filter Bubble” Metaphors Have Failed Us’ (2019); Möller and others (n 19).

¹⁰⁵ D boyd, K Levy and A Marwick, ‘The Networked Nature of Algorithmic Discrimination’, *Data and Discrimination: Collected Essays* (Open Technology Institute 2014).

¹⁰⁶ CoE, ‘Declaration by the Committee of Ministers on the Manipulative Capabilities of Algorithmic Processes’ (Council of Europe 2019) (13/02/2019)1

Second, despite the general trend towards more diverse news encountered through algorithmic curation, there are certain groups that lack both the skills and the interest to adjust their settings to deliver them a diverse news diet while relying more on algorithmically curated news on social media as a source of information.¹⁰⁷ Lower levels of political interest are also associated with a lower likelihood of receiving news on social media or searching for information on search engines.¹⁰⁸ It is important to note that digital literacy and information literacy are also lower in some segments of the population. In other words, those who receive the least amount of news get the largest share of their news through algorithmically sorted channels while also having the least understanding of how this technology works, creating new vulnerabilities.

Even if, as we have argued, ideological filter bubbles do not currently present a threat to a healthy democratic public sphere as long as most citizens receive a diverse news diet online, our analysis further highlights the need not only to protect overall diversity in the media but also for more regulatory attention to the problem of new digital inequalities and vulnerabilities. Depending on the choice architecture of recommendation systems, *all* users can potentially become vulnerable not only to exclusion from a diverse media offer or a media offer that 'does not fit their profile' but also to tailored deception and manipulation. If users are exposed exclusively to tailor-made misinformation or deceptive information, without the opportunity to verify it, they are vulnerable. This is more likely to occur if the personal characteristics of users lead to a user profile on platforms or the news media that attracts little high-quality news content. Consequently, developing a freedom of expression perspective on the use of AI-driven tools in the media also means paying attention to the issue of digital marginalisation as a dynamic process that potentially affects every user of platforms.

In the next and final section we will reflect on some lessons learned and potential implications also for the current EU-driven initiatives towards regulating AI-driven tools in the media.

<https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168092dd4b> accessed 29 January 2020.

¹⁰⁷ Bodó and others (n 20); Judith Möller, Natali Helberger and Mykola Makhortykh, 'Filter bubbles in the Netherlands?' (Commissariaat voor de Media 2019)

<<https://www.cvdm.nl/sites/default/files/publication-Filter-bubbles-in-the-Netherlands.pdf>>.

¹⁰⁸ Judith Möller and others, 'Explaining Online News Engagement Based on Browsing Behavior: Creatures of Habit?': [2019] Social Science Computer Review

<<https://journals.sagepub.com/doi/10.1177/0894439319828012>> accessed 10 March 2020.

6 Concluding reflections

AI-driven technologies can contribute to and support the role of the media in a democracy in a range of ways, from better informing users and being more responsive to their information needs and interests, and developing new means of and tools for investigative data journalism or fulfilling the media's archival role, to automating journalistic and editorial processes making them more efficient and unlocking new business models. The potential positive effects of AI-driven technology for facilitating freedom of expression should not be left out of sight in the current the regulatory push to counter the threats and risks of AI-driven content moderation and recommendation.¹⁰⁹ For the proportionality of any measures taken it is important to be aware that the use of AI-driven tools by both the news media and social media platforms is in principle covered by Article 10 ECHR.

With rights come responsibilities. So far, much of the debate about the responsible use of algorithms and Article 10 ECHR has concentrated on the use of automated content moderation on social media platforms, and more recent recommendations of the CoE have confirmed, and explicitly alluded to, the responsibility of platforms to protect freedom of expression interests. This also means that the use of automated content moderation in a way that endangers the right to freedom of expression of users and media organisations is only possible within the limits of Article 10 ECHR and must be subject to democratic oversight (not self-regulation) and a strict proportionality test. The European Commission's steps towards clarifying the duties and responsibilities of online platforms in the form of clearly defined (*ex ante*) obligations and moving away from its reliance on self-regulatory initiatives are a step in the right direction.

As the CoE noted in its 2018 recommendation on media pluralism, "activities of intermediaries differ from those of traditional media outlets in respect of the provision of news. However, the wide scope of information they distribute, their wide audience reach and their potential for highly targeted advertising have contributed to a shift of advertising and marketing revenues towards the internet."¹¹⁰ As such, the question is not only how platforms should handle AI-driven tools in a way that is compatible with the freedom of expression interests of both users and other news media companies that are increasingly dependent on platforms for access to audiences, Article 10 ECHR and the positive obligations for governments to promote and protect a diverse media landscape that flow

¹⁰⁹ European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act)' and 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' (n 5); European Parliament 'Digital Services Act and fundamental rights issues posed' (n 7).

¹¹⁰ CoE, 'Recommendation on Pluralism' (n 54) para 7.

from it also urges regulators and policy makers to consider the impact of platforms on the broader quality, resilience and diversity of overall media markets.

