Defamation law reform, the European Convention on Human Rights and EU law[1]

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I. Introduction

Over the years, the European Court of Human Rights has steadily developed a body of principles that have guided its interpretation of Article 10 of the European Convention on Human Rights. This has resulted in a rich jurisprudence that is protective of robust public debate and appreciative of the valuable contributions that the media, journalists and other actors make to public debate. In recent years, public debate has taken a pronounced digital turn. Public discussion of matters of general interest to society is increasingly taking place online, with enhanced opportunities for everyone to participate. This has great benefits for deliberation and democracy, but it also has a downside. The technologies that facilitate and enable deliberative interaction also facilitate and enable the wide and speedy dissemination of objectionable and harmful types of content, including illegal content.

In light of freedom of expression's "digital turn", this paper's central line of enquiry asks whether the Court's existing principles on freedom of expression and defamation are fit for purpose in the digital age, or whether they need revisiting and recalibration in order to meet new challenges. This is a pressing question because in the online environment, a new generation of gatekeepers has emerged and has a determinative influence over the (free) flow of information online. These new gatekeepers include various types of intermediaries and platforms, some of which have achieved positions of considerable dominance in one or more

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markets, e.g. search, social networking, micro-blogging, etc.[3] These intermediaries have clear "discursive significance" in society.[4] This has given rise to a paradoxical situation: much public debate nowadays takes place in privately-owned networks, services and forums.

The European Court of Human Rights has a voluminous and ever-growing case-law on freedom of expression and defamation.[5] For the purposes of the present analysis, twelve key principles have been distilled from that body of case-law. They have been grouped into two sections, dealing with freedom of expression (II) and defamation (III). Each section comprises six principles; each principle will be summarised and explained briefly in turn. The focus of the analysis will then shift to how these principles are being applied in the digital age (IV). Some general distinctive features of the digital age will be sketched before zoning in on three specific challenges for the continuing development of the Court's principles on freedom of expression and defamation. Those challenges concern the frequently frictional relationship between freedom of expression and privacy; the varying levels of protection for offensive and vulgar expression and hate speech, and the implications of the rise of disinformation in public debate.

Central as it is, the European Convention on Human Rights is not the only regulatory instrument that governs relevant issues at the European level. Within the framework of European Union Law, the E-Commerce Directive regulates the free movement of information society services in the internal market. More specifically, it sets out the conditions under which providers of information society services may be exempted from liability for illegal third-party content (including defamatory content) that is disseminated through their services. The relevance of this so-called "safe harbour" regime will be the final substantive focus of this paper (V).

II. Principles of freedom of expression

[3] See generally: Martin Moore and Damian Tambini, Eds., *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford, Oxford University Press, 2018) [Open access] and Rikke Frank Jørgensen, Ed., *Human Rights in the Age of Platforms* (Cambridge, Massachusetts and London, England, The MIT Press, 2019) [Open access].
[4] Emily B. Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge, Cambridge University Press, 2015), p. 204.
[5] Tarlach McGonagle (with the collaboration of Marie McGonagle and Ronan Ó Fathaigh), *Freedom of expression and defamation: A study of the case-law of the European Court of Human Rights* (Strasbourg, Council of Europe Publishing, 2016).

1. The right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights, doesn't just protect uncontroversial information and ideas. It also famously covers information and ideas that may offend, shock or disturb the government or any group in society. This is important because the values of **pluralism, tolerance and broadmindedness** are key features of democratic society.[6] Democracies have rough edges and public debate should not be forcibly sanitized or constrained by political correctness. There has to be space for pluralistic viewpoints to be articulated, exchanged, debated and challenged. Robust public debate is the lifeblood of democratic society and it should thus be open to everyone (see Principle 2).

   This so-called *Handyside* principle is the veritable bedrock of the Court's case-law on freedom of expression and the touchstone for the scope of freedom of expression. In its case-law, the Court strives to consistently uphold the principle, but when push comes to shove and the Court is assessing the necessity of a measure that has interfered with the right to freedom of expression, the question often becomes: how far does the *Handyside* principle stretch? Article 10(2) ECHR sets out a number of grounds on the basis of which it may be permissible to restrict the right to freedom of expression, when necessary in a democratic society. In any event, the *Handyside* principle does not go so far as to create a right to offend. In its judgment in the *Otto-Preminger-Institut* case, the Court held that in the context of religious opinions and beliefs, there may even be a duty to avoid as far as possible expressions that are gratuitously offensive to others.[7] Nor does the *Handyside* principle in any way legitimize or offer protection to hate speech or incitement to violence (see Principle 6).

