



**Organization for Security and Co-operation in Europe
Office of the Representative on Freedom of the Media**

**LEGAL REVIEW
OF THE AUSTRIAN FEDERAL ACT FOR
DILIGENCE AND RESPONSIBILITY ONLINE**

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Executive Summary

On 10 April 2019, the Austrian Federal Chancellery proposed an Act that would eliminate users' anonymity when publishing on any social media or news website that targets an Austrian audience.

The Proposed Act would require certain service providers to collect personal information about users (full name, verification of identity and physical address) before it allows them to post content on their online platforms, including comments on news sites.

Service providers would then be obliged to share users' personal information with police or prosecutors based on suspicion of a criminal offence committed by virtue of an online posting. The Proposed Act also requires service providers to share users' personal information with private persons if such a person is able to "credibly claim" he or she needs the user's private information to take legal action against the user for defamation or injury to honour or to initiate criminal prosecution against the poster according to Article 117 (1) of the federal Criminal Code ('Privatanklagedelikt').

The pre-emptive collection of online media users' private information – whether or not the user has been suspected of any crime – poses a serious threat to OSCE commitments on media freedom and freedom of expression.

The OSCE has long recognised that "the right to freedom of expression includes freedom to hold opinions to receive and impart information and ideas without interference by public authority and regardless of frontiers."¹ The Proposed Act threatens these commitments by revoking online anonymity without judicial oversight. This creates uncertainty for those relying on hidden identities to speak out on sensitive issues, including exposing corruption. Such self-censorship will have an impact on the plurality of opinion online; as certain actors, particularly those from already marginalised communities will be more reluctant to express themselves freely.

The Proposed Act also poses a threat to the OSCE commitments of freedom of the media and freedom of expression by privatising roles traditionally held by judges and other law enforcement entities. The Proposed Act fails to address how service providers are to decide when to legitimately hand over their user's private information. Decisions taken outside the judiciary framework risks leading to restrictions to freedom of expression that fall short of the requirements of legality, necessity in a democratic society, and proportionality with a view to an internationally acceptable legitimate aim. Unclear cases, where a balancing of rights has to be performed in order to determine whether there has been a violation of the law, should be decided by a competent national authority through a clear judicial process and not by a private entity.

¹ Organization for Security and Co-operation in Europe Ministerial Council 'Decision No. 3/18 Safety of Journalists' [2018]; 'Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism' (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019.

The Proposed Act further threatens the OSCE commitment to freedom of expression *regardless of frontiers* because the Proposed Act may affect service providers targeting an Austrian audience differently as compared to those targeting other audiences, and may make information available to an Austrian audience censored in comparison to readers located elsewhere.

Another way in which the Proposed Act may lead to media self-censorship is because of substantial fines as a consequence of non-compliance with the law. As has been observed in regards to notice and take-down legislation, “the greater the burden that is put upon intermediaries, in terms of liability and the requirement to use resources to mediate or judge third party disputes, the greater will be the incentive to remove content without carefully reviewing, or otherwise evaluating the veracity of the noticed received.”² Similarly, this Proposed Act may increase the likelihood of the service providers to expose private information of online media actors to third persons.

The Legal Review further concludes that the Proposed Act, if it becomes law, would fail to meet the criteria required by the OSCE commitments and international law³ for a national law to limit the freedom of expression and freedom of the media. The reasons for the Proposed Act’s invalidity is the Act’s broad scope (its indiscriminate application to all users), its lack of transparency and outsourcing of a traditional judicial function to private companies and its conflict with rules of EU and international law established, *inter alia*, in GDPR (*e.g.* data minimisation) and in the E-Commerce-Directive (*e.g.* the country of origin principle).

² Alekandra Kuczerawy, ‘Intermediary liability & freedom of expression: Recent developments in the EU notice & action initiative’ (2015) 3 Computer Law & Security Review 46-56.

³ See Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019: “[A]ny restriction on the right to freedom of expression may only be such as are provided by law and are necessary on the grounds set out in paragraph of Article 19 of the ICCPR”; The freedom of expression and the freedom of media may only be restricted as “prescribed by law and in accordance with international standards”.

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1. Introduction

Broadly, the Proposed Act requires Internet service providers offering forum platforms such as YouTube or Twitter and online news sites or other media platforms to collect and verify users' personal data in order to facilitate the prosecution of any crime committed by virtue of an online posting and the private filing of defamation lawsuits. Under the Proposed Act, service providers must hand over user's personal data when requested by a public authority or a private party that claims he or she is a victim of defamation, if necessary for investigations.

This Legal Review will examine whether the Proposed Act conflicts with the OSCE's Commitments to Freedom of Expression and Freedom of the Media as well as other internationally recognised fundamental human rights standards.

2. The Proposed Act

On 10 April 2019 the Austrian Federal Chancellery presented the Proposal for a Federal Act on Diligence and Responsibility Online.

Stakeholders are invited to comment on the draft until 23 May 2019.⁴ The draft will then be negotiated in the government and, possibly, presented as a government-proposal to the Austrian Parliament. The proposal is accompanied by explanatory notes,⁵ a summary with short information on the law⁶ and an estimation of its (economical) impact⁷.

According to **Section 1** of the Proposed Act, the Act is intended to 'promote the respectful conduct of users towards each other and facilitate the pursuit of legal claims' by requesting service providers hosting an online forum to require mandatory registration from their users as a precondition to publish content online, including posting comments on news sites.⁸ The explanatory notes add that the Proposed Act shall promote the respectful conduct of posters in online forums towards each other and facilitate the pursuit of legal claims in the event of actually unlawful postings.

The registration process obliges information society service providers (in the sense of Directive 2000/31/EC) ('service provider') to **collect and authenticate name and address in advance of any user wishing to post in a forum** using the service provider's service.

In accordance with the Proposed Act, a service provider is "a provider of an information society service".⁹ Specifically, an information society service constitutes:

⁴ Bundeskanzleramt - Bundesminister für EU, Kunst, Kultur und Medien, 'Bundesgesetz, Mit Dem Ein Bundesgesetz Über Sorgfalt Und Verantwortung Im Netz Erlassen Und Das Kommaustria-Gesetz Geändert Wird; Begutachtung' (2019) <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00134/imfname_747399.pdf> accessed 14 May 2019.

⁵ 'Ministerialentwurf - Erläuterungen' (2019) <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00134/fname_747397.pdf> accessed 14 May 2019.

⁶ 'Bundesgesetz, mit dem ein Bundesgesetz über Sorgfalt und Verantwortung im Netz erlassen und das Kommaustria-Gesetz geändert wird' (2019) <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00134/imfname_747512.pdf> accessed 17 May 2019.

⁷ Vereinfachte Wirkungsorientierte Folgenabschätzung' (2019) <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00134/fname_747396.pdf> accessed 17 May 2019.

⁸ „Mit diesem Bundesgesetz werden Maßnahmen festgelegt, mit denen alle diesem Gesetz unterliegenden Diensteanbieter von Postern in ihrem Forum verlangen, vorab ein Registrierungsprofil zu erstellen. Damit soll der respektvolle Umgang der Nutzer miteinander gefördert und die Verfolgung von Rechtsansprüchen erleichtert werden.“

⁹ Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, Section 2(2).

a service normally provided for remuneration, at a distance, by electronic means at the individual request of the recipient (Sec. 1 (1) no. 2 Notification Law 1999, Federal Law Gazette (BGBl). I No. 183/1999), especially the online distribution of goods and services, online information services, online advertising, electronic search engines, and data request options as well as services that transmit information via an electronic network, that provide access to such a network, or that store the information of a user (Sec. 3 no. 1 e-Commerce Law (ECG), BGBl I No. 52/2001);¹⁰

Accordingly, for the purpose of the Proposed Act, a user who is known in the Act as the ‘Poster’, is a “User who published a post in a forum”.¹¹ For the purpose of clarity, a ‘Forum’ is defined within the Proposed Act as “the online function for exchanging communication or presentations with intellectual content [gedanklicher Inhalt] (post) by users with a wider circle of other users”.¹²

2.1 Scope

A service provider must require registration if they run a forum that is *directed at* users in Austria or allows its user to host such a forum. Applicability is therefore bound neither to an Austrian place of business nor to solely or even primarily Austrian users. In practice, this would mean that a forum hosted by a non-Austrian website in a foreign language, having a subsection allowing foreigners currently living in Austria to exchange opinions would fall within the scope of the Proposed Act, while, a forum run by an Austrian website dedicated solely to Austrians *abroad* would not fall under the scope as it would not be directed at users “in Austria”.

Whether the forum is directed at users in Austria or not is an issue that cannot be judged without interpreting the content of the online forum and its post. As these might change at any given time, the outcome of this could be that the service provider would have to constantly monitor and analyse the content of each and every post/thread on their online forum.

The service offered by a service provider has to be provided ‘normally for remuneration’.¹³ Therefore, forums that are not offered ‘normally for remuneration’ such as (strictly) private websites or services offered by public authorities or self-governing bodies are outside the scope of the Law. Importantly, however, the term ‘normally for remuneration’ has to be interpreted broadly. It is, in particular, not necessary that a client pays the provider directly for the service, other business models such as funding by third-party advertisements are within the scope of the Law.

In addition, service providers are only affected by the Proposed Act if they meet certain size-related thresholds.

The rules apply

1. to service providers whose service exceeds 100,000 registered users in Austria and

¹⁰ *ibid*, Section 2(1).

¹¹ *ibid*, Section 2(4).

¹² *ibid*, Section 2(3).

¹³ See Recital 17 and Article 2(a) of Directive 2000/31/EC.

2. to service providers whose turnover generated in Austria exceeded 500,000 € in the previous year and
3. to media owners, who received or receive more than 50,000 € in the previous or the current calendar year, respectively, in grants under the Press Subsidies Act, BGBl. I No. 136/2003 and
4. to service providers affiliated with a media owner in the sense of Sec. 9 (4) of the Private Radio Law (PrR-G), BGBl. I No. 20/2001 covered by no. 3, insofar as their online information service appears under the same or a similar brand as the grant recipient covered by no. 3.

