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Internet Access as a Basic Human Right: An Ongoing European Legal Debate?

Abstract

The pervasive use of Information and Communication Technology has inevitably interfered with human rights worldwide. This persistent interaction has led to questioning the legal nature of Internet access itself: is it an autonomous right or an implicit right? This paper examines the relevant case law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) in order to assess whether Internet access is today a basic human right. The Strasbourg jurisprudence stems mainly from applications based on freedom of expression and the right to education. The ECtHR applies the binary axiological test: the right for which protection is sought and the competing interest/right provided by the European Convention on Human Rights. So far, it has not explicitly recognised the right to Internet access but rather the Internet's widespread usage and importance. The Luxembourg case law constitutes proof of the economic dimension of the Union since the CJEU applies a threefold test, depending on the piece of legislation basing the application, and takes a moderate approach to questions involving human rights. Thus, the complementarity of ECtHR and CJEU case law proves that Internet access rather facilitates the exercise of other rights than is an autonomous right. For this reason, limitations are assessed on a case-by-case basis according to the requirements associated with each conventional right's specific restrictions.

Keywords: Internet access; fundamental rights; threefold conflict of values; freedom of expression; freedom to conduct business; copyright-related rights

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I Introduction

Ubiquitous, evolving and 'merely' essential. These appear to be a few of the most conspicuous traits of the Internet[1] nowadays. What if suddenly your access to the Internet was restricted to a limited number of web pages or, even worse, banned entirely? Taking this dystopian scenario a step further, what if the restriction or the ban impinged on a whole community? For the European space of freedom, security and justice delineated by the borders of the European Union (EU), these hypotheses appear to pertain only to Orwell's or Huxley's writings, yet other parts of the world seem to perceive these challenges as possible and even real.[2]

Undoubtedly, the Internet has transformed into an omnipresent tool. Recent data from the International Telecommunication Union prove the increasing trend to online presence: in 2020, 3.7 billion people were offline worldwide, while in 2023, the connectivity rate rose, with only 2.6 billion people offline worldwide. Accordingly, perspectives about the Internet have polarised both around utopian – that is, technophilic – and dystopian points of view.[3] Embedded in our lifestyle and daily habits, this instrument has become increasingly popular with individuals of various ages and socio-economic backgrounds insofar as to be qualified as a specificity of this era of humankind. However, to what extent is this factual popularity reflected in the legal lens? In other words, should Internet access be taken for granted as a convenient facility of the present era? May the same conclusion be drawn regarding the legal articulation of the right to Internet access?

Indeed, the rapid development of information and communication technology alongside the widespread use of the Internet has correspondingly led to stronger expectations about connectivity at the social level. For this reason, numerous areas of our lives have been forged on digital frameworks and concepts such as 'e-learning', 'e-justice', 'e-administration' and 'e-governance' are increasingly familiar. Of course, this desire for societal innovation has led to a surge in the frequency of interactions with human rights. Whether what is at stake is access to justice or the right to education, the clash between technology and human rights has become so visible that new debates have emerged[4] concerning the possibility of reconsidering the well-established normative framework of human rights to include a stand-

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1 My analysis revealed that the European Court for Human Rights uses Internet in its capitalised form while the Court of Justice of the European Union uses this term in the non-capitalised version. For consistency purposes, this paper will rely on the capitalised form.

2 For a comprehensive overview of Internet shutdowns around the world, see the 2022 Report of Access Now and the #KeepItOn coalition, 'Weapons of control, shield of impunity. Internet shutdowns in 2022' <https://www.accessnow.org/internet-shutdowns-2022/> accessed 15 October 2024.

3 Steven Hick, Edward F. Halpin, Eric Hoskins, *Human Rights and the Internet* (Macmillan Press Ltd 2000, London) 12–13, DOI: https://doi.org/10.1057/9780333977705

4 Hendrik Mildebrath, *Internet access as a fundamental right. Exploring aspects of connectivity* (European Parliamentary Research Service 2021) 7–12.

alone right to Internet access.[5] At the United Nations (UN) level, for instance, numerous recommendations have been formulated in the last almost two decades regarding Internet access[6] in relation to 'two major dimensions of Internet access: freedom of expression in cyberspace […] and physical access to the Internet'.[7] From the perspective of the Council of Europe (CoE), the Parliamentary Assembly affirmed in 2014 that 'public authorities have a duty to ensure the effective enjoyment of the right to freedom of expression online' and thus recommended 'that the Council of Europe member States ensure the right to Internet access' in accordance with a series of 12 principles, reinforcing the need for developing a universal definition of the right to Internet access.[8]

While Internet shutdowns represent a conspicuous threat to human rights, the EU space appears to be quite safe from this point of view.[9] However, from the standpoint of the CoE, the right to Internet access is recognised only in specific situations – namely, in the case of individuals deprived of liberty as a right derived from freedom of expression or the right to education, hence leaving no room for generalisations.[10] Similarly, at the EU level, the current normative framework does not enshrine an explicit right to Internet access.[11] In contrast, the number of Internet users in the EU significantly increased from 67% in 2010 to 92% in 2023.[12] This status quo reflects the notable benefits and drawbacks that fuel the debate concerning the 'emancipation' of a derived or stand-alone right to connectivity.[13] In this respect, some specialists question the potential legal grounds of this emergent right, even exploring its constitutional legal basis,[14] while others perceive

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5 Başak Çalı, 'The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law' in Andreas Von Arnauld, Kerstin Von Der Decken, Mart Susi (eds), *The Cambridge Handbook of New Human Rights* (Cambridge University Press 2020, Cambridge) 277–278. DOI: https://doi.org/10.1017/9781108676106

6 Łukasz Szoszkiewicz, 'Internet Access as a New Human Right? State of the Art on the Threshold of 2020' (2018) 8 Przegląd Prawniczy Uniwersytetu im Adama Mickiewicza 49–62, DOI: https://doi.org/10.14746/ppuam.2018.8.03. According to the author's quantitative analysis, between 2007 and 2017, the committees functioning under the United Nations umbrella mentioned the word 'Internet' in 246 recommendations.

7 Szoszkiewicz (n 6) 57.

8 Parliamentary Assembly of the Council of Europe, The right to Internet access, Resolution 1987 (2014) 9th April 2014.

9 According to the mid-year update provided by Access Now, the Internet shutdown phenomenon has persisted, and new reasons to disrupt Internet access during key national moments have been advanced, eg, catching fugitives in Mauritania or stopping protests in Pakistan: <https://www.accessnow.org/publication/internet-shutdowns-in-2023-mid-year-update/#join-us> accessed 15 October 2024.

10 Mildebrath (n 4) 29–30.

11 Article 36 of the CFR related to access to services of general economic interest might be a potential legal basis for this right. For details on this thesis, see Mildebrath (n 4) 32–34.

12 Eurostat, Digital economy and society statistics – households and individuals, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Digital_economy_and_society_statistics_-_households_and_individuals#Internet_access_of_individuals.2C_2010_and_2023> accessed 15 October 2024.