2. Everyone should be able to participate freely and without fear in discussions and debates on **matters of public interest**.[8]

   This reinforces the *Handyside* principle significantly by affirming that even when someone wishes to express views that the authorities or others do not share or may consider irksome, they must be free to do so and not be afraid to do so. The fact that the Court has identified a positive obligation for States Parties to the Convention to

[6] *Handyside v. the United Kingdom*, 7 December 1976, Series A, no. 24.
[7] *Otto-Preminger-Institut v. Austria*, 20 September 1994, § 49, Series A no. 295-A.
[8] *Dink v. Turkey*, nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, § 137, 14 September 2010.

create a "favourable environment for participation in public debate" along the above lines puts steel in the principle.[9] Building on this important precedent, the Court recently underscored the need for States to take meaningful measures to ensure what it has now for the first time called "the spirit of an environment protective of journalism".[10]

It is very important that the Court has stressed that effective participation in public debate must be "without fear". The object of fear has not been specified. It does not have one single meaning and it could infer fear of civil or criminal legal proceedings, or even the threat of either.

Politics, current affairs, health matters, religion, culture and history are all examples of topics of public interest, unlike individuals' strictly private relationships or family affairs. There is an important distinction to be made between what is of interest to the public and what interests the public. Insofar as the latter only concern the trivial and prurient interests of (sections of) the public, they are of less democratic value for the public as a whole than the former.

3. While everyone[11] – including bloggers,[12] whistle-blowers,[13] academics,[14] members of civil society organisations,[15] etc. - should be able to participate in public debate, it is particularly important for journalists and the media to be able to do so because of their ability to spread information and ideas widely, and thereby contribute to public opinion-making. They have the **task of imparting information** and ideas on matters of public interest, **which the public has a right to receive**.[16] Journalists, the media and a growing

[9] For analysis, see: Tarlach McGonagle, "Positive obligations concerning freedom of expression: mere potential or real power?", in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives* (Strasbourg, Council of Europe Publishing, 2015), pp. 9-35.
[10] *Khadija Ismayilova v. Azerbaijan*, nos. 65286/13 and 57270/14, § 165, 10 January 2019.
[11] *Steel & Morris v. the United Kingdom*, no. 68416/01, ECHR 2005-II.
[12] *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016.
[13] *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008; *Heinisch v. Germany*, no. 28274/08, ECHR 2011.
[14] *Hertel v. Switzerland*, 25 August 1998, Reports of Judgments and Decisions 1998-VI.
[15] *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009; *Youth Initiative for Human Rights v. Serbia*, no. 48135/06, 25 June 2013.
[16] The Sunday Times v. the United Kingdom (no. 1), 26 April 1979, Series A no. 30; Observer and Guardian v. the United Kingdom, 26 November 1991, Series A no. 216; *Jersild v. Denmark*, 23 September 1994, Series A no. 298.

range of other actors can also act as public watchdogs, by bringing information to light and by exposing wrongdoing and corruption by those in power.[17]

This classical vision of the media as the Fourth Estate casts the media as a structural check on the other three branches of government. As the range of actors engaging in journalistic activities or otherwise contributing to public debate is expanding and becoming more diverse, it is logical that non-journalistic actors can and do carry out public watchdog roles – to greater or lesser extents. In consequence, the Court has broadened the notion of public watchdog by introducing the adjacent term, "social watchdog", denoting the equivalent role that can be played by civil society organisations.[18] The Court has similarly recognised the importance of citizen journalism.[19] In keeping with the logic of these developments, fact-checking organisations could be considered a new breed of public watchdog, insofar as they are another form of what is sometimes referred to as "accountability journalism".[20]

4. When a law or other measure or sanction discourages the media from participating in public debate, very close scrutiny is called for, as there is a **"chilling effect"** on freedom of expression that affects society as a whole.[21] Such interferences with media freedom cause others to become afraid to exercise their right to freedom of expression in a bold manner and as a result engage in **self-censorship,**[22] which weakens public debate.

   The fear factor has a central place in the chilling effects doctrine. Fear can cause critical voices to be silenced – it is a stealthy enemy of freedom of expression because it can be difficult to expose. It interferes with the right of the individual journalist or other actor to impart information and ideas and with the right of the public to receive information and ideas. The Court has underlined the seriousness of the societal loss when journalists are threatened and silenced. The vigour and plurality of public debate are damaged when the silenced voices are independent or critical ones, or those offering perspectives of particular groups in society, e.g. women or minority groups.

[17] *Barthold v. Germany*, 25 March 1985, Series A no. 90.
[18] *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009.
[19] *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, ECHR 2015.
[20] C.W. Anderson, Leonard Downie Jr. and Michael Schudson, *The News Media: What Everyone Needs to Know* (New York, Oxford University Press, 2016), p. 112.
[21] *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, 17 December 2004.
[22] *Vajnai v. Hungary*, no. 33639/06, § 54, 8 July 2008.