Therefore, the Proposed Act will not apply to personal blogs, even if they are offered for remuneration. This raises questions on the effectiveness of the Proposed Act to achieve its aim to ‘promote the respectful conduct of users towards each other and facilitate the pursuit of legal claims’ as smaller, yet prominent forums, that are hosted by providers from the more extreme ends of the political spectrum will remain outside scope, when they fall below the above mentioned threshold.

According to Section 3(3) the obligation to register will also not apply to online selling/buying/sharing platforms such as eBay/Amazon/Airbnb/Uber although all of them offer possibilities to publish and share comments online that might also be offensive and/or illegal.

To control whether a service provider falls under the scope of the Proposed Act or not is one of the (new) obligations of the Austrian regulatory authority RTR GmbH; this task requires a yearly report from the service provider to the regulatory authority on the relevant figures (Section 3(2) subparagraph 2).

2.2 Obligations

The user is requested to authenticate themselves via a registration profile using their formal first name, surname, (physical) address and a user-ID that can be a pseudonym.¹⁴ No further specifications on the physical address – for example for users with several places of residence are given.

The service provider is requested to authenticate the identity of the user during the registration process, based on documents, data and information that have to come from a trustworthy and independent source. No further details on the design of the registration process are given. However, quickly after the Proposed Act’s presentation media reported¹⁵ that the technological solution for verification might be “Mobile Connect”. Mobile Connect is a

¹⁴ However, terms and conditions of major providers affected by the draft do not allow the usage of pseudonyms but follow a ‘real name policy’, see, for example Facebook Help Center, What names are allowed on Facebook? <<https://www.facebook.com/help/112146705538576>> accessed 17 May 2019.

¹⁵ Muzayen Al-Youssef, ‘Minister Blümel’s ominöse Software zur De-Anonymisierung’ (*Der Standard*, 12 April 2019) <<https://derstandard.at/2000101256631/Minister-Bluemels-ominoese-Software-zur-De-Anonymisierung>> accessed 16 May 2019; Muzayen Al-youssef, ‘Minister Blümel’s Ominous De-Anonymization Software’ (*Der Standard*, 18 April 2019) <<https://derstandard.at/2000101678440/Minister-Bluemels-Ominous-De-Anonymization-Software>> accessed 16 May 2019.

single-sign-on solution developed by GSMA.¹⁶ However, Mobile Connect is not yet market ready in Austria. It is highly unclear how such a process should look.¹⁷ The Proposed Act does not provide any guidance on which “documents, data and information” can be used and what the requirements for a “trustworthy and independent source” may be. ‘Independent’ might mean that the provider should be obliged to not only rely on own data but that a third party acting as a ‘trust broker’ needs to be involved. This might also explain why ‘the documents and information’¹⁸ used for authentication are to be deleted immediately after authentication according to Section 4(4).

The service provider is further obliged to become active if there are reasons to believe that the provided registration information is or has become incorrect. The service provider has to exclude users whose registration information is or has become obviously incorrect – for example due to a change of name or address (Section 3(5)).

The service provider has to delete the registration profile upon the poster’s request,¹⁹ poster’s cancellation of the service provider’s service and if a routine periodic review shows that the profile has been inactive for more than a year²⁰ (Section 3(6)).

The service provider has to disclose first name, surname, as well as the address of the poster to a third person upon their “well-founded written request”. A well-founded request requires that a third person, after proof of identity, credibly claims that knowledge of the poster’s identity is an indispensable prerequisite for private prosecution of this poster for defamation (Sec. 111 (2) Criminal Code) or insult (Sec. 115 Criminal Code) or for a civil claim because of injury to honour (Sec. 1330 Civil Code) due to the content of a post (Section 4(2) Proposed Act). In addition, first name, surname and address of the poster are also to be disclosed upon a request from criminal police authorities, prosecutors, or courts relating to the investigation of a concrete suspicion of a criminal offence committed by the poster by means of the content of a post (Section 4(4)).

In addition, the service provider has to make a proper record of a post if there are well founded indications that the content of a post might fulfil the objective requirements of defamation or insult or that the content might otherwise give rise to a concrete suspicion of a

¹⁶ 'Introducing Mobile Connect – the new standard in digital authentication' (GSMA) <<https://www.gsma.com/identity/mobile-connect>> accessed 16 May 2019. GSMA is an organisation representing the interests of mobile operators worldwide, 'About us' (GSMA) <<https://www.gsma.com/aboutus/>> accessed 16 May 2019.

¹⁷ See also Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, 'Explanatory notes', Section 4 which remain highly unclear: “The obligation of the service provider would be fulfilled, for example, if the data necessary for pursuing legal claims were confirmed with two-factor authentication with a mobile telephone number or if the service provider has ensured that - if necessary, in cooperation with the telephone service operator - it can find out the data necessary for pursuing legal claims in case of well-founded requests.”

¹⁸ It is noteworthy that the term ‘data’ which was used in the beginning of the paragraph is missing here. Whether this is an error or whether this has a reason, remains unclear.

¹⁹ It remains unclear which consequence this has on the posts already made by the poster, in particular, whether they have to be deleted or stored. This will become critical whenever a poster becomes aware that his posts might trigger actions of an offended party and wants to delete traces.

²⁰ It is very unclear how this is meant. Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, 'Explanatory notes state: “Diese Anordnung bedeutet nicht, dass der Diensteanbieter zu prüfen hätte, ob der Poster regelmäßig Postings veranlasst, sondern es geht um die Frage, ob der registrierte Nutzer überhaupt das Online-Informationsangebot länger schon nicht genutzt hat.”; ‘This requirement does not mean that the service provider must review whether the poster is posting regularly; rather it is about the question whether the registered user has not used the online information service for an extended period of time at all.’

criminal offence. The provider has to transfer this record to the authorities and a party asking for disclosure of the identity of a poster, but may not establish a link between the identity of a poster and the content of a post (Section 4(4)).

Service providers have to nominate a responsible representative and must inform the supervisory authority immediately about the appointment. The responsible representative has to take the provider's responsibility for compliance with the provider's obligations under this Proposed Act (Section 5(1)). Their contact details must be easily and constantly available and the service provider has to guarantee that the responsible representative can be contacted immediately. The explanatory notes clarify that, under normal conditions, the responsible representative will have to be reachable within 12 hours.²¹ The responsible representative needs to be in a position allowing them to order the transfer of identity-data after a request.

The regulatory authority "KommAustria" has to randomly check compliance with the Proposed Act. Providers are requested to give the regulatory authority all relevant information upon request. In cases of non-compliance, the regulatory authority has to impose a fine on the service provider of up to EUR 500,000; and EUR 1,000,000 in case of reoccurrence for breaches of the requirements (Section 7). In addition, the responsible representative can be fined individually with penalties of up to EUR 100.000 per case if the service provider does not comply with its obligations (Section 8).

50% of the earned fines shall be used for refinancing the regulatory authority (Section 10(3)).

It is noteworthy that the explanatory notes explicitly deny that the Proposed Act abolishes online-anonymity.²² They further state that no link between the poster's identity and the posting may be established by the service provider²³ and that the obligations of GDPR fully apply.²⁴

3. International standards and OSCE commitments

The first part of this Legal Review will set forth the OSCE Commitments²⁵ and international and EU standards²⁶ relevant to the analysis of the Proposed Act - particularly freedom of

²¹ Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, 'Explanatory notes' Section 5.

²² Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, 'Explanatory notes', Section 3: "Es bedarf angesichts der verschiedenen im Entwurf vorgesehenen Vorkehrungen auch keiner weiteren Ausführungen, dass von einer Aufhebung der Anonymität nicht die Rede sein kann, sondern die Regelungen des Entwurfs einen angemessenen Ausgleich zwischen dem Recht auf Meinungsäußerungsfreiheit einerseits und dem Recht auf Schutz des guten Rufs und Sicherstellung des Persönlichkeitsschutzes andererseits bewirken sollen."

²³ *ibid*, Section 3. Unfortunately, the sentence is grammatically incorrect: "Gesondert ist darauf hinzuweisen, dass – wie § 4 Abs. 4 des Entwurfs dies eindeutig regelt – beim Diensteanbieter keinerlei Verknüpfung zwischen der Identität eines Posters und dem Inhalt eines Postings vorgenommen werden darf und [dieser?!] die Daten überhaupt nur in konkret bezeichneten Fällen, dh. nur ausnahmsweise „herausgeben“ darf." But see also Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, 'Explanatory notes', Section 4: „Gesondert ist erneut darauf hinzuweisen, dass – wie § 4 Abs. 4 des Entwurfs dies eindeutig regelt – beim Diensteanbieter keinerlei Verknüpfung zwischen der Identität eines Posters und dem Inhalt eines Postings vorgenommen werden darf.“ The last sentence appears twice within two paragraphs.

²⁴ *ibid*, Section 3.

²⁵ See generally, OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

²⁶ For example, the Freedom of Expression and Information rights provided for in Article 11 of the Charter of Fundamental Rights of the European Union, Article 10 of the European Convention on Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights of 1948.

expression, freedom and pluralism of the media – all fundamental values aimed at “safeguarding democracy and enhancing our European identity.”²⁷

Part two will address how the Proposed Act is inconsistent with those OSCE Commitments and international standards.

3.1 Freedom of Expression

3.1.1 OSCE Commitments

The OSCE considers “[h]uman rights and fundamental freedoms” to be “the birthright of all human beings, [rights which are] inalienable and are guaranteed by law”.²⁸

Freedom of expression and the free flow information are two examples of such fundamental rights. Since August 1975, OSCE participating States have committed to respect fundamental freedoms including the freedom of expression. This was memorialised in the Helsinki Final Act. This Act established the importance of ensuring the free and unencumbered distribution of media and of the fundamental role of media within society. The aim of this Act was to “facilitate the freer and wider dissemination of information of all kinds, to encourage co-operation in the field of information and the exchange of information with other countries, and to improve the conditions under which journalists from one participating State exercise their profession in another participating State”.²⁹

Nevertheless, the OSCE participating States also acknowledge there may be circumstances in which fundamental rights and freedoms, including the right to freedom of expression, may be limited. The OSCE participating States openly condemn “manifestations of intolerance, and especially of aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism, and will continue to promote effective measures aimed at their eradication”.³⁰

3.1.2 International Standards

Freedom of expression as a fundamental human right is a widely and internationally accepted right which has remained steadfast within society from at least the first half of the 20th century.