With the growing acknowledgement that platforms may differ from traditional media but do exercise media power, the question of how to balance media power in overall information markets becomes ever more pressing. This is because the introduction of AI-driven tools in the process of producing and distributing media content brings with it substantial structural shifts, dependencies and transformations of power in existing media markets. We argued that from Article 10 ECHR follows a positive obligation for states to also create the conditions for fair competition vis-à-vis powerful media companies, and a sustainable and independent media sector. The envisaged revision of EU competition law will be an important opportunity to critically revisit the existing controls over AI-driven tools in European media markets, but this will remain mostly limited to aspects of economic competition.¹¹¹ And although the Commission has announced an analysis of existing national media diversity and concentration rules in the light of the growing role of online platforms, due to its limited competencies there is still a clear task for Member States to critically revisit their media concentration laws. This is a field where the CoE's extensive experience of dealing with issues of media power can provide useful guidance and complement the initiatives at the level of the European Union.

In so doing, it is important to recognise that ensuring functioning competition and a diverse media landscape means not just scrutinising and controlling the media power of a few dominant players. Initiatives to stimulate the competitiveness of media markets need to go beyond that and acknowledge that ensuring media diversity and the conditions for users to be able to inform themselves from a diversity of sources requires the existence of a diverse range of media outlets that have a realistic chance of reaching the audience (in the sense of 'effective pluralism'). Access to technology, skills and training data becomes a new important competitive asset, favouring the growing influence for new players such as social media platforms and search engines, but also creating potential barriers for smaller, less affluent news rooms, media in less technologically developed countries and/or local news. There is, furthermore, an important role for Member States to ensure that access to innovative technologies, training data, digital skills and education regarding the use of new data-driven means of producing and distributing news is also open to smaller local players.¹¹² Support for financing of, for instance, public service media has been dwindling in several Member States. Our investigation has confirmed that from a freedom of expression perspective, experimentation and investment in media innovation is essential for the news media to respond to changes in user behaviour and make optimal use of the

¹¹¹ 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' (n 5);

¹¹² CoE, 'Declaration on the Financial Sustainability of Quality Journalism' (n 58) aims to address some of these issues, though others fall outside its scope (such as the access to training data).

affordances of new technologies.¹¹³ This is a consideration that is also reflected in the European Commission's democracy action plan, where the Commission explicitly refers to the need to support the media 'in a way that respects and promotes media independence, freedom and pluralism'.¹¹⁴ The Commission refrains, however, from going into too much detail (except some references to state aid rules and the fair allocation of state advertising) and points to the responsibilities of Member States in that respect. An important task for the Member States, therefore, will be to scrutinize the various institutional dependencies of the news media from platforms, ranging from more obvious forms of influence (e.g. dependence on platforms for reach and access to data) to less visible ones, such as the prominent role of platform-driven initiatives to fund innovation in the news media sector.¹¹⁵

A particular point of attention, especially in the context of the CoE Member States, should be the cultural dimension. So far, the debate on AI-driven tools has been dominated by some countries (in particular developed Northern European digital market economies), a tendency that is likely to be re-enforced by the strong push from Brussels for a comprehensive and harmonised approach towards the regulation of AI and AI-driven media markets. Research and eventually law and policy making should pay more attention to the question of how different cultural, economic, legal and technological conditions in the Member States translate into different applications, impacts, concerns and policy implications of AI-driven tools.

Not only platforms, but the news media too have a responsibility to use AI-driven tools in a way that is conducive to the fundamental freedoms and values that characterise European media markets and policies. As the CoE rightly observed "Media (and journalists') ethics, deontology and standards are the basis of media accountability systems".¹¹⁶ So far, much of the regulatory attention in Europe has focused on the use of AI-driven tools by platforms. The strong focus, for example, in the European democracy action plan risks further obscuring the potential implications of the growing array of news media organisations in Europe that are experimenting with AI-driven tools, such as automated content moderation and recommendation systems. The use of new technologies in the

¹¹³ See on the need to ensure public service media are able to adapt to the new media system and changing expectations of the audience already the recommendation on the CoE, 'Recommendation on the Remit of the PSM' (n 45). See more recently the CoE, 'Declaration on the Financial Sustainability of Quality Journalism' (n 58).

¹¹⁴ 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan' (European Commission 2020c) (Com(2020)790, p. 16 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>>

¹¹⁵ Fanta, A. (2018). The Publisher's Patron: How Google's News Initiative Is Re-Defining Journalism, European Journalism Observatory, <<https://newsinitiative.withgoogle.com/impact/#journalist-trainings>>

¹¹⁶ CoE, 'New Notion of Media' (n 48) para 39.

fulfilment of their democratic task is subject to Article 10 ECHR, and so it is essential that they use the technology in a way that promotes the societal and democratic role of the media, and respects freedom of expression rights of users and competing media providers