13 Mildebrath (n 4) 24–28.

14 Oreste Pollicino, 'The Right to Internet Access: Quid Iuris?' in Andreas Von Arnauld, Kerstin Von Der Decken, Mart Susi (eds), *The Cambridge Handbook of New Human Rights* (Cambridge University Press 2020, Cambridge) 271, DOI: https://doi.org/10.1017/9781108676106.021

it as an 'enabler' of other rights.[15] In accordance with this latter point of view, it has been argued that 'Internet access is not merely a luxury for those who can afford it but instead necessary for individuals to lead minimally decent lives'.[16] Contrastingly, some specialists deny its autonomous existence,[17] whereas other stakeholders advance the corresponding counterargument,[18] inflaming the legal discussion.[19]

Should this newly crafted right also imply a certain level of network security, a right to access digital literacy training services, the supply of a terminal device or even an independent right to access social media networks?[20] Some scholars argue that current UN-based soft law advocates 'the necessity of expanding Internet infrastructure, ensuring its affordability, and the importance of building digital literacy in […] society, particularly in the most disadvantaged and marginalised groups'.[21] Regardless of the potential answers, it is certain that 'the right to Internet access is a solid and much-needed guarantee for the democratic dimension of human lives, both in the bit and in the atomic dimensions', with due regard to 'net neutrality'.[22]

It goes without saying that the apparently underequipped legal framework may be enhanced in scope and mission by means of the judiciary. It appears as no surprise that 'the courts will play a critical role in shaping a legal framework, the boundaries of which are still flexible and indirectly call for (judicial) interpretation'.[23] In other words, the increasing role of the judiciary in transnational matters related to the relation between law and technology may be explained as follows: 'The burden of making up for this inevitable legislative inertia – at national and supranational level – falls heavily on the shoulders of the courts'.[24]

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15 Nicola Lucchi, 'The Role of Internet Access in Enabling Individual's Rights and Freedoms' 2013/47 EUI Working Paper RSCAS 14. According to the author, the effervescence of the contemporary public debate around Internet access constitutes 'an essential element to give an updated meaning and application to already recognized fundamental legal rights'.

16 Merten Reglitz, 'The Human Right to Free Internet Access' (2020) 37 (2) Journal of Applied Philosophy 327, DOI: https://doi.org/10.1111/japp.12395

17 Vinton G. Cerf, 'Internet Access Is Not a Human Right' (4 January 2012) The New York Times, <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=1&ref=opinion> accessed 15 October 2024.

18 Scott Edwards, 'Is Internet access a human right' <https://www.amnestyusa.org/updates/is-internet-access-a-human-right/> accessed 15 October 2024.

19 Media Defence, 'Is there a Right to the Internet under International Law?' <https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-3-access-to-the-internet/is-there-a-right-to-the-internet-under-international-law/> accessed 15 October 2024.

20 Mildebrath (n 4) 22.

21 Szoszkiewicz (n 6) 59.

22 Marco Bassini, Giovanni De Gregorio, Oreste Pollicino, *Internet Law and Protection of Fundamental Rights* (EGEA Spa – Bocconi University Press 2022, Milan) 49–50.

23 Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet A Road Towards Digital Constitutionalism* (Hart Publishing 2021, London) 197, DOI: https://doi.org/10.5040/9781509912728

24 Gergely Gosztonyi, *Censorship from Plato to Social Media. The Complexity of Social Media's Content Regulation and Moderation Practices* (Springer 2023, Cham) 12, DOI: https://doi.org/10.1007/978-3-031-46529-1_2

Bearing these observations in mind, the present paper aims to verify whether the EU actually provides its nationals with a truly safe area as regards Internet access, hence deepening the debate concerning the legal nature of Internet access as an autonomous human right or a means enabling the exercise of other rights.

First, this contribution outlines the European Court of Human Rights (ECtHR) case law regarding Internet access, especially the most recent developments regarding this matter. The analysis focuses on the current legal architecture of the European Convention of Human Rights (ECHR or Convention), which does not expressly secure the right to Internet access *per se*. Thus, the paper notes the subtle interference between Internet access and the exercise of other human rights, eg the well-known freedom of expression, as well as the right to education, in order to underline the recognition and the standard of protection developed by the Strasbourg Court.

Second, the analysis aims to emphasise the EU perspective on the matter through the lens of the relevant case law of the Court of Justice of the European Union (CJEU). Closely linked to the functioning of the single market, from the point of view of the Luxembourg Court, Internet access appears to have a prevalent economic dimension, hence being imbued with a rather faded human rights legal nature. It is the status of Internet access that the present contribution discusses, in accordance with the current legal framework. Correspondingly, the potential overlap between the perspectives of Strasbourg and Luxembourg is under scrutiny in light of the provisions of Article 52 of the Charter of Fundamental Rights of the European Union (CFR).

Last, the limitations of the right to Internet access are assessed. It goes without saying that the geo-political international context nowadays reveals a rather tense configuration of global affairs. This could trigger governments or individuals to resort to restrictive measures that could affect access to the Internet to a certain extent. Taking this into account, the paper discusses the scale of legitimacy that is applicable to Internet access limitations in light of the case law of the two European courts.

II The ECtHR Perspective – A Crossroads with Freedom of Expression and Right to Education

It is undisputed that the ECHR does not provide *expressis verbis* for a right to Internet access. Yet, the Strasbourg Court has ruled in some recent cases as regards the emergence of the aforementioned right. By means of these judgments, the ECtHR acknowledged the role of the Internet nowadays and implicitly underlined its potential judicial enshrinement in the conventional block of legal norms and protections. To begin with, on various occasions, the ECtHR was confronted with the legal qualification of the Internet. In fact, the timeline of the Strasbourg Court's attention to the increasingly impactful role of the Internet in the development of human rights is a few decades old since it initially ruled on this legal matter

in *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)* in March 2009: 'In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general'.[25]

The same perspective has already been developed in connection to freedom of expression, as safeguarded by means of service providers' liability, namely in *Delfi AS v Estonia*:

> The Court notes at the outset that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognised by the Court on previous occasions […] However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.[26]

In the same context, the ECtHR acknowledged the role of the Internet while underlining the potential threats it brought about, that is, 'the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press'.[27]

This perspective has been maintained until the present time, as revealed by the recent judgement delivered in the case *Kilin v Russia*,[28] in which the Court admitted the omnipresence of the information and technology phenomenon:

> (...) The Court reiterates in this connection that owing to its accessibility and capacity to store and communicate vast amounts of information, the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information. The Internet provides essential tools for participation in activities and discussions concerning political issues and issues of general interest; it enhances the public's access to news and facilitates the dissemination of information in general. Article 10 of the Convention guarantees "everyone" the freedom to receive and impart information and ideas.

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25 *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)*, no. 3002/03, 23676/03, § 27, 10 March 2009.

26 *Delfi AS v Estonia*, no. 64569/09, § 110, 16 June 2015. In this case, the applicant company complained that holding it liable for the comments posted by the readers of its Internet news portal infringed its freedom of expression as provided for in Article 10 of the Convention. The Court concluded there was no such violation.

27 *Delfi AS v Estonia*, § 133.

28 *Kilin v Russia*, no. 10271/12, § 54, 11 May 2021. The case concerned the applicant's criminal conviction for public calls to violence and ethnic discord on account of video and audio files that had been made accessible via a social network account. The Court found no violation of Article 10 related to freedom of expression.

> It applies not only to the content of information but also to the means of its dissemination, for any restriction imposed on the latter necessarily interferes with that freedom (…)

Bearing this in mind, the Strasbourg Court has dealt with several cases in which the factual situations assessed represented various configurations of the Internet's impact on human rights development. On the one hand, freedom of expression 'reached a turning point with the advent of the Internet, which was seen in its early days as a means of communication offering complete freedom',[29] thus generating several innovative judicial interpretations. On the other hand, the right to education interacted with the technological process at its own pace. Finally, ECtHR's case law offers an innovative view of the potential conflict between technology *lato sensu* and the respect due to contractual undertakings.