5. In order to avoid a "chilling effect", it is very important that any measures or remedies interfering with the right to freedom of expression are governed by the **principle of proportionality.**

This principle is an integral component of the Court's assessment of whether an interference with the right to freedom of expression amounts to a violation of the right. In order to pass muster under Article 10, an impugned interference must be prescribed by law, pursue one of the legitimate aims enumerated in Article 10(2) (e.g. "the protection of the reputation or rights of others") and be necessary in a democratic society. The Court interprets the final prong to its standard test – the necessary in a democratic society criterion – strictly. It must correspond to a pressing social need. The measure(s) taken by State authorities must be proportionate to the purported goals of the measure(s) and the reasons given by the State authorities for having taken the measure(s) must be relevant and sufficient.

6. Criminal measures have far-reaching consequences for those affected by them. Thus, by their very nature, criminal measures have a "chilling effect" on public debate. A prison sentence for a press offence will be compatible with freedom of expression only in exceptional circumstances, namely when other human rights have been seriously impaired, for instance in cases of **hate speech or incitement to violence**.[23]

This principle reflects the belief that criminal sanctions should only be deployed as an ultimate remedy. That is why only specific extreme types of expression – with motives that go against the fundamental values of the Convention – are explicitly mentioned as categories of expression which would be appropriately subject to criminal law.

In those cases where legal measures are deemed necessary to limit the right to freedom of expression, civil-law measures will, generally-speaking, be much more proportionate than criminal-law measures. A fine or a prison sentence of short duration or a suspended or conditional prison sentence may well appear to be a less severe sanction than a

[23] *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, 17 December 2004. See also, *Gündüz v. Turkey*, no. 35071/97, ECHR 2003-XI.

lengthy actual prison sentence. However, the Court has repeatedly recognised that the limited nature of a sanction is not necessarily determinative; what matters is that a journalist has been convicted at all.[24] The mere fact of a criminal conviction itself can have a chilling effect on freedom of expression. Indeed, it has even found that the "fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression".[25]

III. Principles of defamation law

7. A defamatory statement is a false or untrue statement of fact that harms the reputation or good name of a living person. The purpose of defamation laws is to **protect the reputations of individuals from injury**.[26] The interconnected, globalized nature of the current communications environment has made it possible for an individual's reputation to be destroyed in an instant. Defamatory content is easily shared and spread online and it has an enduring online presence. This amplifies its impact and exacerbates the lasting harm suffered by the targeted individual. It is therefore a key challenge to find effective but proportionate ways to curb the dissemination of defamatory attacks on individuals' reputation.

   Remedies for defamation, including an award of **damages**, must always bear **a reasonable relationship of proportionality to the injury to reputation suffered.** The Court established this principle in its leading judgment on the question of freedom of expression and damages for defamation, *Tolstoy Miloslavsky v. the United Kingdom*.[27] In that case, the Court also referred to the need for "adequate and effective safeguards […] against a disproportionately large award".[28] Having regard to the size of the award (GB £1.5 million) and the lack of such safeguards, the Court found that there had been a violation of the applicant's right to freedom of expression.

[24] *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298.
[25] *Fatullayev v. Azerbaijan*, no. 40984/07, § 102, 22 April 2010. See also, *Cumpănă and Mazăre v. Romania* [GC], *op. cit*., § 113 and *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, § 49, 18 December 2008.
[26] In exceptional circumstances, this may also apply to a company or other entity having a legal status, but a commercial reputation does not have the same moral dimension as an individual reputation. Defamation laws should only apply to the deceased in very exceptional circumstances. Defamation laws should not be used to protect (State) symbols, flags, anthems, etc.
[27] *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, § 49, Series A no. 316-B.
[28] *Ibid*., § 51.

In relation to legal systems which use juries in defamation actions, the Court's message is clear: clear and comprehensive judicial guidance to juries is a very important safeguard against arbitrary and/or disproportionate awards of damages which could have a chilling effect on freedom of expression.[29]

The availability of a range of civil remedies as alternatives to damages in appropriate cases, such as apologies or correction orders, can help to provide a proportionate response to defamation and, where fast-track or low-cost measures are also available, can enable a person's reputation to be vindicated in a more timely fashion. The role of extra-judicial bodies, such as Press Councils, can play a valuable role in achieving proportionality and timeliness also, as has been noted by the Court in cases such as *Stoll v. Switzerland*.[30]

8. **Politicians** (including heads of state and government and members of government), **public officials or public figures** (including business people and even celebrities) must **tolerate higher levels of criticism** than other individuals.[31] By deciding to enter public life, they knowingly lay themselves **open to close scrutiny of their words and actions**.[32] While they are entitled to protection of their reputation, even when they are not acting in a private capacity, the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.[33]

9. Everyone who exercises the right to freedom of expression has certain **duties and responsibilities**, the scope of which varies in different contexts. Journalists and the media must not cross certain lines, in particular in respect of the reputation and rights of others. In principle, they are expected to act in **good faith** in order to provide **accurate and reliable information** to the public in accordance with the **ethics of journalism**.[34]