To this end, the CoE has an important role in encouraging and supporting the elaboration of guidelines on the responsible use of AI-driven tools in the newsroom, for example in the form of professional journalistic algorithmic ethics. Existing journalistic codes and mission statements regarding editorial responsibility are still very much focused on traditional journalistic routines,¹¹⁷ and so are the relevant recommendations of the CoE.¹¹⁸ The automation of journalistic functions and the disruptive structural changes that accompany these processes raise new legal and ethical challenges that existing codes and routines do not address. Potential issues for journalistic algorithmic ethics to address may include questions such as how to interpret fundamental rights like freedom of expression, but also traditional journalistic values such as fairness, balance and diversity in the context of AI, and also how to re-organise internal professional routines.¹¹⁹

The automation of journalistic and editorial processes calls for new internal procedures to define freedom of expression values and metrics that can inform the development of AI-driven tools, as well as processes that ensure that these values are taken into account during the development of AI-driven tools. The algorithmically mediated relationship between the media and users also requires rethinking how to respect users' rights to privacy, to form opinions and to non-discrimination. Accordingly, news media should refrain from using technology in ways that manipulate, stereotype or in other ways reduce users' freedom of expression rather than increase it.¹²⁰ The Article 10 ECHR analysis above

¹¹⁷ Diaz-Campo, J. and Segado-Boj, F. (2015). Journalism ethics in a digital environment: How journalistic codes of ethics have been adapted to the Internet and ICTs in countries around the world. *Telematics & Informatics*, 32(4), 735-744.

¹¹⁸ CoE, 'Recommendation of the Committee of Ministers to Member States on Self-Regulation Concerning Cyber Content (Self-Regulation and User Protection against Illegal or Harmful Content on New Communications and Information Services)' (Council of Europe 2001) CM/Rec(2001)8 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804d5105>; CoE, 'New Notion of Media' (n 48) paras 39–40; Parliamentary Assembly, 'Recommendation of the Parliamentary Assembly on Ethics of Journalism' (Council of Europe 1993) 1215 <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=15249&lang=EN>>.

¹¹⁹ Charlie Beckett, 'New Powers, New Responsibilities. A Global Survey of Journalism and Artificial Intelligence' (LSE 2019) <<https://blogs.lse.ac.uk/polis/2019/11/18/new-powers-new-responsibilities/>>; Bastian, M., Helberger, N. and Makhortykh, M. (2021). Safeguarding the journalistic DNA: Attitudes towards the role of professional values in algorithmic news recommender designs. Accepted for publication in *Digital Journalism*.

¹²⁰ CoE, 'Declaration by the Committee of Ministers on the Manipulative Capabilities of Algorithmic Processes' (Council of Europe 2019) (13/02/2019)1 <https://search.coe.int/cm/pages/result_details.aspx?ObjectID=090000168092dd4b> accessed 29 January 2020.

has further highlighted the need for transparency and explainability of the implications of AI-driven tools for the choice that news users are given, as these automated sorting decisions affect users' right to privacy, as well as their freedom to receive information. For a similar reason, respect for users' privacy AND freedom of expression rights also necessitates confidentiality of the media vis-à-vis the growing amount of data that the news media hold on users' reading choices, political preferences, etc. – information that could, depending on the political and economic climate in a country, be highly sensitive if shared with third parties.

Finally, when measuring the impact of AI-driven tools on news markets and the public sphere, the concept of the audience needs to be reconsidered. Unlike in the traditional mass media model, which is based on the idea of a sender transmitting information to an unidentified audience, one important implication of the use of AI-driven tools in newsrooms is that news users can be targeted in terms of far more precise groups, or even on an individual level. As already seen in recommendations by search engines, and the Declaration on the Manipulative Capabilities of Algorithmic Processes, automated filtering and sorting mechanisms can affect the cognitive autonomy of individuals,¹²¹ and the exercise of an individual's right to receive information based on personal characteristics and preferences.¹²² The use of AI-driven tools can not result in a situation in which certain parts of the population or users with particular characteristics are structurally excluded from accessing information, or where society experiences new digital divides and marginalisation. Such a situation would be incompatible with Article 10 ECHR and the positive obligations of Member States. Policy makers should identify potentially vulnerable groups, including users who are structurally excluded from receiving news, in danger of receiving a less diverse information offer, or paying a disproportionately high price (including in terms of privacy), with a view to promoting their equal enjoyment of freedom of expression.¹²³

¹²¹ CoE, 'Declaration by the Committee of Ministers on the Manipulative Capabilities of Algorithmic Processes' (Council of Europe 2019) (13/02/2019)1 <https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168092dd4b> accessed 29 January 2020.

¹²² CoE, 'Recommendation on Search Engines' (n 54) para III.12 and III.16; CoE, 'Recommendation on Pluralism' (n 54) para 2.6; CoE, 'Recommendation on Intermediaries' (n 60) para 1.3.5; CoE, 'AI Guidelines' (n 54).

¹²³ CoE, 'Declaration on the Manipulative Capabilities of Algorithmic Processes' (n 109); CoE, 'Recommendation on Algorithmic Systems' (n 55) 13–14.