At an international level, one of the first official pronouncements of the freedom of expression and freedom to information as an established human right was Article 19 of the United Nations’ Universal Declaration of Human Rights of 1948. This right encompasses the right to freedom of opinion and expression, the freedom to hold opinions without interference, and to seek and impart information and ideas through any media and regardless of the frontiers. For the purpose of clarity, United Nations’ declarations are not legally binding, but instead

²⁸ Charter of Paris for a New Europe, 19-21 November 1990, Paris Human Rights, Democracy and Rule of Law, page 21. In OSCE, 'OSCE Commitments 4Th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

²⁹ OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019, page 11. ²⁹ In the follow up meetings of the OSCE Participating States, the aims of the 1975 Act were affirmed. *See, e.g.*, Third Follow-up Meeting to the Helsinki Conference) 15 January 1989, Vienna, page 16. In OSCE, 'OSCE Commitments 4Th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

³⁰ CSCE Budapest Document 1994 Towards a Genuine Partnership in a New Era, 5-6 December 1994, Budapest, page 29. In OSCE, 'OSCE Commitments 4Th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

internationally represent the intentions and aspirations of signatory nations. UN Covenants are legally binding instruments under international law.

Article 19 of the International Covenant on Civil and Political Rights adopted by the United Nations General Assembly. Currently, this multilateral treaty applies to 172 signatory countries. The 1966 Covenant entered into force in Austria in December 1978. While this is an internationally binding Treaty, there is no effective international mechanism to enforce its provisions.³¹

Article 10(1) of the Council of Europe European Convention on Human Rights (“ECHR”) secures ‘Freedom of expression’ as a fundamental right: “*Everyone has the right to freedom of expression. This right shall include freedom to be able to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers.*” The ECHR provides that judgements by the European Court of Human Rights (“ECtHR”) are binding on the States concerned. The Council of Europe currently includes 47 member states, including Austria.

While the freedom of expression is a fundamental aspect of any democratic society, it is not limitless. The right may be subject to restrictions under strict conditions. As will be further addressed in later parts of this Legal Review, under European law, restrictions placed on this right must be provided for in law and must be necessary in a democratic society.³² Further, under Article 10(2) ECHR, any such restrictions must be necessary, proportionate and justified in relation to the aim, and the restriction must be based in law.

Both the Council of Europe and the EU operate with a relationship consisting of shared values and co-operation in human rights, democracy and the rule of law.³³ As put by Jean-Claude Juncker, “the Council of Europe and the European Union were products of the same idea, the same spirit and the same ambition.”³⁴ While the EU is not yet³⁵ party to the ECHR, all EU Member States are. The Charter of Fundamental Rights of the European Union (“the Charter”) confirms the fundamental rights obligations of all EU Member States. Article 52(3) of the Charter states that any rights which are found in the Charter which also exist in the ECHR shall be interpreted as having the same meaning and scope.³⁶ EU law may nonetheless apply stricter protection than that of the ECHR. The Charter is both legally binding on EU institutions and it is directly enforceable in the EU Member States.

³¹ United Nations, 'Toward Universal Participation and Implementation' (2010) <https://treaties.un.org/doc/source/events/2010/Press_kit/fact_sheet_5_english.pdf> accessed 15 May 2019; Member States may nonetheless provide national mechanisms for the enforcement of Treaty provisions.

³² Council of Europe European Convention on Human Rights, Article 10(2).

³³ 'The Council of Europe's Relations with the European Union' (*Council of Europe*) <<https://www.coe.int/en/web/der/european-union>> accessed 16 May 2019

³⁴ Report by Jean-Claude Juncker, Prime minister of the Grand Duchy of Luxembourg, to the attention of the Heads of State or Government of the Member States of the Council of Europe, 'Council Of Europe - European Union: "A Sole Ambition For The European Continent"' (2006) <<https://rm.coe.int/16804e3d96>> accessed 16 May 2019.

³⁵ The Draft Accession agreement of the EU and ECHR was finalised in April 2013. However, it was not adopted due to the possibility of undermining EU autonomy in relation to the Treaty of the European Union. From 2016 until this year talks within and between the EU and the Council have continued regarding the Draft Accession.

³⁶ This notion was reaffirmed in the Brussels Declaration: Brussels Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 27 March 2015. See also the Brighton Declaration, adopted at the High-Level Conference on the future of the European Court of Human Rights, 18–20 April 2012, CDDH(2012)007 at para 1.

Article 11 of the Charter ensures that “Everyone has the right to freedom of expression”. This right includes the freedom to hold opinions and to impart ideas without interference by a public authority. Again, this right is not limitless, and Article 52(1) of the Charter permits limitations be placed on this freedom where it is provided for by law with respect to the essence of those rights and freedoms. Further, the limitations must be subject to the principle of proportionality and must be necessary and genuinely meet general interest objectives recognised by the Union, or must be necessary for the protection of the fundamental rights of others.³⁷

The European Commission considers Freedom of Opinion, Freedom of Expression and the Right to Information as basic human rights, and they are seen by the EU as “cornerstones of democracy in any society”.³⁸

3.2 Freedom of the Media/Pluralism

Freedom of the media and the free flow of information “are fundamental tenets to achieve peace, security, and confidence-building” in all democratic nations.³⁹ “[I]ndependent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms”.⁴⁰

3.2.1 OSCE Commitments

The OSCE Representative on Freedom of the Media, Harlem Désir warned just last year that OSCE participating States must ensure future Internet regulation does “not erode the existing liberal climate that has contributed to the development of a free and diverse media landscape”

³⁷ Charter of Fundamental Rights of the European Union, Article 52(1).

³⁸ 'Freedom of expression' (European Commission - International Cooperation and Development) <https://ec.europa.eu/europeaid/freedom-expression_en> accessed 14 May 2019.

³⁹ Harlem Desir, OSCE Representative on Freedom of the Media 'To the Reader', page 7. In 'OSCE Commitments 4Th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

⁴⁰ Organization for Security and Co-operation in Europe Ministerial Council 'Decision No. 3/18 Safety of Journalists' [2018]; 'Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism' (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019 (quoting the Joint Declaration on Freedom of Expression and Countering Violent Extremism, 'The United Nations (UN) Special Rapporteur On Freedom Of Opinion And Expression, The Organization For Security And Co-Operation In Europe (OSCE) Representative On Freedom Of The Media, The Organization Of American States (OAS) Special Rapporteur On Freedom Of Expression And The African Commission On Human And Peoples' Rights (ACHPR) Special Rapporteur On Freedom Of Expression And Access To Information' (2016) (“The public’s right to information is an integral part of the right to freedom of expression...The media, the Internet, and other digital technologies have an essential role in keeping society informed. Even in difficult times, governments must create environments conducive to the free flow of information and should take particular care not to adopt restrictive measures.”)); *See also* European Parliament Report on media pluralism and media freedom in the European Union, April 12, 2018 (“[T]he right to inform and the right to be informed are part of the core basic democratic values on which European Union is founded...[T]he importance of pluralistic, independent and trustworthy media as a guardian and monitor of democracy and the rule of law cannot be underestimated[.]...[M]edia freedom, pluralism and independence are crucial components of the right to freedom of expression...the media play an essential role in democratic society, by acting as public watchdogs, while helping to inform and empower citizens, through widening their understanding of the current political and social landscape, and fostering their conscious participation in democratic life; ...the scope of such a role should be enlarged to encompass online and citizen journalism, as well as the work of bloggers, internet users, social media activists and human rights defenders, in order to reflect today’s profoundly changed media reality...” ; “[P]ublic authorities have the duty not only to refrain from implementing restrictions on freedom of expression, but also the positive obligation to adopt a legal and regulatory framework which fosters the development of free, independent and pluralistic media”).

and that future regulation should be “fully consistent with international standards on freedom of expression and freedom of the media.”⁴¹

As early as 1975, in the Helsinki Final Act, the OSCE participating States recognised the media's critical role in promoting democracy.⁴² Participating States reaffirmed their commitment to a free and independent media after the 1990 meeting in Copenhagen, agreeing “that no legal or administrative obstacle” should stand “in the way of unimpeded access to the media on a non-discriminatory basis for all political” groups.⁴³ Moreover, participating States recognised the importance of ensuring equal access to media and preventing discrimination “against anyone based on ethnic, cultural, [or] linguistic...grounds.”⁴⁴ Most recently, in Milan 2018, the OSCE participating States reaffirmed “all relevant OSCE commitments on the right to freedom of expression, freedom of the media, and free flow of information [...] include[ing] freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁴⁵ While the Internet has greatly enhanced access to the media and broadened traditional definitions of news sources, the same OSCE commitments and standards apply to media online.⁴⁶

3.2.2 International Standards

International standards include Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention on Human Rights, and Article 11 of the Charter of Fundamental Rights of the European Union.

These international standards contain similar language acknowledging the right of everyone to receive and impart information and ideas of all kinds, regardless of frontiers, and without interference by public authority and provide that these rights may only be restricted “in accordance with the test...under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law,⁴⁷ and be necessary and proportionate to protect that interest.”⁴⁸

⁴¹ OSCE Representative on Freedom of the Media, 'Recommendations On Protection Media Freedom And Freedom Of Expression In The Regulation Of Online Content In South East Europe' (The OSCE Representative on Freedom of the Media 2018) <<https://www.osce.org/representative-on-freedom-of-media/392999?download=true>> accessed 16 May 2019, page 3.

⁴² OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019, pages 10-13

⁴³ *ibid*, page 19.

⁴⁴ *ibid* page 24; *See also* page 37: “We reaffirm the importance of independent media and the free flow of information as well as the public’s access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society.”; p. 46 (“Free and pluralistic media which enjoy maximum editorial independence from political and financial pressure have an important role to play in ensuring [...] transparency” in “public affairs...an essential condition for the accountability of States and for the active participation of civil society in economic processes. Transparency increases the predictability of, and confidence in an economy that is functioning on the basis of adequate legislation and with full respect for the rule of law.”)