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[29] *Independent Newspapers (Ireland) Limited v. Ireland*, no. 28199/15, 15 June 2017. For analysis, see: Tarlach McGonagle, Case-note, *Independent Newspapers (Ireland) v. Ireland*, *European Human Rights Cases*, 2017-12, no. 213, available at: https://www.ivir.nl/publicaties/download/Annotatie_EHRC_2017_12.pdf.
[30] *Stoll v. Switzerland* [GC], no. 69698/01, ECHR 2007-V.
[31] *Lingens v. Austria*, 8 July 1986, Series A no. 103.
[32] *Ibid*.
[33] *Von Hannover v. Germany*, no. 59320/00, ECHR 2004-VI; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012.
[34] *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III;

10. **Facts** and opinions or **value judgments** are not the same: the existence of facts can be demonstrated, but it is not possible to **prove the truth** of opinions or value judgments.[35] A requirement to prove the truth of a value judgment infringes the right to freedom of opinion. A value judgment should, however, have **adequate factual basis**, as even a value judgment without any factual basis to support it may be excessive.[36]

    The distinction between facts and opinions is not new. Nor is it an exclusively legal question. It is also about editorial and journalistic transparency. As C.P. Scott, the former editor of *The [Manchester] Guardian* newspaper, once wrote in a much-quoted piece, "comment is free, but facts are sacred".[37] Distorting or otherwise tampering with facts is a red line that journalists must not cross. When they do, for example in the recent Claas Relotius Affair, in which fraudulent reporting by an award-winning journalist for *Der Spiegel* was exposed, public outcry is justified because their bond of trust with the journalist/media has been broken. [38]

11. It is important that defamation laws include a range of **defences** that safeguard the right to freedom of expression. Journalists and the media face deadlines and as **news is a perishable commodity**, to delay its publication, even for a short period, may well deprive it of all its value and interest.[39] There must therefore be a range of defences available to them in legal proceedings concerning alleged defamatory statements, e.g., that there is a **high public interest** in the topics they are treating; the **truth** or accuracy of their statements; their **good faith** in publishing the statements; that their statements are **fair comments**, and that they have acted in accordance with their **duties and responsibilities.**

    Truth is a defence to a defamation action in that if the facts are true and can be proven true to the satisfaction of a court, there is no basis for holding the speaker liable and

[35] *Lingens v. Austria*, 8 July 1986, § 46, Series A no. 103.
[36] *Dichand and Others v. Austria*, no. 29271/95, §§ 42 and 43, 26 February 2002.
[37] 'CP Scott's Centenary Essay', *The Guardian*, 23 October 2017 (originally published as: C.P. Scott, 'A Hundred Years', *The Manchester Guardian*, 5 May 1921), available at: https://www.theguardian.com/sustainability/cp-scott-centenary-essay.
[38] Ullrich Fichtner, 'DER SPIEGEL Reveals Internal Fraud', Spiegel Online, 20 December 2018: http://www.spiegel.de/international/zeitgeist/claas-relotius-reporter-forgery-scandal-a-1244755.html.
[39] *Observer and Guardian v. the United Kingdom*, 26 November 1991, Series A no. 216.

freedom of expression prevails. This stems from the fact that a person is entitled only to a reputation based on truth, not to a good reputation that is based on falsehood and therefore undeserved. Generally, it is not sufficient for the speaker to believe that what s/he published was true; it is necessary to be able to prove it. Accuracy as to the facts and reporting the facts is therefore key.[40] However, for journalists in particular, it is not always possible while a story is breaking to be wholly accurate, and therefore some leeway is required. As Carl Bernstein has put it, the primary task of the journalist is to seek out "the best obtainable version of the truth".[41] The Court recognises that "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[42]

12. Contributions to public debate can be made by different actors, through different media and in different styles. The right to freedom of expression includes, especially for journalists and the media, the freedom to select, edit and present information and ideas in whatever way they like. This means that they may use **exaggeration, provocation, irony, satire or other styles or techniques**, as long as their expression is not "gratuitously" offensive.[43] In principle, journalists, the media and **online intermediaries** should not be held liable for defamatory statements by third parties, unless there are exceptional circumstances which would warrant such liability. These freedoms are very relevant when considering the proportionality of interferences with the right to freedom of expression.

IV. Selected dilemmas in the digital age

In today's multi-media environment, law and policy are struggling to catch up with – never mind to keep up with - technological change. Nowadays, the traditional media (press, radio and television) have to compete with other actors (search engines, social media operators, apps) in an increasingly noisy and crowded space. Information flows and opinion-making processes are

[40] See, for example, the importance of accuracy in *Bergens Tidende and Others v. Norway*, no. 26132/95, ECHR 2000-IV.
[41] Carl Bernstein, 'The Idiot Culture: Reflections of Post-Watergate Journalism', *The New Republic* (8 June 1992) 22, 24.
[42] *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216.
[43] *Prager and Oberschlick v. Austria*, 26 April 1995, Series A no. 313; *De Haes and Gijsels v. Belgium*, 24 February 1997, Reports of Judgments and Decisions 1997-I; *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, 25 January 2007.

increasingly influenced and controlled by 'big tech' – private companies whose services and networks shape public debate.