1 The Right to Receive and Impart Information – A Contemporary Perspective concerning those Deprived of Liberty

First, the situation of prisoners' access to the Internet seems to appear quite frequently before the Strasbourg Court, thus emphasising the values to be reconciled, namely the rights enshrined by the ECHR and the inherent restrictions imposed on prisoners.

With facts dating from 2005-2008, in *Kalda v Estonia*, the applicant was serving a lifetime imprisonment sentence, and the authorities refused to grant him access to a series of websites.[30] Namely, Pärnu Prison refused him access to the online version of the State Gazette, the decisions of the Supreme Court and administrative courts and the HUDOC database, whereas Tartu Prison, where he had been transferred, refused the applicant's request to be granted access to the Internet sites of the Council of Europe Information Office in Tallinn, the Chancellor of Justice and the Estonian Parliament. According to his allegations, the Estonian state was limiting prisoners' Internet access to the official databases of legislation and the database of judicial decisions. Therefore, these refusals hampered his judicial defence strategy in a number of legal disputes with the prison administration.[31]

The Strasbourg Court ruled that the Estonian state's conduct had infringed Article 10 of the ECHR. While the measure had been prescribed by law and pursued a legitimate aim, ie the protection of the rights of others and the prevention of disorder and crime, the necessity requirement had failed to be verified. The ECtHR took into account the informative content of the websites and the legal research purpose of their access:

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[29] Gosztonyi (n 24) 169, DOI: https://doi.org/10.1007/978-3-031-46529-1_12

[30] *Kalda v Estonia*, no. 17429/10, 19 January 2016.

[31] Gergely Ferenc Lendvai, Gergely Gosztonyi, '"Access Denied" – Interpreting the Digital Divide by Examining the Right of Prisoners to Access the Internet in the Case Law of the European Court of Human Rights' (2024) 17 (1) Baltic Journal of Law & Politics 223–237, DOI: https://doi.org/10.2478/bjlp-2024-0011

> […] the websites to which the applicant wished to have access predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. […] The Court considers that the accessibility of such information promotes public awareness and respect for human rights and gives weight to the applicant's argument that the Estonian courts used such information and the applicant needed access to it for the protection of his rights in the court proceedings.[32]

In addition, the Strasbourg Court took note of Estonia's elevated degree of digitisation insofar as the official publication of legal acts is done online. Furthermore, prisoners' general access to the Internet was equally assessed in the sense that national legislation provided for limited access to the Internet by means of computers specially adapted for that purpose and under the supervision of the prison authorities. In the absence of a concrete security risk assessment on the part of national authorities and given the lack of proof as regards additional costs, the ECtHR concluded that the interference was not sufficiently justified.[33]

It is worth noting that the ECtHR underlined the Internet's current societal role, as previously examined in *Delfi AS v Estonia*,[34] and further developed this perspective by stating that:

> The Court cannot overlook the fact that in a number of Council of Europe and other international instruments, the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. Internet access has increasingly been understood as a right, and calls have been made to develop effective policies to attain universal access to the Internet and to overcome the "digital divide" (…) The Court considers that these developments reflect the important role the Internet plays in people's everyday lives. Indeed, an increasing amount of services and information is only available on the Internet […].[35]

In a comparable fashion, the case of *Jankovskis v Lithuania* underscores the link between the Internet and freedom of expression in its component referring to receiving and imparting information and ideas.[36] In the latter case, with facts dating from 2006-2007, the applicant was serving an imprisonment sentence and complained that he did not have Internet access in prison, more specifically to a state-administered website which contained information about learning and study programmes in Lithuania. Hence, he was prevented from receiving education-related information concerning the possibility of enrolling at a university in order to continue his higher education (to acquire a second university degree) in a distance-learning format.

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32 *Kalda v Estonia*, § 50.
33 *Kalda v Estonia*, § 53.
34 *Kalda v Estonia*, § 44.
35 *Kalda v Estonia*, § 52.
36 *Jankovskis v Lithuania*, no. 21575/08, 17 January 2017.

The Court concluded that Article 10 of the ECHR had been infringed. In applying its three-step test,[37] the ECtHR acknowledged there had been an interference with the applicant's right, which was prescribed by national law and pursued the legitimate aim of protecting the rights of others and preventing disorder and crime. Still, when assessing the necessity of the measure, ie the Internet ban applicable to prisoners, the Strasbourg Court concluded that this condition was not fulfilled. In this respect, the ECtHR paid attention to the relevance of such information to the applicant's educational perspective, rehabilitation and reintegration into society. Added to this, the Court observed the efficiency of web browsing study programmes, the lack of other adequate education alternatives in prison, and the reticence of state authorities to grant at least limited or controlled access to the Internet.[38]

Notably, this case reinforces the Strasbourg view already developed in *Kalda v Estonia* regarding the Internet's role concerning human rights, more specifically, freedom of expression. As already noted by legal specialists, in this case, the Strasbourg Court made only some particular observations in slightly different terms, which may not be interpreted in a general manner, hence remaining rather cautious.[39] Still, it appears quite surprising that, in spite of the targeted online content, the legal grounds of the complaint did not make any reference to the right to education:

> […] the Court is mindful of the fact that in a number of the Council of Europe's and other international instruments[,] the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. Internet access has increasingly been understood as a right, and calls have been made to develop effective policies to achieve universal access to the Internet and to overcome the "digital divide" (…) The Court considers that these developments reflect the important role the Internet plays in people's everyday lives, in particular since certain information is exclusively available on [the] Internet.[40]

A similar approach may be identified in the case *Ramazan Demir v Turkey*, which represented an adequate occasion for the ECtHR to rule on similar matters beyond the EU space and in matters dating from 2016, thus obviously more recent.[41] In this case, the applicant was a lawyer subject to a preventative measure who requested permission from the prison authorities to access the Internet sites of the ECtHR, the Constitutional Court and

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37 William A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015, New York) 468–480.

38 *Jankovskis v Lithuania*, § 59–62.

39 Lina Jasmontaite, Paul de Hert, 'Access To The Internet In The EU: A Policy Priority, A Fundamental, A Human Right Or A Concern For Egovernment?' (6) 2020/19 Brussels Privacy Hub Working Paper 13. DOI: https://doi.org/10.2139/ssrn.3535718

40 *Jankovskis v Lithuania*, § 62.

41 *Ramazan Demir v Turkey*, no. 68550/17, 9 February 2021.

the Official Gazette, arguing that these information sources were necessary for preparing his own defence and following his client's cases. While national law provided for prisoners' access to the Internet, subject to supervision by the prison authorities and in view of training and rehabilitation programmes, his request was rejected by the authorities.

The Strasbourg Court ruled that Article 10 had been violated in this case. Consistent with its previous case law, namely *Kalda* and *Jankovskis*, the ECtHR admitted that the impugned restriction constituted an interference with the applicant's right to receive and impart ideas, which was prescribed by law yet not necessary in a democratic society. In this respect, the legal debate focused on the assessment and reasoning of national judicial authorities. As the Court observed, the domestic court did not examine in an adequate and detailed manner the security risks triggered by the applicant's access to the three websites, especially since these belonged to state authorities or to an international organisation, and his access took place under authorities' control and in accordance with the conditions therein determined.[42] This analysis shall be complemented by the case law developed under Article 2 of Protocol No. 2 of the ECHR.