⁴⁵ OSCE Ministerial Council Decision No.3/18 on Safety of Journalists,, <https://www.osce.org/chairmanship/406538?download=true>

⁴⁶ Yaman Akdeniz, OSCE ‘Media Freedom on the Internet: An OSCE Guidebook’ commissioned by the Office of the OSCE Representative on Freedom of the Media (2016) <<https://www.osce.org/netfreedom-guidebook?download=true>>, page 4.

⁴⁷ *See*, the International Covenant on Civil and Political Rights, Article 19(3), recognizing such restrictions might be necessary for “the respect of the rights or reputations of others” or “the protection of national security or of public order, or of public health or morals.”

⁴⁸ The United Nations ‘Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS)

The ECtHR “in almost all decisions emphasises the essential function the press fulfils in a democratic society.”⁴⁹ “UN Human Rights Committee’s General Comment No. 34 on Article 19 of the ICCPR also states that ‘a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights.’”⁵⁰

4. Why the Proposed Act Violates OSCE Principles and International Standards

In this Part, we will examine if the Proposed Act complies with each of these OSCE Commitments and relevant international standards.

This legal review concludes that the Proposed Act is inconsistent with the OSCE Commitments on Freedom of Expression and Freedom of the Media/Pluralism. The Proposed Act violates these OSCE Commitments in the following aspects:

4.1 Revoking Anonymity

The OSCE participating States have recognized the importance of online anonymity to the exercise of the right to freedom of expression and its particular importance in journalists’ investigative work. Online anonymity permits users and the media to disseminate information without the fear of political or private retribution or embarrassment – which in turn promotes media pluralism, and political and corporate oversight.

The OSCE participating States have explicitly recognized “the importance of investigative journalism, and the ability of media to investigate, and to publish the results of their investigations, including on the Internet, without fear of reprisal, can play an important role in our societies, including in holding public institutions and officials accountable.”⁵¹ The EU Member States also recognized that such investigative journalism can also be performed by members of the public: “[E]fforts to protect journalists should not be limited to those formally recognised as such, but should also cover...others such as citizen journalists, ‘bloggers, social media activists and human rights defenders, who use new media to reach a mass audience.”⁵²

The OSCE Ministerial Council has called on participating States to

“[r]efrain from arbitrary or unlawful interference with journalists’ use of encryption and anonymity technologies and refrain from employing unlawful or arbitrary surveillance techniques, noting that such acts infringe on the journalists’ enjoyment of human rights, and could put them at potential risk of violence and threats to their safety”⁵³

The OSCE participating States have also emphasized

Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information’ (2015) <<https://www.osce.org/fom/237966?download=true>> accessed 16 May 2019.

⁴⁹ Yaman Akdeniz, OSCE ‘Media Freedom on the Internet: An OSCE Guidebook’ commissioned by the Office of the OSCE Representative on Freedom of the Media (2016) <<https://www.osce.org/netfreedom-guidebook?download=true>>, page 33.

⁵⁰ *ibid.*

⁵¹ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018];

⁵² Interpretative Statement by Austria in its capacity as EU Presidency to the Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018] <https://www.osce.org/chairmanship/406538?download=true>;

⁵³ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019.

“the particular risk with regard to the safety of journalists in the digital age, including the particular vulnerability of journalists to becoming targets of hacking or unlawful or arbitrary surveillance or interception of communications, undermining enjoyment of their right to freedom of expression and their right to be free from arbitrary or unlawful interference with privacy.... [V]iolations and abuses of the right to be free from arbitrary or unlawful interference with privacy may affect the safety of journalists.”⁵⁴

The Proposed Act’s Section 3, paragraph 4 violates these principles by requiring any “user” (including journalists) of an online media platform who wishes to publish content (including comments on news sites) to formally register to the platform by disclosing their full name and address, which the service provider must then verify.

The Proposed Act creates a chilling effect on the freedom of expression by stripping users of their anonymity and requiring them to engage in a quid pro quo before being able to exercise their right to freedom of expression and potentially before gaining access to information/media (*i.e.*, the exchange of their personal data for access to the platform).⁵⁵ Indeed, the explanatory notes to the Proposed Act make clear the proposed legislation’s very *intention* is to restrict certain forms of speech because, as the explanatory notes reason, once a user’s anonymity is stripped, he or she will be less likely to post something not “respectful”.⁵⁶ However, the right to freedom of expression goes beyond what is considered to be ‘respectful’ speech, as recognised in case law of the ECtHR (*Handyside v United Kingdom*)⁵⁷.

When online anonymity is removed in such a sweeping and arbitrary manner, and without judicial oversight, it is likely to affect the willingness of those relying on hidden identities to speak out on sensitive issues such as corruption. This form of self-censorship will have an impact on the plurality of voices online; as certain actors, particularly those from already marginalized communities will be more reluctant to express themselves freely.

The OSCE Ministerial Council has also urged participating States to comply with “their international obligations related to freedom of expression and media freedom”.⁵⁸ The ECtHR has also acknowledged that online anonymity fosters freedom of expression.

⁵⁴ Decision 3/18

⁵⁵ See Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* [2014] OJ C 175, [28] (recognizing that data retention can impact the exercise of the freedom of expression).

⁵⁶ See Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, ‘Explanatory notes’ – General Part: “In order to promote the respectful conduct of posters in online forums towards each other and in order to facilitate the pursuit of legal claims in the event of actually unlawful postings...”; ‘ISPA kritisiert Ausweispflicht im Internet’ (*ISPA*, 10 April 2019) <https://www.ots.at/presseaussendung/OTS_20190410_OTSS0089/ispa-kritisiert-ausweispflicht-im-internet> accessed 16 May 2019: “Without the possibility of anonymity on the Internet, we fear that people will be less open about controversial issues such as sexuality or politics, and that they will refrain from sharing in anonymous self-help groups.”

⁵⁷ “Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.” *Handyside v United Kingdom*, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57499%22%5D%7D>

⁵⁸ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019.

In *Delfi AS v. Estonia*,⁵⁹ the Court approvingly cited the European Council's 28 May 2003 declaration on freedom of communication on the Internet, which provides: “*In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users on the Internet not to disclose their identity.*”⁶⁰ The Court went on to state that “[a]nonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet.”⁶¹

4.2 Outsourcing of Judicial Responsibility

Safeguarding human rights and fundamental freedoms requires the rule of law.⁶² In particular, maintaining the role of police and judicial authorities to ensure decisions are taken inside the rule of law legal frameworks, and therefore mitigating any restrictions to the freedom of expression and media.

The Proposed Act requires the service provider to make a legal assessment. The service provider must first identify and confirm whether the relevant legal provision from Section 4(2) (pertaining to criminal acts, or civil defamation) applies and then make an interpretation of the law which they think applies and confirm this in relation to the request. The service provider must make a judgement as to the applicability and credibility of the request in relation to a specific Austrian law. Further, given that the service providers to whom the Proposed Act applies can be located outside of Austria, there is also an expectation for foreign service providers to have the resources and ability to make an assessment on the validity of application of an Austrian law.

Lastly, the service provider must assess whether identification of the poster is indeed an indispensable prerequisite for criminal or civil judicial proceedings. The first question here would be how one assesses if an amount of information is an indispensable prerequisite. Certainly, anyone, and not only a service provider would require an appropriate level of contextual knowledge and then legal expertise to complete the assessment.

Each of these requirements which encompass what the Proposed Act calls a ‘well-founded request’ for the purposes of Section 4. However, each point is largely subjective and is akin to the assessments usually made by judges or other legal experts within Austria, and not the providers of an online service who may be located anywhere in the world.

The explanatory notes make this point and its problems even clearer. They state:

⁵⁹ *Delfi AS v Estonia* (2015) ECtHR Series A no. 64569/09.

⁶⁰ *ibid*, [44].

⁶¹ *ibid*, [147]: The Court acknowledged that anonymity on the Internet is not subject to absolute protection: “[a]lthough freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives such as the prevention of disorder or crime or the protection of the rights and freedoms of others.” (quoting *K.U. v Finland*, (2008) ECtHR Series A no 2872/02, [49].); *See also Nagla v. Latvia* (2013) ECtHR Series A no 73469/10 (noting that Article 10 of the ECHR protects “anonymous sources assisting the press to inform the public about matters of public interest...”).

⁶² Charter of Paris for a New Europe (Summit of Heads of State or Government), 19-21 November 1990, Paris Human Rights, Democracy and Rule of Law in OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

The draft is intended to ... ensur[e] that the service provider only in factually founded cases hands over the data concerned that make it possible to request from the telephone service operator the master data of the poster it has processed. The third-person party must therefore provide credible evidence that he/she has no other possibility to obtain the true identity of the poster for the purpose of private prosecution or for the pursuit of possible claims in accordance with Sec. 1330 of the ABGB. Specifically, it has to be pointed out again that – as unequivocally stipulated in Sec. 4 (4) of the draft – there must not be established any link between the identity of a poster and the content of a post at the service provider.⁶³

Not only is it evident that the provider has to decide on whether the person asking for the data has provided credible evidence that he/she has no other possibility to obtain the true identity of the poster and whether this data might be useful for the purpose of prosecution. In addition, the provider may not assess the identity of the poster which, however, might obviously have an impact on this assessment as it might put the posting in a different context. A statement that looks like defamation might in fact have a completely different legal assessment if it is authored by a comedian, a competitor or a political opponent.

To comply with the Proposed Act, service providers must take a quasi-judicial role, a responsibility that should be maintained by an independent judicial oversight body. This is firstly because of the complexities of the law, and secondly because of the significant impact the subjective exercise can have on individual's right to freedom of expression. In examining Section 4, the Proposed Act appears to place a significant burden upon the service provider in accurately providing a legal assessment as to whether a request is well-founded. This practice also asks the question of whether judicial responsibility is now being outsourced to private actors.

In *Digital Rights Ireland*, upon the invalidation of Directive 2006/24, the CJEU confirmed that the lawfulness of an access request to a service provider by competent national authorities to data retained, must receive a prior review by a court or an administrative body.⁶⁴ *Digital Rights Ireland* acknowledges it is the role of the court or independent administrative body to limit access to data to “what is strictly necessary for the purpose of attaining the objective pursued”.⁶⁵ The outcome of these requests presents significant risks for the protection of fundamental rights. It is not therefore the role of private entities to assess the lawfulness of access requests. Rather, this is a role reserved for courts and other applicable supervisory authorities in their function as impartial experts in the given field.