All of this poses a dilemma for the Court: in order to deal with the dynamics of the information society, should it replicate or adapt its existing principles to ensure their continued relevance, or does the new information order require new, tailor-made principles? Should journalists and the media continue to enjoy their current privileges and freedoms in the online world? And how do we strike a balance between preserving media freedom and regulating the media when they disseminate inaccurate, misleading, sensationalist, offensive, defamatory or hateful content? Should journalistic and media freedoms be extended to the wider range of actors that contributes in various ways to public debate? It is beyond the scope of this paper to answer all these far-reaching questions. Instead, focus will turn briefly to three indicative challenges faced by the Court, namely the tense relationships between: freedom of expression and privacy; offensive content and hateful content, and facts and falsity.

1. Which right, or which interpretive road?

One of the biggest challenges facing the Court for the consolidation and future development of its case-law on freedom of expression and defamation is of an interpretive order. It concerns the interplay between two rights – to freedom of expression and to private and family life, both of which are enshrined in the Convention, in Articles 10 and 8, respectively. The Court has taken the view that the two rights are of equal weight and status. It must verify if a fair balance has been struck by the domestic authorities when protecting two values guaranteed by the Convention.[44] The Court has not always been consistent in this task and has expanded the scope and protection of privacy, for example by including reputation as an aspect of it, and thus in effect attenuating the corresponding scope and protection of freedom of expression in Article 10.[45]

[44] See, for example, *Chauvy and Others v. France*, *op. cit.*; *White v. Sweden*, no. 42435/02, § 20, 19 September 2006. Barendt refers to this as a "fair balance" test: Eric Barendt, "Balancing Freedom of Expression and Privacy: the Jurisprudence of the Strasbourg Court", [2009] 1 *Journal of Media Law* 49, at 52.
[45] See, for instance, the criticism of the three dissenting judges in *Flux v. Moldova (no. 6)*, no. 22824/04, 29 July 2008, who took the view that the majority judgment (a 4 to 3 majority) "has thrown the protection of freedom of expression as far back as it possibly could." (at § 17).

A line of cases beginning in 2004 illustrates this development.[46] The Court spoke of "on the one hand, freedom of expression protected by Article 10 and, on the other, the right of persons attacked […] to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life".[47] In *Pfeifer v. Austria*, the Court justified the inclusion of reputation under the privacy rubric by reference to personal identity and psychological integrity.[48]

In *Karakó v. Hungary*, the Court revisited that line of cases in which it had recognised reputation as a separate right forming an aspect of privacy, trying to rationalise those decisions and in effect to redirect its approach.[49] It stated that when a violation of the rights guaranteed in Article 8 is asserted and the alleged interference with those rights originates in an expression to which Article 10 would apply, "the protection granted by the State should be understood as one taking into consideration its obligations under Article 10".[50] The thrust of the judgment suggests that Article 8 would only be engaged if the attack on a person's reputation "constituted such a serious interference with his private life as to undermine his personal integrity".[51]

The Court has since attempted to further clarify the relationship between freedom of expression and protection of reputation and thereby the relationship between Articles 10 and 8 on this point in its *Axel Springer AG v. Germany* judgment as follows:

> 83. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life […]. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life [...]. The Court has held, moreover, that Article 8 cannot be relied on in order to complain

[46] This line of cases started with *Radio France and Others v. France*, no. 53984/00, ECHR 2004-II and *Chauvy and Others v. France*, no. 64915/01, ECHR 2004-VI.
[47] *Ibid.*, § 70**.** For a critique of these and the other cases in which this line of thought was developed, including *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, ECHR 2007-IV, see Marie McGonagle, "Defamation Law in Europe – Closing the gap between Reynolds and the ECHR", (2009) 14 *Media and Arts Law Review* 166; Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict", 26 *American University International Law Review* (no. 1, 2010), 183-236.
[48] *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007.
[49] *Karakó v. Hungary*, no. 39311/05, §§ 20-25, 28 April 2009.
[50] *Ibid*., § 20.
[51] *Ibid*., § 23.