2 Educational Needs in Prison – A Legal Bedrock for an Emerging Right to Internet Access

From a different perspective, the case *Mehmet Reşit Arslan and Orhan Bingöl v Turkey* stands out due to its focus on the right to education.[43] The two applicants, who were serving life imprisonment sentences, complained about restrictions imposed on their use of a computer and access to the Internet, which facilities they considered vital for pursuing higher education and developing their general knowledge. The first applicant had been a student at the faculty of medicine, and his request to access a computer and Internet was refused by prison authorities; yet, afterwards, he enrolled in the faculty of economics and management, which provided distance learning courses. Concerning the latter, for security reasons, the national authorities drastically restricted his use of an electronic device equipped with computing and English-Turkish translation functions to once per fortnight, for only one hour, in the library. The other applicant was admitted to higher education in the field of computer programming in a distance learning format, which required access to a computer and the Internet, but his request for the latter was rejected by the prison authorities. As regards the timeframe, it must be highlighted that the facts date from 2006-2007.

Sua sponte, the Strasbourg Court examined their complaints from the point of view of Article 2 of Protocol No. 2 of the Convention and found a violation thereof regarding both applicants. The Court applied the three-step test, which is defined in this case as a

[42] *Ramazan Demir v Turkey*, § 46.

[43] *Mehmet Reşit Arslan and Orhan Bingöl v Turkey*, no. 47121/06, 13988/07, 34750/07, 18 June 2019.

non-exhaustive list of legitimate aims. Expectedly, given the similarity of factual situations, it took 'due account of its case law, hitherto developed under Article 10 of the ECHR, on the right of prisoners to Internet access', more specifically, *Kalda* and *Jankovskis*. Thus, the scrutiny of the ECtHR could be summarised as follows: 'In order to determine whether a refusal to provide prisoners with Internet access is justified in a given case, an assessment should be made of whether the domestic courts conducted an adequate evaluation of the actual risks to security inherent in the particular case, thus properly balancing the competing interests.'[44]

It is noteworthy that, in this case, the role of the Internet appears rather ancillary and less significant. Indeed, according to the facts of the case, the prisoners were allowed to use a computer and have access to the Internet in the premises designated for that purpose by the prison authorities in the framework of rehabilitation and training programmes, and Internet use could be monitored by the authorities to the extent required by the relevant training and rehabilitation programmes. Far from being granted the status of a severable or autonomous right, in this case, Internet use was understood solely to constitute a means of exercising the right to education; thus, the legal question appears to be the reasoning process of the national judicial authorities:

> In the Court's view, there can be no doubt that the manner and means of regulating the mode of access to such facilities in prison fall within the Contracting State's margin of appreciation. It is enough for the Court to seek to ascertain whether the domestic courts, on the one hand, carried out the requisite balancing of the various competing interests in the present case, and on the other fulfilled their obligation to prevent any abuse on the authorities' part in implementing the relevant domestic rules.[45]

The sphere of human rights impacted by information and communication technology is not confined only to freedom of expression and the right to education. Thus, the aforementioned interaction has unexpected legal implications.

3 Are Electronic Means of Communication more Important than Contractual Obligations?

Finally, it is surprising that the ECtHR's mission of safeguarding human rights, specifically freedom of expression, may even interfere with apparently private disputes, as is the case in *Khurshid Mustafa and Tarzibachi v Sweden*.[46] In this case, the applicants concluded a rental agreement for a flat in Stockholm, which stated that the 'tenants were obliged to take proper care of the flat and to maintain good sanitary conditions, order, and good

[44] *Mehmet Reşit Arslan and Orhan Bingöl v Turkey*, § 59.
[45] *Mehmet Reşit Arslan and Orhan Bingöl v Turkey*, § 64.
[46] *Khurshid Mustafa and Tarzibachi v Sweden*, no. 23883/06, 16 December 2008.

practice in the house'. When moving in, a satellite dish was mounted on the façade of the building, next to one of the windows of the flat, which the applicants used in order to receive television programmes in Arabic and Farsi. After their landlord changed, they were required to dismantle the dish mainly for safety reasons in the case of a break in the tenancy contract. Failing to comply, they were served with a notice terminating the tenancy, and despite having replaced the satellite dish with a mobile unit, the landlord started proceedings, which concluded with the applicants' eviction from the flat, even though the only concern of the landlord was aesthetic dissatisfaction.

On the one hand, as regards admissibility, this judgement concerned the intervention of the ECtHR in contractual matters. In fact, the state's responsibility could be engaged since it stemmed from the effects of a national court's ruling. In this respect,

> […] the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.[47]

On the other hand, as regards the merits, the ECtHR found a violation of Article 10 of the ECHR. The reasoning of the Court relied on the concrete usefulness of the television programmes accessed via the satellite dish:

> […] the Court observes that the applicants wished to receive television programmes in Arabic and Farsi from their native country or region. That information included, for instance, political and social news that could be of particular interest to the applicants as immigrants from Iraq. Moreover, while such news might be the most important information protected by Article 10, the freedom to receive information does not extend only to reports of events of public concern, but covers in principle also cultural expressions as well as pure entertainment. The importance of the latter types of information should not be underestimated, especially for an immigrant family with three children, who may wish to maintain contact with the culture and language of their country of origin. The right at issue was therefore of particular importance to the applicants.[48]

At the same time, the Court took into consideration the scarcity of the means to acquire information in their native language:

[47] *Khurshid Mustafa and Tarzibachi v Sweden*, § 33.
[48] *Khurshid Mustafa and Tarzibachi v Sweden,* § 44.

> […] it has not been claimed that the applicants had any other means of receiving these or similar programmes at the time of the impugned decision than through the use of the satellite installation in question, nor that their satellite dish could be installed in a different location. They might have been able to obtain some news through foreign newspapers and radio programmes, but these sources of information only cover parts of what is available via television broadcasts and cannot in any way be equated with the latter. Moreover, it has not been shown that the landlord later installed broadband and internet access or other alternative means which gave the tenants in the building the possibility to receive these television programmes.[49]

It is this latter argument that is of utmost importance to our analysis. In other words, the applicants' right to receive and impart information in their native language was deemed much more significant in the context of the shortage of electronic communication methods for maintaining a connection with the cultural and linguistic heritage of their country of origin. It is for this specific reason that, *mutatis mutandis*, Internet access could be deemed as overriding the contractual interests of others. Although this interpretation might be deemed as going further than the Court's intention, it seems reasonable to adopt this stance given the technological evolutions that have occurred since the time of the facts (1999-2004).

From this closer scrutiny of case law, it seems that the ECtHR is fully aware of the growing importance of the Internet and its impactful interference with human rights. While a stand-alone right has not been so far recognised, not even by applying the evolutive method of interpretation, access to the Internet has interfered with several Convention-safeguarded rights and freedoms.[50] Among them, freedom of expression appears to be the most conspicuous bedrock for assessing the Internet's impact as regards receiving and imparting information, yet the ECtHR's findings may not be generalised. Only the content-based analysis of such information may give rise to a different legal basis, namely, the right to education. All in all, the Court chose a rather cautious approach without actually embracing a clear position as to the severability of this right. It seems that in the absence of a legal instrument positively enshrining this right, the legal debate at the CoE level remains in the soft law sphere.