⁶³ Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, ‘Explanatory notes’, Section 4: “Dieses Defizit soll durch den Entwurf beseitigt, gleichzeitig aber dafür Sorge getragen werden, dass der Diensteanbieter nur in sachlich begründeten Fällen die betreffenden Daten herausgibt, die es ermöglichen, vom Betreiber des Telefondienstes die von ihm verarbeiteten Stammdaten des betreffenden Posters zu verlangen. Die dritte Person hat daher glaubhaft zu machen, dass ihr kein anderer Weg zur Verfügung steht, um für die Erhebung der Privatanklage oder die Verfolgung allfälliger Ansprüche nach § 1330 ABGB zur wahren Identität des Posters zu gelangen. Gesondert ist erneut darauf hinzuweisen, dass – wie § 4 Abs. 4 des Entwurfs dies eindeutig regelt – beim Diensteanbieter keinerlei Verknüpfung zwischen der Identität eines Posters und dem Inhalt eines Postings vorgenommen werden darf.“

⁶⁴ Cases C-293/12 and C549/12 *Digital Rights Ireland Ltd* [2014], [62].

⁶⁵ *ibid.*

In addition to ‘well-founded’ requests by ‘a third person’, required by Section 4, the Proposed Act requires service providers to disclose poster information upon request to criminal police authorities, prosecutors and courts which have a ‘concrete suspicion’ that the user may have committed a crime. A service provider must then, upon request by a law enforcement authority, make a record of the post in question to allow for a complete reproduction which is true to the original. In this instance the service provider would be taking a role traditionally taken by public law enforcement members, that is evidence gathering and recording. This action is supposed to be based upon the notion of a ‘concrete suspicion’. The Proposed Act provides no explanation as to the meaning of these terms. Thus, it appears that based on terms which can be construed as uncertain, a service provider must make a judgement whether to disclose the personal information to the law enforcement authorities and whether to make a record of their post.

This situation presents various concerns for the freedom of expression and media due to the apparent uncertainties under which personal data and forum content can be handed over to law enforcement authorities. There is also a question of which entity provides oversight for what a ‘concrete suspicion’ is and whether the personal data can subsequently be handed over.⁶⁶ This is of substantial concern as it further increases the responsibility of the service provider. The Proposed Law should not assign service providers the role of judges, as decisions taken outside the rule of law framework may lead to restrictions to fundamental rights, including the right to freedom of expression and media and the right to privacy.

Rather, the Proposed Act should provide clear guidance as to what action is illegal and what is not. In unclear cases where a balancing of rights is required, it must be done so by a national authority that is competent to do so and which is assisted by a clear judicial process and not by a private entity.

Additionally, the Proposed Act should provide more clarity on how service providers should engage with law enforcement if required, and how the service providers should effectively interact with law enforcement while providing the necessary responsibility with regard to fundamental rights and freedoms.

The concern in this instance is that in response to uncertainty, service providers will over regulate to avoid legal proceedings and the heavy penalties. This outcome would be dire for the freedom to information and media alike. In 2018, a Decision was taken by the OSCE participating States to ensure the Safety of Journalists in which it was stated that all participating states shall ensure that “defamation laws do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public and, where necessary, to revise and repeal such laws, in compliance with participating States’ obligations under international

⁶⁶ “In January 2016, the OSCE Representative on Freedom of the Media recommended to the participating States that [...] the important presence and role of intermediaries should not endanger the openness, diversity and transparency of Internet content distribution and access”. Yaman Akdeniz, OSCE ‘Media Freedom on the Internet: An OSCE Guidebook’ commissioned by the Office of the OSCE Representative on Freedom of the Media (2016) <<https://www.osce.org/netfreedom-guidebook?download=true>>, pages 98-99. The implementation of the Proposed Act would undoubtedly endanger these principles as it would take advantage of the role of intermediaries for separate reasons unconnected to those for which the given forums are used.

human rights law”. With, among other things discussed in this document, the ambiguities presented by the self-determination of the application of this law required on the part of service providers, the Proposed Act would run contradictory with this OSCE commitment.

It is important to note that the scope of the German law “Netzwerkdurchsetzungsgesetz”⁶⁷ is very different from the Proposed Act’s. Whereas the Austrian law requires providers to identify every single poster, the German law does not require the user disclose any personal or identifying information at all; instead, the German law requires a service provider to quickly erase illegal content. No additional personal user data is therefore processed by German providers because of the Netzwerkdurchsetzungsgesetz and therefore the risk of a chilling effect caused by fears that sensitive ‘anonymous’ information might later be linked to a known poster is smaller. However, the German law has constantly been under heavy critique for putting providers in a judicial role in very complex cases requiring private entities to make a judgment about potentially conflicting human rights.

4.3 Vulnerable Groups

As expressed by the OSCE participating States, the Internet provides a platform for “[p]ersons belonging to national minorities [to] have the right freely to express, preserve and develop their ethnic, cultural or religious identity and to maintain and develop their culture in all its aspects, free of any attempt at assimilation against their will”⁶⁸.

Additionally, the OSCE participating States declared that countries should “work to ensure that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity”⁶⁹. Online forums provide a facilitation tool for this kind of development and unhindered freedom of expression for vulnerable/minority groups by providing a free, anonymous and safe platform to share ideas, report without persecution and to connect with others.

Section 3(1) of the Proposed Act requires that “service providers of online information services must require each poster in advance to create a registration profile for authentication”. In accordance with Section 4(1) of the Proposed Act, the service provider will have information on the first and second name of the user as well as their address. The problems associated with this Proposed Act in relation to vulnerable and minority groups are multifaceted: The requirement of individuals to register a profile which can be used to identify the individual provides an obstacle in itself. In some minority cultures, being associated with particular groups or online forums can have detrimental and even harmful effects in real-life. In this case it is possible that such groups will simply abstain from the online discussions. This result will not only be problematic for the development of vulnerable

⁶⁷ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Act to Improve Enforcement of the Law in Social Networks, (BGBl. 2017 I S. 3352) <<https://www.gesetze-im-internet.de/netzgdg/BJNR335210017.html>>, accessed 17 May 2019.

⁶⁸ Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE 29 June 1990, Copenhagen, page 19 – see OSCE commitments document. In OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

⁶⁹ Document of the Ninth Meeting of the Ministerial Council 4 December 2001, Bucharest The Bucharest Plan of Action for Combating Terrorism (Annex to MC(9).DEC/1), page 40. In OSCE, 'OSCE Commitments 4th Edition' (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

groups, but it will halt their access to information, their freedom of expression and media pluralism overall.

The Proposed Act is likely to restrict (or even altogether inhibit) the freedom of expression of vulnerable (including minority) groups or those that do not have an Austrian government issued identification⁷⁰ or a contract with an Austrian telecom service provider. This is because to comply with the Proposed Act the Internet service providers would have to establish a relatively inexpensive and automated way to verify the identity and address of users. Though the Proposed Act leaves it up to the service provider to determine how this will be accomplished.

The Proposed Act is also likely to have a disparate impact on media platforms versus on large service providers like Google and Facebook. This is because the Proposed Act explicitly applies to online media – requiring the same registration and oversight requirements from, for example, online newspapers, as would be required of large social media corporations.⁷¹ For the same reasons, the Proposed Act will have a negative impact on the freedom of the media. Such an impact may be even more pronounced if the Proposed Act is used as a pretext to identify journalists’ confidential sources.

4.4. Excessive fines

The Proposed Act potentially violates OSCE commitments to freedom of the media and freedom of expression by placing excessive fines on violators of the Proposed Act; even going so far as to create personal liability for the responsible representative employed by a service provider. As noted, the Proposed Act calls for fines up to EUR 1 million for service providers and up to EUR 100,000 for responsible representatives employed by a service provider, personally. Such fines can also be imposed on service providers and their responsible representative if they do not comply with portions of the law requiring them to hand over private information of users to private individuals with a “credibl[e] claim”⁷² that he or she requires the private information in order to file a lawsuit for defamation against the user.

The OSCE Ministerial Council has called on participating States to

“[e]nsure that defamation laws do not carry excessive sanctions or penalties that could undermine the safety of journalists and/or effectively censor journalists and interfere with their mission of informing the public and, where necessary, to revise and repeal such laws, in compliance with participating States’ obligations under international human rights law”⁷³

⁷⁰ This may also contravene Article 21 of the Charter of Fundamental Rights of the European Union that provides, in relevant part: “within the scope of application of the treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited”.

⁷¹ Chapter 2 (3) and (4) of the Proposed Act applies the registration requirements to “media owners, who received or receive more than 50,000 euros in the previous or current calendar year...in grants under the Press Subsidies Act....and to service providers affiliated with a media owner...”.

⁷² Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act Section 4(4).

⁷³ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019.

The Proposed Act conflicts with this OSCE commitment, and the OSCE’s commitment to freedom of expression and the media, generally, because the large fines imposed by the Proposed Act incentivize service providers to be overly cautious. That is, it incentivizes service providers to disclose their users’ personal information to the police, public authorities or private individuals – even though there may not be a legitimate basis for the disclosure.

This overabundance of caution has already been observed in response to “notice and take down” legislation. “Notice and take down” refers to legislative schemes that require service providers (or intermediaries as they are referred to in such legislation) to “take down” illegal or infringing content after they are notified of its existence. In response to the high fines imposed by such laws, Google observed: “the greater the burden that is put upon intermediaries, in terms of liability and the requirement to use resources to mediate or judge third party disputes, the greater will be the incentive to remove content without carefully reviewing, or otherwise evaluating the veracity of the notices received.”⁷⁴

Moreover, the Proposed Act may negatively impact the freedom of the media by forcing media companies to bear potentially high overhead costs to comply with the law⁷⁵.

4.5 Fragmented Online Communities

In accordance with OSCE commitments:

“[T]he public will enjoy similar freedom to receive and impart information and ideas without interference by public authority regardless of frontiers...any restriction on the exercise of this right will be prescribed by law and in accordance with international standards...”⁷⁶

The OSCE’s Decision No. 3/18 on the Safety of Journalists reaffirmed “that the right to freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and *regardless of frontiers*.”⁷⁷ In this sense any geographically connected barrier to the freedom of expression and media would likely constitute such a frontier.