> of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence […].
>
> 84. When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 […].[52]

In subsequent cases, the Court has continued to try to figure out in a variety of factual circumstances, whether the seriousness threshold has been reached for Article 8 to be triggered. Thus, it found in one case that accusing the applicant (a journalist) "of being disrespectful in regard to another ethnicity and religion was not only capable of tarnishing her reputation, but also of causing her prejudice in both her professional and social environment".[53] For the Court, the accusations "attained the requisite level of seriousness as could harm the applicant's rights under Article 8 of the Convention".[54]

2. Are vulgarity and offensiveness the new norm?

In *Delfi v. Estonia*, an online news portal had been held liable by the Estonian courts for defamatory comments posted by users in response to an article that it published on its website.[55] Some of the user comments amounted to hate speech, according to the Strasbourg Court – a detail that was crucial to its ultimate finding that the news portal's freedom of expression had not been violated. Notwithstanding the existence and implementation of a filtering system and a notice-and-takedown system, the Court found that the applicant company was liable for the comments, *inter alia*, due to its duties and responsibilities *vis-à-vis* hateful content posted in response to its own content. The applicant company had removed the impugned comments

[52] (citations omitted) *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83-84, 7 February 2012. See also: *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007, and *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011.
[53] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no 17224/11, § 79, 27 June 2017.
[54] *Ibid*.
[55] *Delfi AS v. Estonia* [GC], no. 64569/09, 16 June 2015.

once it was notified about them, but the notification only took place some six weeks after the article was originally posted.

In its subsequent case-law on similar topics, the Court went to considerable effort to distinguish the later cases from *Delfi*.[56] The Grand Chamber in *Delfi* had stressed that the precedential value of its majority judgment was limited to the specific facts of the case and that its findings should not be seen as having wider ramifications for other online intermediaries. For the Court, the key point of distinction between *Delfi* and its progeny has been "the pivotal element of hate speech" in *Delfi*.[57] In subsequent cases, the Court has tended to qualify the impugned expression as vulgar, offensive or vituperative, but not full-blown hate speech.

The Court generally takes a very dim view of vulgar and offensive language and it sometimes explicitly states that it does not condone it in any way. But it also recalls, conversely, that vulgarity "may well serve merely stylistic purposes" and that both the style and substance of expression are ordinarily protected by Article 10.[58] In short, whatever distaste the Court itself may feel towards vulgar and offensive expression online, such expression is protected under Article 10 ECHR – as long as it does not degenerate into hate speech or incitement to violence, etc.

This is one of the intractable problems of online communication. The internet is a place where the free flow of information, in particular information that is valuable for democratic deliberation, has to compete with torrents of "viral hate"[59] and to navigate its way through a proliferation of "cyber cesspools".[60] In its recent case-law, the Court seems to be reluctantly resigned to the fact that much online communication is simply vulgar and offensive.[61]

[56] See, for example, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016 and *Tamiz v. the United Kingdom* (dec.), no. 3877/14, 19 September 2017.
[57] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, *op. cit*., § 69.
[58] *Savva Terentyev v. Russia*, no. 10692/09, § 68, 28 August 2018.
[59] A.H. Fox and C. Wolf, *Viral Hate: Containing its Spread on the Internet* (New York: Palgrave Macmillan, 2013.
[60] Brian Leiter, "Cleaning Cyber-Cesspools: Google and Free Speech", in Saul Levmore and Martha C. Nussbaum (Eds.), *The Offensive Internet: Speech, Privacy, and Reputation* (Cambridge, Massachusetts, and London, England: Harvard University Press, 2010), pp. 155-173.
[61] See, for example, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 77, 2 February 2016 and *Tamiz v. the United Kingdom* (dec.), no. 3877/14, § 81, 19 September 2017; see also: J. Rowbottom 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) *The Cambridge Law Journal*, 355-383.

However, the vulgarity or offensiveness of an expression alone does not legimitize criminal sanctions.[62]

3. How sacred are facts in the post-Truth era?

The right to freedom of expression, as guaranteed by Article 10 ECHR, is not limited to protection for truthful information. The Court has held in this respect that Article 10 "does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention".[63]

Yet, as we now live in a so-called "post-Truth" era, in which facts and expertise are devalued and scorned, concerns are growing about the increasing prevalence of disinformation, especially online. The ease with which deep fakes are being produced and disseminated is also fuelling such concerns. In light of how disinformation can have disruptive and destructive impact on public debate, it remains to be seen if the Court will, in the future, be more sensitive to the harmful effects of disinformation.[64] It also remains to be seen whether defamation law and reliance on the defence of truth will be affected by increasing patterns of disinformation.

V. European Union Law

From a European Union law perspective, defamation should be considered against the backdrop of the Charter of Fundamental Rights of the European Union and the Brussels regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[65] Given the limited scope of this paper, the focus here will be on the E-Commerce

[62] *Savva Terentyev v. Russia*, no. 10692/09, § 69, 28 August 2018.
[63] *Salov v. Ukraine*, no. 65518/01, § 113, ECHR 2005-VIII.
[64] See further: Tarlach McGonagle, "'Fake news': False fears or real concerns?" 35 *Netherlands Quarterly of Human Rights* (No. 4, 2017), 203-209.
[65] REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJEU L351/1 of 20 December 2012. For broader perspectives on defamation and jurisdictional issues, see: *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states*, Doc. No. DGI(2019)04, prepared by the Expert

Directive, which contains important provisions concerning the role of, *inter alia*, social media service providers, when it comes to the dissemination of defamatory content through their services. As noted above (and as explained further, below), such service providers play a key role in enabling the wide circulation of content in the online environment.