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[49] *Khurshid Mustafa and Tarzibachi v Sweden,* § 45.

[50] Adam Wiśniewski, 'The European Court of Human Rights and Internet-Related Cases' (2021) 26 (3) Białostockie Studia Prawnicze 109–133, DOI: https://doi.org/10.15290/bsp.2021.26.03.06. According to the author, such Internet-related cases represent proof of Strasbourg Court's capacity to dynamically develop the 20th-century conventional provisions, hence shaping updated standards as regards human rights protection.

III The Luxembourg Point of View – An Enhanced Threefold Conflict

It goes without saying that the debate revolving around the right to Internet access is also noticeable at the EU level. In this respect, the human rights legal framework does not explicitly recognise such a right. However, legal specialists argue that the current normative architecture allows for the respect of such a right by virtue of Article 36 CFR.[51] In light of its scope and role, the Charter itself gives enough leeway for successfully enshrining such a right, subject to the limitations imposed by Article 51 CFR, namely the interlink between the specific right and EU law application.[52] In this respect, the latest developments underscore three potential scenarios: the policies and actions of Member States in view of incorporating the right to Internet access, the innovative interpretation method applied by the Luxembourg and Strasbourg courts, or formal recognition as a result of international developments.[53]

Bearing these hypotheses in mind, the CJUE's point of view may be most effectively assessed by means of its recent case law. Thus, in its 2019 case *Google (Territorial scope of de-referencing)*, the Luxembourg Court was called to decide on the 'balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other [which] is likely to vary significantly around the world.'[54] Similarly, a bipartite clash of rights was assessed in the case of *Tommy Hilfiger Licensing and others*, which emphasised the fair balance which must be struck between 'the protection of intellectual property and the absence of obstacles to legitimate trade'.[55]

Still, the human rights debate is particularly obvious when immixtures with various CFR-safeguarded rights are analysed. This is the case of national injunctions on various grounds and legal instruments that give rise to the fruitful development of the human rights framework. As such, both the *UPC Telekabel Wien* case and the *Mc Fadden* case underline the threefold axiological conflict between copyright-related rights, freedom to conduct business and freedom of expression.

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51 Mildebrath (n 4) 32–33. For an overview of the scope of this right, see Paul Craig, Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (Oxford University Press 2011, New York) 1073–1074.

52 Mildebrath (n 4) 33.

53 Jasmontaite, de Hert (n 39) 11–13.

54 Case C-507/17 *Google LLC, successor to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL),* EU:C:2019:772, § 60.

55 Case C-494/15 *Tommy Hilfiger Licensing LLC, Urban Trends Trading BV, Rado Uhren AG, Facton Kft., Lacoste SA, Burberry Ltd v Delta Center a.s.*, EU:C:2016:528, para 35.

1 The UPC Telekabel Wien Case[56] – The Cinematographic Injunction

Delivered on 27 March 2014, the abovementioned case stirred the interest of scholars from various points of view, such as the liability of service providers.[57] However, the present analysis focuses solely on the human rights assessment.

The facts of the case may be briefly summarised as follows: Constantin Film and Wega discovered that a website was offering, without their consent, either a download or 'streaming' of some of the films they had produced in violation of their copyright-related rights. The two film production companies applied for interim measures to obtain an order obliging UPC Telekabel, an Internet service provider, to block the access of its customers to the website at issue.

Procedurally speaking, the court of first instance, *Handelsgericht Wien* (Commercial Court, Vienna), prohibited UPC Telekabel from providing its customers with access to the website at issue, which led to the blocking of the site's domain name and current IP address and any other IP addresses of that site. Then, the higher court, *Oberlandesgericht Wien* (Higher Regional Court), partially reversed the order, establishing that UPC Telekabel could only be required, in the form of an obligation to achieve a particular result, to forbid its customers access to the website at issue, but that it must remain free to decide the means to be used. Finally, the highest court, *Oberster Gerichtshof* (Supreme Court), stayed the proceedings in view of the preliminary ruling request at stake.

Before analysing the judgment, it is worth paying attention to the Opinion of Advocate General Cruz Villalón, which is notable for at least two reasons.[58] On the one hand, the threefold conflict of values is underscored, namely, the balance that must be struck between the rights safeguarded by means of the specific EU instrument, ie copyright, and the other concurring rights.[59] In this case, alongside copyright protection as enshrined by Article 8(3) of Directive 2001/29/EC, the Advocate General (AG) observed the impact on freedom of expression, protected by Article 11 CFR, as well as on freedom to conduct business, safeguarded by Article 16 CFR. Regarding freedom of expression, the AG highlighted that 'the blocking measure does actually affect infringing material and that there is no danger of blocking access to lawful material.'[60] On the other hand, the opinion of the AG proves to be coherent with the Strasbourg perspective since the case law of the ECtHR is taken into account. In this respect, the AG underlined that 'the access to information afforded by the Internet is today considered essential in a democratic society',[61] having regard to the

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[56] Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, EU:C:2014:192.

[57] Gosztonyi (n 24) 134–135, DOI: https://doi.org/10.1007/978-3-031-46529-1_9

[58] Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Opinion of AG Cruz Villalón, EU:C:2013:781.

[59] *UPC Telekabel Wien*, Opinion of AG Cruz Villalón, § 81.

[60] *UPC Telekabel Wien*, Opinion of AG Cruz Villalón, § 82.

[61] *UPC Telekabel Wien*, Opinion of AG Cruz Villalón, § 108.

praetorian developments stemming from the 2012 case *Yildirim v Turkey*, including the comparative law survey led by the Council of Europe survey on this matter.[62] Bearing these observations in mind, the AG took the view that prohibiting an internet service provider 'in quite general terms and without ordering specific measures, from allowing its customers access to a particular copyright-infringing website' is not compatible with the balance test of fundamental rights.

The judgment of the Luxembourg Court is remarkable from two points of view. Not only does it acknowledge the threefold conflict of values emphasised by the AG in his Opinion,[63] but it also highlights the interference with Internet users' rights.[64] In this respect, the Court outlined the strict requirements that must be met by injunctions associated with the online ecosystem:

> […] the measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.[65]

For these reasons, the CJEU embraced a different perspective from the AG and allowed for such a prohibition subject to certain conditions. First, the compatibility depends on whether respect for Internet users' freedom of expression is respected.[66] Second, such prohibitions must equally safeguard copyright-related rights.[67]

To conclude, in *UPC Telekabel Wien*, the Court adopted no explicit stance as to the potential autonomy of the right to Internet access. In fact, it rather chose the EU-specific moderate approach that connects Internet access to freedom of expression and its component, access to receive and impart information. Refraining from any reference to the Strasbourg point of view, the CJEU undertook close scrutiny of the human rights at stake and, surprisingly or not, decided to award particular importance to online freedom of expression without qualifying it as a stand-alone right.

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62 *Ahmet Yildirim v Turkey*, no. 3111/10, 18 December 2012, § 31. According to this survey, 20 Member States protect this right constitutionally by means of the guarantees granted to freedom of expression.

63 *UPC Telekabel Wien*, § 47.

64 *UPC Telekabel Wien*, § 55.

65 *UPC Telekabel Wien*, § 56.