The Section 3(2) of the Proposed Act confirms that it applies to service providers of online information services who are connected to Austria whether by virtue of their generated earnings, to media owners by virtue of their earnings or to service providers affiliated with said owners, or “to service providers whose service domestically has more than 100,000 registered users”.⁷⁸ The location of the poster is also relevant. A poster must have set up or

⁷⁴ Aleksandra Kuczerawy, *Intermediary liability and freedom of expression: Recent developments in the EU notice & action initiative* [2015] 0(31) Computer Law & Security Review 46-56, at 53.

⁷⁵ Such overhead costs can even be viewed as the government requiring media companies to subsidize private (libel) lawsuits. These overhead costs may also be a threat to media plurality as it may make it prohibitively expensive for smaller websites to continue to do business in Austria or smaller players to break into the market. See Muzayen Al-youssef, ‘Government Seeks to Eliminate Internet Anonymity – With Severe Penalties - derstandard.at/2000101677286/Government-Seeks-to-Eliminate-Internet-Anonymity-With-Severe-Penalties’ (*Der Standard*, 18 April 2019) <<https://derstandard.at/2000101677286/Government-Seeks-to-Eliminate-Internet-Anonymity-With-Severe-Penalties>> accessed 16 May 2019.

⁷⁶ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019.

⁷⁷ Emphasis added.

⁷⁸ Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, Section 3(2)(1).

operate a forum that is dedicated to users in Austria, or enable, within the framework of their service the setting up of a forum in Austria by the users of their own service.

Given the requirement of the connection to Austria in regard to the internet which operates outside of the conventional national borders, one must question what the restrictive effects of this Proposed Act will have upon the fragmentation of the freedom of expression and of media whether in relation to the access to information or the dissemination of information.

In the context of Notice and Action procedures, it has been stated that inconsistent national legislation “is considered to be one of the major obstacles for intermediary service providers as well as for victims of illegal content to exercise their rights. It could also lead to a race to the bottom, in a way that the intermediaries would adopt the interpretation followed by the countries with the most restrictive rules on content. This would allow them to keep their response consistent across different countries and, at the same time, ensure the highest chance of protection against possible liability. Such approach, however, could be highly detrimental for freedom of expression.”⁷⁹ While the context may differ slightly, the same premise applies. The protection of the fundamental right to freedom of expression applies ‘regardless of frontiers’ and in line with the shared understanding of freedom of expression and media.

A particular concern here is that this Proposed Act only applies to posters and forums with a connection to Austria. This creates a patchwork Internet regulation problem, that is, where some areas of the online sphere are freer than others.⁸⁰ This can have a knock-on effect for individuals’ freedom of expression as individuals may be more reserved and even silent when interacting on forums related to Austria. The silence and the hesitation of expression on forums related to Austria could result in an absence of information which would otherwise be present. This pre-emptive data collection could result in a restrictive media environment exclusive within the EU to Austria and content connected to it.

4.6 Requirements for Restrictions

As set forth earlier in this Review, fundamental rights such as the freedom of expression and freedom of the media are not absolute.⁸¹ Nonetheless, any restriction of these freedoms must “comply with the standards for such restrictions recognised under international human rights law” including passing a three-part test dictated by Article 52 of the EU Charter of Fundamental Rights.⁸²

⁷⁹ Aleksandra Kuczerawy, 'Intermediary liability and freedom of expression: Recent developments in the EU notice & action initiative' [2015] 0(31) Computer Law & Security Review 46-56.

⁸⁰ See, e.g., Aleksandra Kuczerawy, *Intermediary liability and freedom of expression: Recent developments in the EU notice & action initiative* [2015] 0(31) Computer Law & Security Review 46-56, at 51 (“[A] lack of uniform rules for Notice and Action procedures across the EU...could lead to a race to the bottom, in a way that the intermediaries would adopt the interpretation followed by the countries with the most restrictive rules on content. This would allow them to keep their response consistent across different countries and, at the same time, ensure the highest chance of protection against possible liability. Such approach, however, could be highly detrimental for freedom of expression.”)

⁸¹ The Charter of Fundamental Rights of the European Union is binding law in Austria as it is considered part of the Constitution for purposes of determining the constitutionality of Austrian national laws. See Austrian Constitutional Court Case No. U466/11-18, U1836/11-13.

⁸² That is, “States must set out clearly in validly enacted law any restrictions on expression and demonstrate that such restrictions are necessary and proportionate to protect a legitimate interest.” Moreover, restrictions on freedom of expression must also be non-discriminatory and subject to independent judicial oversight. Joint Declaration on Freedom of Expression and Countering Violent Extremism, The United Nations (UN) Special Rapporteur On Freedom of Opinion And Expression,

Article 52 of the Charter and Article 19 of the ICCPR⁸³ require any national laws that purport to limit the freedom of expression and freedom of the media to meet certain requirements before being considered valid.

According to the European Court of Human Rights jurisprudence, interpreting the European Convention of Human Rights, Article 10(2) “a strict three-part test is required” for any restriction or interference with the freedom of expression.⁸⁴

- First, “the restriction must be ‘provided by law.’”⁸⁵
- Second, the restrictive Proposed Act (or interference) must have as its aim, the protection “of one or more of the following interests or values: national security; territorial integrity; public safety; prevention of disorder or crime; protection of health; morals; reputation or rights of others; preventing the disclosure of information received in confidence; and maintaining the authority and impartiality of the judiciary.”⁸⁶ According to ECtHR jurisprudence, this is an exhaustive list.⁸⁷
- Third, “the proposed law must be ‘necessary in a democratic society.’”⁸⁸

Article 52 of the Charter requires a similar analysis. It states in relevant part:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of

The Organization For Security And Co-Operation In Europe (OSCE) Representative On Freedom Of The Media, The Organization Of American States (OAS) Special Rapporteur On Freedom Of Expression And The African Commission On Human And Peoples’ Rights (ACHPR) Special Rapporteur On Freedom Of Expression And Access To Information’ (2015); The United Nations ‘Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information’ (2015)
<<https://www.osce.org/fom/237966?download=true>> accessed 16 May 2019.

⁸³ The relevant portion of the International Covenant of Civil and Political Rights (ICCPR) Article 19, reads in relevant part:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, ... or through any other media of his choice.

3. The exercise of rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For the respect of the rights or reputation of others;

(b) For the protection of national security or of public order ..., or of public health or morals.

As with the ECtHR’s test, the burden of proving each part of the test is satisfied lies with the government. See International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966, Articles 2, 3 and 19.

⁸⁴ *Haldimann and others v. Switzerland*, (2015) ECtHR Series A no. 21830/09 [34]-[55]; See also Dominika Bychawska-Sinicuska, ‘Protecting the Right to Freedom of Expression Under the European Convention of Human Rights – A handbook for legal practitioners’, (Council of Europe, 2017), page 32; See also *Yaman Akdeniz*, OSCE ‘Media Freedom on the Internet: An OSCE Guidebook’ commissioned by the Office of the OSCE Representative on Freedom of the Media (2016) <<https://www.osce.org/netfreedom-guidebook?download=true>>, accessed 16 May 2019, page 31.

⁸⁵ Dominika Bychawska-Sinicuska, ‘Protecting the Right to Freedom of Expression Under the European Convention of Human Rights – A handbook for legal practitioners’, (Council of Europe, 2017), pages 32-33.

⁸⁶ *ibid.*, 33.

⁸⁷ See Dominika Bychawska-Sinicuska, ‘Protecting the Right to Freedom of Expression Under the European Convention of Human Rights – A handbook for legal practitioners’, (Council of Europe, 2017), page 43.

⁸⁸ *ibid.*

general interest recognised by the Union or the need to protect the rights and freedoms of others.

The Proposed Act likely fails at least two of the prongs of the ECtHR’s three-step test:

STEP 1: Prescribed by Law

If the Proposed Act passes, any resulting restriction on the freedom of speech would be “prescribed by law” in that there would be a national law in place.

Nonetheless, the ECtHR has cautioned that this prong “not only requires that the impugned measure should have some basis in domestic law, but also refers to the **quality of the law** in question, which should be accessible to the person concerned and foreseeable as to its effects...”⁸⁹

In *Petra v. Romania*, the Court held a Romanian national law did not meet these requirements and therefore did not qualify as a “law” where, among other things, domestic provisions in the law applicable to the monitoring of prisoners’ correspondence “left national authorities too much latitude” and the confidential implementing regulations “did not satisfy the requirement of accessibility and did not indicate with reasonable clarity the scope and manner of exercise of discretion conferred on the public authorities.”⁹⁰

The Proposed Act may be challenged on the same basis, because, as already discussed, it grants broad discretion to private companies to determine under what circumstances to hand over private user’s personal information to authorities or even to other private citizens. Indeed, the law provides almost no guidance in this regard, leaving service providers with the burden and responsibility of exercising a quasi-judicial function with little to no oversight, and no remedy.

STEP 2: Legitimate Aim

The Explanatory Notes to the Proposed Act provide that the aim of the proposed legislation is to “promote the respectful conduct of posters in online forums towards each other and in order to facilitate the pursuit of legal claims in the event of actually unlawful postings”.

By its very terms, the Proposed Act is intended to facilitate any criminal investigation.⁹¹ It is not limited to specific pernicious or serious criminal offenses, such as incitement to violence

⁸⁹ *Haldimann and others v. Switzerland*, (2015) ECtHR Series A no. 21830/09 [36]; See also Dominika Bychawska-Sinicuska, ‘Protecting the Right to Freedom of Expression Under the European Convention of Human Rights – A handbook for legal practitioners’, (Council of Europe, 2017), page 40 (noting the ECtHR has consistently required the first prong to require a law be “public, accessible, predictable, and foreseeable.”); Steve Peers & others, *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart 2014) 1473; Opinion in Case C-70/10 *Scarlet Extended* [2011], [94]-[100].

⁹⁰ *Petra v. Romania* (1998) ECtHR Series A no. 115/1997/899/1111; See also *Leander v Sweden* (1987) ECtHR Series A no. 9248/81, [50]-[51] “the law has to be sufficiently clear in its terms to give them an adequate indication as to the circumstances in which and the conditions on which the public authorities are empowered to resort to this kind of secret and potentially dangerous interference with private life.”