The main aim of the E-Commerce Directive is to seek "to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States".[66] The Directive is premised on a contemporary understanding of how internet intermediaries worked in 2000 when the Directive was adopted, namely that intermediaries either have a passive or an active relationship with third-party content disseminated through their networks or services. In the logic of this binary distinction, the drafters of the Directive sought to ensure that passive intermediaries would not be held liable for content over which they had no knowledge or control. The Directive thus establishes a "safe harbour" regime for passive intermediaries.

The "safe harbour" regime entails exemptions from liability in "cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored".[67] These exemptions are set out in Articles 12-14 of the Directive and they can be availed of by service providers acting as a 'mere conduit' for information, or those which provide 'caching' or 'hosting' services. This means that intermediaries which serve as hosting providers would ordinarily benefit from an exemption for liability for illegal content, as long as they maintain a neutral or passive stance towards that content. A service provider that hosts third-party content may avail of this exemption on condition that it does not have "actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal

Committee on human rights dimensions of automated data processing and different forms of artificial intelligence (MSI-AUT), Rapporteur: Emeric Prévost, Council of Europe, 2019.

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

[67] Recital 42, *ibid*.

activity or information is apparent" and that "upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information".[68]

However, "the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level".[69] Pursuant to Article 15 of the Directive, EU Member States are not allowed to impose a general obligation on providers to "monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity". The type of surveillance that such a general monitoring obligation would entail would have a chilling effect on the freedom of expression of users of the service.

The Court of Justice of the European Union (hereafter, CJEU) recently provided some useful interpretative guidance in respect of the safe harbour regime and Article 15(1). In the *Eva Glawischnig-Piesczek* case,[70] the CJEU grappled with several thorny questions of internet intermediary liability and jurisdiction, including the extra-territorial impact of defamatory content. These are thorny questions because defamatory content can be reproduced or re-purposed, shared and spread online, in particular via social media, with great speed, reach and impact. This means that viral content can cause lasting damage to a person's reputation with great alacrity.

At the operative time, the applicant, Eva Glawischnig-Piesczek, held a number of positions within the Austrian political party, The Greens. In April 2016, a Facebook user shared on that user's personal page an article from an Austrian online news magazine. This created a thumbnail of the original article, containing the title of the article, a short summary and a photo of the applicant. The user also published – in connection with the article – a comment which the Austrian courts held to have been harmful to the applicant's reputation and to have insulted and defamed her. The post was accessible for any Facebook user.

The applicant asked Facebook Ireland (the operator of Facebook's services outside of the US and Canada) to delete the comment. When Facebook Ireland refused to do so, the applicant

[68] Article 14, *ibid*.
[69] Recital 46, *ibid*.
[70] Judgment of the Court (Third Chamber) of 3 October 2019, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, C-18/18.

initiated legal proceedings before the Austrian courts. An interim injunction by the Commercial Court, Vienna, directed Facebook Ireland to cease and desist from publishing and/or disseminating the comment or content with equivalent meaning. Facebook Ireland then disabled access in Austria to the original content. The Higher Regional Court in Vienna, on appeal, distinguished between the identical allegations (upholding the lower court's order) and equivalent content (the dissemination of which only had to cease in respect of such content that was brought to the knowledge of Facebook Ireland). Both parties appealed to the Austrian Supreme Court on points of law, which requested a preliminary ruling on a few questions from the CJEU.

The case concerned a particular piece of defamatory information, as identified by the Austrian courts. The CJEU held that this was specific enough not to fall foul of Article 15(1). But that was not the end of the matter. Social media facilitate the sharing, spreading and re-shaping of content. Consequently, if a court order were only to be directed at a specific piece of information, variants could be created and disseminated which would for all intents and purposes, have the same harmful impact as the original, specific piece of information. It was in anticipation of such a legal loophole that the Austrian Supreme Court sought interpretative guidance from the CJEU on the words "information with an equivalent meaning".

The CJEU appreciated this concern and stated that "in order for an injunction which is intended to bring an end to an illegal act and to prevent it being repeated, in addition to any further impairment of the interests involved, to be capable of achieving those objectives effectively, that injunction must be able to extend to information, the content of which, whilst essentially conveying the same message, is worded slightly differently, because of the words used or their combination, compared with the information whose content was declared to be illegal" (para. 41). It also went along with the Austrian Supreme Court's suggestion that "the effects of such an injunction could easily be circumvented by the storing of messages which are scarcely different from those which were previously declared to be illegal, which could result in the person concerned having to initiate multiple proceedings in order to bring an end to the conduct of which he is a victim" (*ibid*.).