66 In its operative part, the CJEU established that 'the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available'.

67 The CJEU stated that the measures taken must 'have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.'

2 The Mc Fadden Analysis – The Insecure Internet Network

While the *Spiegel Online* case focused on the conflict between copyright-related rights (namely the author's exclusive rights or reproduction and communication to the public, on the one hand, and the fundamental rights of users of that specific intellectual work, in particular, their freedom of expression and information), the judicial analysis provided a valuable view of this latter right, yet, overall, an incomplete one.[68] The same bipartite exercise of weighing the interests at stake may be identified in *Funke Medien NRW* with regard to refused access to confidential documents,[69] as well as in *Pelham and Others*, which concerned the copyright protection of a phonogram, more specifically, the alleged copying of approximately two seconds of a rhythmic sequence.[70] What all these cases have in common is the fact that private rights, namely copyright-related ones, are weighed against freedom of expression. While this exercise is noteworthy in itself, it seems quite common in relation to the developments in the ECtHR.

A more comprehensive legal analysis may be observed in *Mc Fadden*,[71] which involved a distinct tripartite balancing test. This time, though, the interests at stake seem to be more deeply imbued with the EU's specificities since freedom of expression is opposed both with copyright-related rights and freedom to conduct business. Still, the EU instrument in discussion is Directive 2000/31/EC on electronic commerce.[72]

Concerning the facts of the case, it is worth noting that Mr Mc Fadden was running a business selling and leasing lighting and sound systems and, at the same time, operating a wireless local area network free of charge in the proximity of his business by means of a telecommunications service. It should be highlighted that access to his network was intentionally not protected in order to attract the attention of customers nearby to his business. Additionally, Mr Mc Fadden made available to the public a piece of musical work in the absence of rightholders' consent (pertaining to Sony Music). In this respect, Mr Mc Fadden denied having infringed copyright law concerning the phonogram and accepted the possibility that one of his wireless network users might have committed the violation.

From a procedural standpoint, Sony Music formally notified Mr Mc Fadden to respect their rights concerning the musical work. Failing this, Mr Mc Fadden submitted an action for a negative declaration ('negative *Feststellungsklage*') and, in turn, Sony Music brought several counterclaims in order to obtain from Mr Mc Fadden (i) payment of damages in virtue of his liability copyright law infringement, (ii) an injunction against the infringement

68 Case C-516/17 *Spiegel Online GmbH v Volker Beck*, EU:C:2019:625, § 42.

69 Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, EU:C:2019:623, § 70.

70 Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben*, EU:C:2019:624, § 32.

71 Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, EU:C:2016:689.

72 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1.

of its rights on pain of a penalty and (iii) reimbursement of the costs of giving formal notice and court costs. The court of first instance delivered a judgment by default of Mr Mc Fadden and decided in favour of Sony Music. Mr Mc Fadden appealed, invoking exemption of liability, whereas Sony Music invoked in defence the direct liability of the claimant and, subsidiarily, his indirect liability. At this point, the national court, ie *Landgericht München I* (Regional Court, Munich I, Germany), stayed the proceedings and referred the matter to the CJEU.

To begin with, the Opinion of Advocate General Szpunar is worth examining from the perspective of the human rights that were involved.[73]

First, by means of this opinion, the AG acknowledged once again the threefold conflict of rights and, implicitly, of values triggered by the case at hand, namely copyright protection as opposed to freedom of expression and information and the freedom to conduct business, enshrined in Articles 11 and 16 CFR.[74] Thus, the AG recalled the well-known weighing of interests exercise: 'Since those fundamental rights are restricted in order to give effect to the right to the protection of intellectual property enshrined in Article 17(2) of the Charter, it is necessary when restricting them to strike a fair balance between the fundamental interests involved'.[75]

Second, AG Szpunar made some noteworthy observations as regards Internet access and its wide contemporary usage. In this respect, the AG outlined the measures available for Mr Mc Fadden and examined one of them, namely password-protecting the network. It is interesting that, from this point of view, securing access to a Wi-Fi network through a password is qualified as a measure restricting freedom of expression and information. Bearing this in mind, the AG states that 'the imposition of an obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, would not be consistent with the requirement for a fair balance to be struck between, on the one hand, the protection of the intellectual property rights enjoyed by copyright holders and, on the other, that of the freedom to conduct business enjoyed by providers of the services in question'.[76]

It is also noteworthy that Internet access is assessed from the perspective of a Wi-Fi network's social benefits: '[…] any general obligation to make access to a Wi-Fi network secure, as a means of protecting copyright on the Internet, could be a disadvantage for society as a whole and one that could outweigh the potential benefits for rightholders'.[77] In this respect, the AG also led a brief copyright risk assessment and argued that infringements are highly unlikely in view of the technical properties of the network and affirmed that these

[73] Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Opinion of AG Szpunar, EU:C:2016:170.

[74] *Mc Fadden v Sony Music Entertainment Germany GmbH*, Opinion of AG Szpunar, § 111.

[75] *Mc Fadden v Sony Music Entertainment Germany GmbH*, Opinion of AG Szpunar, § 112.

[76] *Mc Fadden v Sony Music Entertainment Germany GmbH*, Opinion of AG Szpunar, § 147.

[77] *Mc Fadden v Sony Music Entertainment Germany GmbH*, Opinion of AG Szpunar, § 148.

were clearly outweighed by 'the great potential for innovation', therefore imposing careful examination of the analysed measures.[78]

Surprisingly, the CJEU did not share the same perspective as the AG regarding the content of the injunction. Obviously, the Luxembourg Court agreed with the AG regarding the existence of the threefold conflict of rights at stake:

> […] in so far as such an injunction, first, places a burden on the access provider capable of affecting his economic activity and, second, is capable of restricting the freedom available to recipients of such a service from benefiting from access to the internet, the Court finds that the injunction infringes the former's right of freedom to conduct a business, protected under Article 16 of the Charter, and the right of others to freedom of information, the protection of which is provided for by Article 11 of the Charter.[79]

In this context, the CJEU recalled the applicable test, ie the balance of rights examination.[80] Bearing in mind the developments put forth in *UPC Telekabel Wien* as to the indeterminate content of the injunction, subject to a series of conditions, the Court assessed the options available to Mr Mc Fadden, namely examining all communications passing through an Internet connection, terminating that connection, or password-protecting it, and removed from the alternatives the first two due to their incompatibility with provisions of the Directive on electronic commerce and the freedom to conduct business, respectively. Thus, as regards the last of the measures, the Court noticed that 'such a measure is capable of restricting both the freedom to conduct a business of the provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service'.[81]

With regard to freedom to conduct business, the Court found no essential damage thereof, noticing that adding a password security method actually consists of 'marginally adjusting one of the technical options open to the provider in exercising its activity'.[82] As regards freedom of expression, the Court embraced a similarly pragmatic approach in stating that the essence of the right to freedom of information of the recipients of an Internet network access service remains intact since access to such a network is only one of several methods of accessing the Internet, and the measure *per se* does not block any website.[83] Therefore, the Court interpreted the addressed provisions as allowing for an injunction that imposes a password to protect the Wi-Fi network.