⁹¹ The Proposed Act requires service providers to disclose a user’s personal information “upon request from criminal police authorities, prosecutors, and courts relating to the investigation of a concrete suspicion of a criminal offence committed by the poster”. Proposed Act at Chp. 2, §4 (3).

or terrorism, but instead, is generally aimed at preventing users from “[h]iding in the anonymity of the Internet”.⁹²

The Proposed Act also is intended to enable private prosecution of defamation cases by requiring service providers to disclose personal information of users to any third person that “can credibly claim” he or she needs the personal information “for private prosecution” of the user for defamation or insult or for a civil claim because of injury to honour.⁹³

These public policy goals could only arguably fit under two of the ECtHR’s exhaustive list of permissible aims: (1) the prevention of disorder or crime; or (2) protection of the reputation of others.⁹⁴

Although, on their face, the public policy goals of the Proposed Act fit under one of the ECtHR’s legitimate aims, “courts must ensure that the interest to be protected is real, and not a mere and uncertain possibility.”⁹⁵ There are serious questions both regarding the permissible scope of the interest to be protected and as to the Proposed Act’s efficacy in pursuing it.

STEP 3: Necessary in a Democratic Society

In this step courts are to apply the principle of proportionality.⁹⁶ The relevant question is: Is the aim “proportional to the means used to reach that aim?”⁹⁷ The aim being one of the legitimate bases discussed in Step 2, above.⁹⁸ Generally, step 3 requires courts to examine the interaction between the objectives being sought, the means of fulfilling those objectives and the subsequent impacts of exercising those means.

The Court of Justice of the European Union (“CJEU”) case of *Tele 2* established that the scope of any limitations to fundamental rights and freedoms must be proportionate in relation to the seriousness of the investigated crime.⁹⁹ Similarly, the recent ECtHR *Big Brother Watch* case confirmed “[n]o interference should be considered proportionate if the information which is sought could reasonably be obtained by other less intrusive means”.¹⁰⁰

As already discussed, the Proposed Act significantly interferes with fundamental rights recognised by the EU Charter, including that of freedom of expression and the media.

The “means” employed by the Proposed Act are, *inter alia*, the compulsory registration of *all* users (by provision of user’s personal information), which requires that service providers designate or might even need to hire new staff to implement the Proposed Act’s requirements

⁹² Draft Federal Act for enacting a Federal Act on diligence and responsibility online and amending the KommAustria Act, ‘Explanatory notes’, page 1.

⁹³ Proposed Act at Chp. 2, §4 (2).

⁹⁴ Dominika Bychawska-Sinicuska, ‘Protecting the Right to Freedom of Expression Under the European Convention of Human Rights – A handbook for legal practitioners’, (Council of Europe, 2017), page 33.

⁹⁵ *ibid.* at 43.

⁹⁶ Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* [2014], [46]; Protecting the Right to Freedom of Expression at [44].

⁹⁷ Another way of stating this question is: Does the Proposed Act exceed the limits of what is proportionate and necessary to achieve a legitimate objective by the Austrian government or can the same objectives be obtained through other, less intrusive means?

⁹⁸ *ibid.*

⁹⁹ Cases C-203/15 and C-698/15 *Tele2 Sverige AB and Watson* [2016], [102].

¹⁰⁰ *Big Brother Watch and Others v the United Kingdom* [2018] ECtHR (58170/13, 62322/14 and 24960/15, [89].

and monitor the service providers' compliance with the same, and that the service provider hand over information when it determines that there is a "well-founded" request for the personal information by a private party or by the Austrian government.¹⁰¹

To demonstrate these "means" are "necessary in a democratic society," domestic courts, as well as the ECtHR must be satisfied that a 'pressing social need' exists, requiring that particular limitation on the exercise of freedom of expression."¹⁰²

The Proposed Act is unlikely to pass the proportionality test because the means (collecting and potentially storing vast amounts of personal information of users and imposing large administrative burdens directly on service providers including the media) are so broad. The Proposed Act applies indiscriminately to all users. The Proposed Act is a blanket ban on anonymity in the name of facilitating the prosecution of any crime that could conceivably be committed by posting something online and enabling the easier filing of defamation lawsuits. Less intrusive measures have been readily available and used by law enforcement to track criminal activity online for years.¹⁰³

The international rapporteurs on Freedom of Expression in their Joint Declaration of 2016 have observed that such blanket bans are unlikely to pass muster under the proportionality test: "Blanket prohibitions on...anonymity, which are inherently unnecessary and disproportionate, and hence not legitimate as restrictions on freedom of expression, including as part of States' responses to terrorism and other forms of violence."¹⁰⁴

The CJEU has also expressed doubts that any pre-emptive and indiscriminate collection of large volumes of personal data can ever pass the proportionality test. For example, in *Tele2* the CJEU considered retention of all traffic and location data to constitute a serious infringement, which could then only be justified by the objective of fighting serious crime.¹⁰⁵

Similarly, in *Digital Rights Ireland* the CJEU struck down the validity of a European Parliament Directive aimed at combatting international terrorism through the collection and retention of traffic data concerning telephony and internet access because, among other things, of the Directive's indiscriminate application:

Directive 2006/24 affects, in a comprehensive manner, all persons using electronic communications services, but without the persons whose data are

¹⁰¹ Proposed Aaw at §4.

¹⁰² Dominika Bychawska-Sinicuska, 'Protecting the Right to Freedom of Expression Under the European Convention of Human Rights – A handbook for legal practitioners', (Council of Europe, 2017), page 33.

'Austria Proposes Censorship Law to Ban Anonymous Online Comments' (Liberties – Anonymous.at, 25 April 2019) <<https://www.liberties.eu/en/news/austria-censorship-law/17422>> accessed 16 May 2019, page 44.

¹⁰³ For example, child pornography cases are regularly prosecuted using these techniques. *See, e.g.*, <https://www.ncjrs.gov/pdffiles1/nij/213030.pdf>; *See also* 'ISPA kritisiert Ausweispflicht im Internet' (ISPA, 10 April 2019) <https://www.ots.at/presseaussendung/OTS_20190410_OTS0089/ispa-kritisiert-ausweispflicht-im-internet> accessed 16 May 2019: "even now criminal offenses committed online are successfully prosecuted...If there really is an interest in tackling hate online, it would be easy to extend the role of the prosecutor on certain offenses..."

¹⁰⁴ Joint Declaration on Freedom of Expression and Countering Violent Extremism, 'The United Nations (UN) Special Rapporteur On Freedom Of Opinion And Expression, The Organization For Security And Co-Operation In Europe (OSCE) Representative On Freedom Of The Media, The Organization Of American States (OAS) Special Rapporteur On Freedom Of Expression And The African Commission On Human And Peoples' Rights (ACHPR) Special Rapporteur On Freedom Of Expression And Access To Information' (2016).

¹⁰⁵ Cases C-203/15 and C-698/15 *Tele2 Sverige AB and Watson* [2016], [102].

being retained being, even indirectly, in a situation which is liable to give rise to criminal prosecutions. It therefore applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime.¹⁰⁶

The same can be said of the Proposed Act. That the law is likely not to fulfil the requirements of Step 3 is even more probable given the rather low-level public policy goals pursued by the Austrian government in the proposed legislation; namely, criminal activity related to online posting and the ease of facilitating civil claims related to defamation.¹⁰⁷

Exacerbating the Proposed Act's broad application is its lack of transparency – How does a service provider determine whether a request for users' personal information is well founded? Does anyone exercise any oversight on the service providers' unilateral decision to divulge personal information of its users? Are there any consequences for the service provider if it hands over personal information when such disclosure was unwarranted? Who takes care under which standards of the technical and organisational measures needed to protect such data against data breaches and privacy infringements?

5. How Other Fundamental Rights Interact with the OSCE Principles and the Proposed Act

Having examined the ways in which the Proposed Act is inconsistent with the OSCE commitments to freedom of expression and media freedom, the following sections will examine the ways in which the Proposed Act is inconsistent with interrelating principles in connection with the freedom to expression and media.

The contents of the Proposed Act are inextricably linked to the legal requirements of data protection and privacy, which are in turn traditionally linked to the freedom of expression, information and media. The following section will therefore analyse the Proposed Act in relation to each of these legal requirements and the overarching OSCE principles.

5.1 Data Protection, Privacy, and Pre-emptive Data Collection

The Proposed Act compels a service provider, upon request by a third party, to disclose the first name, surname and address of a poster. That is, the Proposed Act directly concerns the processing of personal data and therefore the right to the protection of personal data as contained in Article 8 of the Charter. As the General Data Protection Regulation 2016/679 (“GDPR”) regulates the processing of personal data within the EU,¹⁰⁸ the following subsection will examine some of the most prominent concerns with regard to the Proposed Act and the principles and legal requirements found within the GDPR.

¹⁰⁶ Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* [2014].

¹⁰⁷ As discussed above, the “legal claims” the Proposed Law is intended to facilitate include private lawsuits for defamation – an offense the Austrian government considers so low-level it cannot be prosecuted by a public prosecutor in Austria. *See* §§111 *et seq.* Austrian Criminal Code.

¹⁰⁸ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016 also regulates the processing of personal data within the EU but in the context of criminal investigation.

The OSCE participating States recognized the right to freedom of opinion and expression to be directly connected to the right to privacy.¹⁰⁹ The UN Special Rapporteur underlined that “[t]he right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression.”¹¹⁰ In many ways, such as with the provision of anonymity online, the right to privacy can facilitate the right to freedom of expression and media. Any effect on the right to privacy is also likely to have an impact on the freedom and openness of media plurality to which the OSCE states that “pluralistic media are essential to a free and open society and accountable systems of government”.¹¹¹ Fear of losing one’s privacy within the context of expression and information dissention and even within the media could stunt and even altogether halt the plurality of media.