Be that as it may, "equivalent" is a slippery term. Unless it is clearly and tightly defined, there is a risk that it will be interpreted overbroadly, with a potential chilling effect for free expression. To trammel the scope of the term, the Court underlined that the equivalent

information at issue in the present case "contains specific elements which are properly identified in the injunction, such as the name of the person concerned by the infringement determined previously, the circumstances in which that infringement was determined and equivalent content to that which was declared to be illegal" (para. 45). It further cautioned that "Differences in the wording of that equivalent content, compared with the content which was declared to be illegal, must not, in any event, be such as to require the host provider concerned to carry out an independent assessment of that content. same and equivalent – important to have a clear and tight definition of 'equivalent'" (*ibid*.).

The CJEU was satisfied that the extension of the obligation to "information with equivalent content" in the present case struck an appropriate balance between the interests at stake. It "appears to be sufficiently effective" for protecting the reputation of the person concerned and it stops short of imposing "an excessive obligation" on the host provider by requiring a general monitoring of content or an independent assessment by the host provider of the defamatory content of an equivalent nature (para. 46). The CJEU envisages that "automated search tools and technologies" can be deployed by the host provider for those purposes (*ibid*.).

Finally, the CJEU ruled that the Directive does not preclude a court of a Member State from "ordering a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law".

VI. Concluding remarks

This paper set out to provide a *tour d'horizon* of the European Court of Human Rights' principles on freedom of expression and defamation. There is a dynamic tension between the strong protection afforded freedom of expression and public debate on the one hand, and reputational rights/interests on the other hand. The principles governing both rights are closely intertwined. Although largely coherent, they require constant attention and refining, not least due to the new challenges arising in the digital age.

The ebb and flow in the Court's case law between reputation as a ground for limiting freedom of expression and as a component of an ever-expanding right to privacy, has proven problematic from the point of view of judicial consistency and legal certainty and predictability. The Court appears to now be in a period of consolidation of the approach it re-

affirmed in the *Axel Springer* and *Von Hannover (No. 2)* judgments, namely that a certain level of seriousness must be attained before Article 8 will enter into play.

Besides the interpretive challenge of consolidating and consistently applying the criteria behind the fair balancing of two Convention rights, the Court has also had to contend with other challenges that are - if not specific to, at least amplified by - distinctive features of the online environment.

The Court is resigned to the banality and apparent inevitability of vulgar and offensive content online. Such content is generally of little added value for public debate on matters of general interest to society. Yet, unless it crosses the Rubicon to enter the realm of hate speech, incitement to violence and other such forms of extreme speech, it will ordinarily be entitled to protection under Article 10 ECHR.

As the scope of protection guaranteed by Article 10 is wide but not absolute, the Court will have to remain vigilant and clear-sighted as it continues to draw and police the outer boundaries of the right. The qualification of expression as hate speech not only has implications for whether or not it will receive or be denied legal protection. It may well also have implications for the determination of responsibility or liability of the different actors involved in the creation, dissemination and amplification of the expression. As already observed, the Court seems to have developed a correlation between the harmfulness of expression and the expected level of responsibility to counter it.

Truth and falsehood have been grappling with each other for centuries, but their struggle has intensified in the digital age. The intensification of the struggle can be explained to a large extent by a combination of factors: the sophistication with which disinformation is being produced; the scale on which it is being produced – by very disparate actors with varying motivations, and the speed and effectiveness with which it is being disseminated. Truth has its work cut out for it – more than ever before. The surge of online disinformation in recent years has been a catalyst for widespread scepticism about the values, agendas and modi operandi of a growing range of actors contributing to public debate. By branding critical journalists and media as “fake news media” and accusing them of peddling lies and spin, some political leaders are contributing to the distrust of the Fourth Estate and to a climate of hostility towards them. All of this can cumulatively undermine the role of public watchdogs in democratic society and

make it even more difficult for them to pursue their primary task – to unearth "the best obtainable version of the truth".

In conclusion, the Court is plotting a course through choppy seas towards an increasingly digitized society. It has cautiously set sail from the shore of familiar principles towards a less familiar and constantly-moving horizon. It is right to place its faith in the navigational power of principles mapped out in an earlier age, but it will need to continuously re-assess its position and course throughout the voyage. Its navigational strategy needs to continue to be one of adaptive replication: replicating its existing principles in a way that is adaptive to new digitally-determined situations. It will also need to be aware of regulatory and jurisprudential developments at the EU level, where specific guidance is given to national law-makers and courts. Such guidance is particularly important when it comes to questions of liability for defamatory content produced by users of online services and disseminated through those same services.