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78 *Mc Fadden v Sony Music Entertainment Germany GmbH*, Opinion of AG Szpunar, para. 149.
79 *Mc Fadden v Sony Music Entertainment Germany GmbH*, § 82.
80 *Mc Fadden v Sony Music Entertainment Germany GmbH*, § 83.
81 *Mc Fadden v Sony Music Entertainment Germany GmbH*, § 90.
82 *Mc Fadden v Sony Music Entertainment Germany GmbH*, § 91.
83 *Mc Fadden v Sony Music Entertainment Germany GmbH*, § 92, 94.

To sum up, this case outlines an intriguing configuration of the threefold conflict of competing rights, copyright protection, freedom of expression and freedom to conduct business. This time, too, the Court took a slightly different approach than the AG regarding the scope of the right to information. While the AG embraced a wider interpretation of freedom of expression in view of the network users, the Court took a more pragmatic stance regarding the concrete configuration of human rights. At first glance, the interpretation of the Court appears to be rather in favour of the economic dimension of the Union and its citizens. Even if it may seem detrimental to human rights' development, the attentive analysis of the case reveals the fact that the Court actually chose the wiser path, *aurea mediocritas*, according to which human rights shall not be idealised, yet are respected with due regard to the entire ecosystem of the Union.

In light of these observations, it is legitimate to wonder whether general criteria regarding limitations on Internet access may be developed.

IV Potential Limitations

While the assessed cases outline particular solutions, it is worth examining whether a coherent view connecting the perspectives from Strasbourg and Luxembourg might be observed.

One landmark case concerning potential limitations of Internet access is *Ahmet Yildirim v Turkey*.[84] In this instance, the applicant owned and ran a website created and hosted using Google Sites, on which he published his academic work and his views on various topics. In the context of criminal proceedings, a certain offending website was blocked as a result of a judicial order. Since the owner of the impugned website did not have a service certificate and lived abroad, the court varied its blocking order the following day so that all access to Google Sites was blocked, including the applicant's website.

In this case, the ECtHR examined the request from the perspective of Article 10 ECHR, ie freedom of expression in its component of receiving and imparting information and ideas, and found a violation thereof.[85] To this aim, the Court assessed the legal effects of the preventive judicial order and acknowledged that 'the measure did not, strictly speaking, constitute a wholesale ban but rather a restriction on Internet access which had the effect of also blocking access to the applicant's website'.[86] Bearing in mind the domestic legal framework, the ECtHR underscored that the applicant's freedom of expression was subject to a form of prior restraint on the part of the public authorities and summarised the legal

[84] *Ahmet Yildirim v Turkey*, no. 3111/10, 18 December 2012 ECHR.

[85] The applicant also invoked, *inter alia*, an alleged infringement of Articles 6, 7 and 13 of the ECHR and Article 2 of Protocol No. 1, hence of his right to education, yet the ECtHR deemed it unnecessary to rule separately on either the admissibility or the merits of the ancillary complaints.

[86] *Ahmet Yildirim v Turkey*, § 54.

debate regarding 'whether, at the time the blocking order was issued, a clear and precise rule existed enabling the applicant to regulate his conduct in the matter'.[87] The Court ruled that this state measure did not fulfil the foreseeability requirements stemming from the Court's case law, noticing that Google Sites was held liable, indirectly, for a website that it hosted.

The ECtHR's reasoning relied on the fact that (i) the national notion of 'publication' covered neither the applicant's website nor Google Sites, (ii) neither Google Sites nor the applicant's website was the subject of judicial proceedings, (iii) the relevant national legal framework did not provide for a wholesale blocking of access, (iv) nor for the blocking of an entire Internet domain like Google Sites and last, (v) Google Sites was not notified regarding the illegal content being hosted and did not refuse compliance with the legal measure ordered in the criminal case.[88] Furthermore, the Strasbourg Court took note of the arbitrary conduct of the administrative body that implemented the blocking order, which 'could request the extension of the scope of a blocking order even though no proceedings had been brought against the website or domain in question and no real need for wholesale blocking had been established'[89] and whose recommendation served as the legal basis for the judicial decision without any other weighing of the interests at stake.

In its analysis, the Strasbourg Court took into account the role of the Internet and its contemporary connection to freedom of expression, as established in *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)*. In addition, it highlighted some guidelines that should have been taken into account by the domestic authorities, namely the effects of the preventive measure, that is, 'rendering large quantities of information inaccessible, [which] substantially restricted the rights of Internet users and had a significant collateral effect'.[90] All aspects factored in, the Court concluded that

> […] the measure in question produced arbitrary effects and could not be said to have been aimed solely at blocking access to the offending website, since it consisted in the wholesale blocking of all the sites hosted by Google Sites. Furthermore, the judicial review procedures concerning the blocking of Internet sites are insufficient to meet the criteria for avoiding abuse, as domestic law does not provide for any safeguards to ensure that a blocking order in respect of a specific site is not used as a means of blocking access in general.[91]

It is noteworthy that the Court's findings regarding Internet blocking, more specifically domain blocking, appear to represent the solution to a specific issue. Still, the approach is cautious, as the arguments put forth by the Court and its line of reasoning leave no room for generalisation in this matter. In this respect, solely the concurring opinion of Judge Pinto de

[87] *Ahmet Yildirim v Turkey*, § 60.
[88] *Ahmet Yildirim v Turkey*, §§ 61–62.
[89] *Ahmet Yildirim v Turkey*, § 64.
[90] *Ahmet Yildirim v Turkey*, § 66.
[91] *Ahmet Yildirim v Turkey*, § 68.

Albuquerque embraced an academic line of thought and went beyond the concrete facts of the case in formulating a series of criteria to be applied to Internet blocking measures. Since this opinion is not agreed upon by the members of the Court, its binding force cannot serve as an authoritative argument. Still, for theoretical purposes, it is advisable to highlight that the eleven criteria developed therein rely on a series of CoE-based documents referring to freedom of expression on the Internet. Thus, bearing in mind the occasion envisaged by this collateral Internet blocking, the following view in the concurring opinion appears relevant:

> […] Thus, any indiscriminate blocking measure which interferes with lawful content, sites or platforms as a collateral effect of a measure aimed at illegal content or an illegal site or platform fails *per se* the "adequacy" test, in so far as it lacks a "rational connection", that is, a plausible instrumental relationship between the interference and the social need pursued. […] When exceptional circumstances justify the blocking of illegal content, it is necessary to tailor the measure to the content which is illegal and avoid targeting persons or institutions that are not *de jure* or *de facto* responsible for the illegal publication and have not endorsed its content. In the case of *interim* or preventive measures which are based on reasonable grounds to suspect the commission of a crime, freedom of expression warrants not only a particularly tight legal framework ("*cadre légal particulièrement strict*") but also the most careful scrutiny by the courts, and consequently the exercise of special restraint.