The Proposed Act undeniably interacts with the right to respect for a private and family life as contained in Article 7 of the Charter and Article 8 of the ECHR. Article 7 provides that everyone has the right to respect for his or her private life, home and communications. The United Nations General Assembly has stated that in the context of the digital sphere, “there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice.”¹¹²

“Undue interference with individuals’ privacy can both directly and indirectly limit the free development and exchange of ideas”.¹¹³ Additionally, it has been expressed that “violations and abuses of the right to be free from arbitrary or unlawful interference with privacy may affect the safety of journalists”.¹¹⁴ The Proposed Act’s interference with the right to privacy will almost invariably cause users to make a value judgment: is the user’s desire to speak/exercise his or her freedom of expression or access to information sufficiently important for the user to compromise his or her privacy and in some cases safety?

To comply with Section 3 of the Proposed Act, service providers must ensure in advance that each poster creates a registration profile for authentication if they wish to be part of and participate on online forums. Given that their detailed personal information is required *in case* it might be needed in a legal case, this Proposed Act represents an example of pre-emptive surveillance. A similar example in the real world would be if an individual were required to provide ID cards with their full name and address prior to entering a supermarket in case they might steal something.

¹⁰⁹ Document of the Twelfth Meeting of the Ministerial Council 7 December 2004, Sofia, page 49. In OSCE, ‘OSCE Commitments 4th Edition’ (2017) <<https://www.osce.org/representative-on-freedom-of-media/99565?download=true>> accessed 16 May 2019.

¹¹⁰ Frank La Rue, United Nations General Assembly Human Rights Council Seventeenth session ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’ (2011) <https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf> accessed 16 May 2019, page 7.

¹¹¹ Decision No. 193. Establishment of the Office of the OSCE Representative on Freedom of the Media, Mandate of the OSCE Representative on Freedom of the Media (PC.DEC/193)* 5 November 1997, Vienna, see <https://www.osce.org/representative-on-freedom-of-media/99565?download=true>

¹¹² United Nations General Assembly, Human Rights Council Twenty-seventh session on ‘The right to privacy in the digital age: Report of the Office of the United Nations High Commissioner for Human Rights’ [2014].

¹¹³ Frank La Rue, United Nations General Assembly, Human Rights Council Twenty-third session ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,’ [2013], page 7.

¹¹⁴ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019, page 2.

This pre-emptive data collection immediately removes the usual privacy protection afforded to a poster in an online forum who is either based in Austria or has a connection to Austria on a forum. The collection must therefore meet the requirements formulated by the CJEU on data retention. As the CJEU put it in 2014¹¹⁵, Art. 8 of the Charter requires in such cases ‘sufficient safeguards [...] to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data.’¹¹⁶

5.2 Data retention and surveillance

Article 5(1)(e) GDPR confirms that personal data may not be kept for longer than necessary for the purposes for which it was collected. In the case of processing by law enforcement authorities, Directive 2016/680 requires that the personal data collected not be “excessive and not kept longer than is necessary for the purpose for which they are processed”.¹¹⁷ Service providers hold a significant quantity of personal data, when third parties or law enforcement agencies request the use of such data they are only required to retain the acquired data for a limited time.

Article 15 of the e-Privacy Directive (2002/58/EC) states that:

Member States may ... adopt legislative measures providing for the retention of data for a limited period [where data retention constitutes] a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system [and provided the data retention measures are] in accordance with the general principles of Community law

The *Digital Rights Ireland* case invalidated Directive 2006/24 on data retention as it was deemed to be a disproportionate exercise of power and therefore in breach of Articles 7, 8 and 52 of the Charter.¹¹⁸ Within the *Digital Rights Ireland* case, it was held that “the persons whose have been retained [shall] have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data”¹¹⁹. The CJEU stated that for a limitation to be necessary, its scope of application has to be defined by clear and precise rules; additionally, minimum safeguards have to be imposed, so that the personal data retained would be protected against the risk of abuse and against any unlawful access and usage.¹²⁰

Given both the high likelihood and amount of personal data which will be collected as a result of the Proposed Act, strict adherence to data retention requirements must be maintained to ensure the data protection and privacy.

¹¹⁵ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger* <http://curia.europa.eu/juris/document/document.jsf?jsessionid=25A7E5F657F70B1706D9AB6446BF9B4A?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4056444>, accessed 17 May 2019.

¹¹⁶ *Ibid.*, para 66.

¹¹⁷ Directive (EU) 2016/680, Recital 26.

¹¹⁸ Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* [2014] OJ C 175.

¹¹⁹ *ibid.*, [54].

¹²⁰ *ibid.*, [54]; Cases C-203/15 and C-698/15 *Tele2 Sverige AB and Watson* [2016], [109].

Moreover, given the type of personal data being sought and the possible indirect uses of the data, the Proposed Act can be seen as a form of surveillance and a risk to the right to privacy contained in Article 7 of the Charter. As discussed, the CJEU has clearly expressed that massive indiscriminate data retention is unlawful in light of both Article 7 and Article 8 of the Charter.¹²¹

In January 2016 in an OSCE publication, “the OSCE Representative on Freedom of the Media recommended to the participating States that [...] the important presence and role of intermediaries should not endanger the openness, diversity and transparency of Internet content distribution and access”.¹²² The implementation of the Proposed Act would undoubtedly endanger these principles as it would take advantage of the role of intermediaries for separate reasons unconnected to those for which the given forums are used. In doing this, data which is private can be accessed and distributed without option. Furthermore, it has been expressed that “[u]ndue interference with individuals’ privacy can both directly and indirectly limit the free development and exchange of ideas”.¹²³

The retention of journalists’ personal data may have unique implications for the freedom of expression: in 2018, the OSCE participating States clearly expressed “[c]oncern that violations and abuses of the right to be free from arbitrary or unlawful interference with privacy may affect the safety of journalists”.¹²⁴ The privacy and anonymity of journalists can be regarded as essential in some fields of work, for example those writing in areas related to terrorism and extremism. The journalist’s safety from harm may heavily depend on the given third party who has obtained their full name and address.

¹²¹ Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* [2014]; Cases C-203/15 and C-698/15 *Tele2 Sverige AB and Watson* [2016].

¹²² OSCE ‘Media Freedom on the Internet: An OSCE Guidebook’ Written by Professor Yaman Akdeniz, commissioned by the Office of the OSCE Representative on Freedom of the Media [2016] pages 98-99.

¹²³ Frank La Rue, United Nations General Assembly, Human Rights Council Twenty-third session ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ [2013], page 7.

¹²⁴ Organization for Security and Co-operation in Europe Ministerial Council ‘Decision No. 3/18 Safety of Journalists’ [2018]; ‘Communiqué by the OSCE Representative on Freedom of the Media on free expression and the fight against terrorism’ (OSCE, 2 September 2016) <<https://www.osce.org/fom/262266>> accessed 16 May 2019, page 2.

6. Concluding Remarks

On the surface, the Proposed Act offers the potential to partly lift the digital veil of anonymity which is provided online. This could help prosecute criminals and assist in civil cases. However, as has already been identified numerous times throughout this Legal Review, the few and narrow possible positive outcomes of this Proposed Act are greatly outweighed by the inevitable negative consequences the Proposed Act would have on the right to freedom of expression, freedom of the media, and freedom of information.

Service providers operating from outside Austria but within the EU will be confronted with a situation in which they will have to follow the data protection rules of their country of origin which will require them for reasons of data minimization not to collect and store data on the one hand. This situation could trigger problems with regard to media plurality and freedom of expression on online forums – if the service provider becomes overzealous in collecting and sharing data pursuant to requests, then the freedom of expression currently provided by online forums will be at risk. Anonymity will be lost, certain voices may be less likely to share information and ideas, and journalists and other media actors may be reluctant to impart ideas and reports due to fear of civil legal reprisals and other potentially harmful consequences associated with exposing themselves.

Further, outsourcing of judicial and police responsibility to service providers with regard to the interpretation and application of the law is an act which threatens the rule of law and the respect for fundamental rights and freedoms. The lack of guidance provided in the Proposed Act adds further uncertainties for service providers and users alike as to what is allowed with regard to the legitimate transfer of their personal data and what is not.

In accordance with international standards and OSCE commitments highlighted in this Legal Review, freedom of expression, freedom of the media and freedom of information and other corresponding fundamental rights must continue to be subject to the strictest of safeguards. The following points highlight the most pertinent issues with the Proposed Act in relation to the right to the freedom of media and expression:

- The Proposed Act places a quasi-judicial role on service providers with regard to assessing the lawfulness of a request to share personal data of forum users.
- The Proposed Act places a quasi-law-enforcement function on service providers by obliging them to record all suspected posts, in support of investigations into potential criminal acts or defamation.
- The terms for which a service provider must take on a judicial or law enforcement role (as mentioned above) remain uncertain, obliging service providers to make a judgement whether to disclose a user's personal information to the law enforcement authorities and whether to record and retain online media content.
- The removal of online anonymity creates a chilling effect as the handover of personal data is required before individuals can express themselves and both share and (potentially) access information online.

- The Proposed Act may restrict freedom of expression and media pluralism, particularly of marginalised voices, as well as certain minority groups and those that do not have an Austrian government issued identification.
- In cases of non-compliance, high penalties for service providers threatens the rights to freedom of expression, freedom of media and freedom of information by incentivising the disclosure of users' personal information, even in cases where there may not be a sufficient basis for such disclosure. This is particularly concerning for online anonymity and confidentiality of journalistic sources.
- As service providers, media companies will be forced to process significantly more personal data than before, and respond to significantly more requests. To fulfil the requirements of the Proposed Law, the media companies will likely face a heavy financial and resource burden. Possible conflicts with GDPR, its national implementations and the country of origin principle increase this burden.
- The Proposed Act does not satisfy the requirements of a legitimate limitation of the right to freedom of expression and freedom of media.¹²⁵

According to the OSCE commitments and international standards, the Proposed Act should be revised and/or amended, or its intention should be pursued within existing legal frameworks.

The authors of this Legal Review contend that the Austrian Government, in its concern about prosecuting specific criminal offences online, may expand the scope of particular prosecutorial powers for specific internet crimes. An example might be the granting of additional powers to prosecutors and public investigators to require that specific service providers divulge personal information of those users who have already committed specific offences. Such an approach would be far more narrowly focused in comparison to the Proposed Act, and therefore provide increased safeguards to fundamental rights and freedoms online such as providing more clarity as to the scope and application of the law.

¹²⁵ Pursuant to both Article 10(2) of the ECHR and Article 52 of the Charter.