As examined above, the potential limitations on Internet access are approached distinctly at the EU level, given the prevalently economic dimension of the Union. Thus, restrictions concerning certain websites, as was the case in *UPC Telekabel Wien*, or to Internet access in Wi-Fi format, as the facts unfolded in *Mc Fadden*, are assessed from the point of view of the restricted rights, namely freedom of expression or freedom to conduct business in a comparable manner to that applied by the ECtHR. In this respect, the similarity stems from Article 52(3) of CFR, which established quite clearly that the ECHR provisions constitute a minimum threshold of protection.[92]

Indeed, case law proves that the Luxembourg perspective overlaps significantly with the Strasbourg point of view. For instance, in *Pelham and Others*, the Luxembourg Court applied the weighing of interests test with reference to the freedom of expression as enshrined in both CFR and ECHR, making clear the connection with the ECtHR's case law.[93] A similar coherence of perspective may be identified in *Funke Medien NRW*, where

[92] EU Charter of Fundamental Rights Article 52(3): 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

[93] *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben*, § 34: 'A balance must be struck between that right and other fundamental rights, including freedom of the arts, enshrined in Article 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in Article 11 of the Charter and in Article 10(1) of the European Convention for the Protection of Human Rights

Luxembourg clarified that its exercise of balancing the interests at stake in matters referring to freedom of expression is, in principle, equivalent in scope to the examination applied by the ECtHR.[94] In this last case, the Court underlined the exact legal relation between the rights enshrined in the CFR and ECHR:

> […] it should be noted that in so far as the Charter contains rights which correspond to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), Article 52(3) of the Charter seeks to ensure the necessary consistency between the rights contained in it and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union […] Article 11 of the Charter contains rights which correspond to those guaranteed by Article 10(1) of the ECHR […].[95]

Scholars have also noticed the interconnection between the ECtHR and CJEU levels of protection granted to equivalent safeguarded rights and freedoms, highlighting that the standard of protection granted by the ECHR and, accordingly, by the Court in its interpretation, constitutes only a minimum threshold, regardless of the effective reference to specific cases of the ECtHR.[96] In this respect, it has been observed that 'the jurisprudence of the two courts is complementary, as the ECtHR approaches the problems on human rights grounds, while the CJEU approaches them on economic grounds'.[97] Still, in both cases, the impact of technology on human rights is perceived as a threat rather than an opportunity.[98]

In this respect, the following observation appears accurate as far as the right to Internet access in concerned: 'although the ECtHR and the CJEU differ on certain issues, this is not surprising, as the two courts examine the same issues from different angles. […] The complementary jurisprudence of the two international courts contributes significantly to ensuring that the liability of platform providers and the internet as a complex and constantly changing ecosystem is on a more solid footing in the practice of national courts.'[99]

Strictly referring to limitations to Internet access, scholars have put forward a series of conditions to be verified *in concreto* for each and every such restrictive measure. These criteria refer to:

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and Fundamental Freedoms, signed at Rome on 4 November 1950, affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds.'

94 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, §§ 73–74.

95 *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, § 73.

96 Amelia-Raluca Onișor, 'CJUE, Carta și CEDO. Amurgul unei relații atipice?' (2021) (1–2) Revista Themis 179.

97 Gosztonyi (n 24) 141.

98 Pollicino (n 14) 193.

99 Gosztonyi (n 24) 142.

> First, legislation should provide for measures that can be used to restrict, and should also set out in clear and predictable rules what content can be blocked and to what extent. In determining what content can be blocked, national legislation should follow the standards set by international human rights law. Second, blocking measures should be ordered by a court or an independent judicial body. Non-independent governmental bodies are likely to apply overly restrictive measures, as their primary objective is to protect interests that conflict with freedom of expression. Third, Internet users and ISPs should be able to challenge restrictive measures. To this end, when they try to access a blocked site, they should be provided with sufficient information on how to challenge the measure. Finally, to avoid blocking legitimate content, blocking measures should be strictly targeted, so IP address technologies should only be used to target non-shared IP servers.[100]

Bearing in mind the Strasbourg-Luxembourg link, in terms of judicial interpretation, it can be concluded that the same criteria shall be applied for restrictions to Internet access pursuant to EU legal instruments. Still, given the more pragmatic view embraced by the CJEU in cases such as *Mc Fadden*, with regard to the Union's human rights dimension, distinct approaches are to be expected. However, these differences appear to be predictable and natural since they seem to be included in the greater architecture of the European *lato sensu* system of human rights protection.

V Conclusions

The debate concerning the autonomous or implicit existence of the right to Internet access is far from settled, especially since the case law of the judicial centres of the Union's space seems to leave a certain leeway for the explicit recognition of this right. The ECtHR case law assessed here reveals that the Strasbourg Court has duly reacted to the new technological framework that underpins several Convention-protected rights. Not only did the Court acknowledge the societal role of the Internet at a general level, but it also analysed its dimensions in connection with alleged violations of conventional rights and freedoms. The bipartite 'balancing test' was used to oppose the safeguarded right and competing interests. Thus, in *Kalda v Estonia*, in *Jankovskis v Lithuania* and then later in *Ramazan Demir v Turkey*, the right to receive and impart information was assessed from a contemporary perspective of those deprived of liberty. Therefore, the acknowledgement of the need for Internet access appeared to apply to a specific category of individuals. Having found violations of Article 10 of the ECHR in all these cases, the Strasbourg Court highlighted the significant role of Internet access in factual situations which occurred over 15 years ago. While these findings may not be generalised, the analysed case law leaves room for future

[100] Gosztonyi (n 24) 155.

jurisprudential developments insofar as our society's *status quo* has dramatically changed in favour of a higher degree of technology usage and greater expectations of connectivity.

As regards the case law of the CJEU, the human rights debate emerges in the context of a differently designed conflict of values. While numerous cases solved by the Luxembourg Court imply a dual exercise of balancing the rights and interests at stake, a few helped an intriguing and more complex examination. It is the case of national injunctions on various grounds and legal instruments that gives rise to legal developments that shed light on the threefold conflict of values thus triggered. Hence, in *UPC Telekabel Wien*, the Court assessed human rights in its discussion and focused on freedom of expression. Thus, the right to Internet access was thoroughly analysed through the lens of freedom of expression, with no reference to its severability, that is, its status of a stand-alone human right. Similarly, in *Mc Fadden*, the CJEU chose once again the solution it deemed suitable for reconciling all the values at stake. Using a rather pragmatic approach, the Court chose to rule in favour of economic interests and took no explicit stance on the autonomy of Internet access. This apparent loss in the human rights field is actually a subtle way of promoting a practical and effective perspective on fundamental freedoms to the detriment of ideal and illusory legal categories.

Limitations to Internet access are assessed in relation to the landmark ruling in *Ahmet Yildirim v Turkey*. With regard to Internet blocking, the Strasbourg Court put forth the solution to a specific issue, stating that abusive and arbitrary measures shall, by all means, be avoided, hence imposing the judicial review of the restrictive measures. Even if no theoretical general-use observations were made, the case constitutes a bedrock for building abstract criteria for assessing such measures. Pursuant to Article 52(3) CFR, this standard of protection represents the minimum threshold conferred at the EU level. Hence, the conditions therein shall be accordingly applied in cases of Internet restriction occurring within the Union's sphere of competence.

All in all, as legal developments stand at the moment, the right to Internet access enjoys only an implicit existence due to the reluctance to acknowledge it in an independent manner. The ECtHR and CJEU case law are defined by complementarity more than mere dichotomy. Therefore, Internet access is rather a 'facilitator' of the exercise of other rights than an autonomous right. As a guiding line of this analysis, it is worth recalling the visionary considerations put forth by The Honourable Lloyd Axworthy, a prominent Canadian public figure: 'The key is how to maximize the Internet's potential for good as a tool to promote and protect human rights: its use for human rights education, as a means of organizing human rights defenders and getting information on human rights violations out to the world.'[101] Bearing these thoughts in mind, it seems legitimate to ask whether it is (high) time for a change of perspective and to what extent academia or other stakeholders should take some braver steps in this direction.

[101] Hick, Halpin, Hoskins (n 3) 16.