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## **SUBMISSION ON FREEDOM OF EXPRESSION AND THE PRIVATE SECTOR IN THE DIGITAL AGE**

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The Danish Institute for Human Rights (DIHR) welcomes the announced study on the responsibilities of the Information and Communication Technologies (ICT) sector to protect and promote freedom of expression in the digital age.

The role of the ICT sector vis-à-vis freedom of expression is a key human rights issue in the digital age, and entails a number of human rights challenges. In the following, I will briefly point to some of the work done by the DIHR in this area, and point to areas where further examination by the Special Rapporteur would be particularly relevant.

DIHR has since 2001 developed tools and methodologies targeting the human rights responsibilities of corporate actors. The work has been carried out in close partnership with companies, civil society organisations, inter-governmental agencies and the global network of national human rights institutions. The practical tools developed include a self-assessment tools for companies, a human rights impact assessment toolbox for use in the context of business projects as well as training materials. For more information on the extensive work done by DIHR in this field please refer to: [www.humanrights.dk/business-human-rights](http://www.humanrights.dk/business-human-rights)

In relation to the ICT sector, a sector wide impact assessment (SWIA) was carried out in 2015 by the Myanmar Centre for Responsible Business in partnership with, its co-founders, the Institute for Human Rights and Business (IHRB) and DIHR. The SWIA included analysis of the legal and policy framework relevant to the sector and the policies and practices of companies operating in the sector. The main findings of the SWIA relate to: Opportunities and challenges for universal access in terms of price and language; Acute online "digital" dangers in a context of significant gaps in the policy, legal and regulatory framework; the risks of

exacerbating or addressing visible divisions in society; as well as “offline” human rights issues. The Myanmar SWIA report is available at: [www.myanmar-responsiblebusiness.org/swia/ict.html](http://www.myanmar-responsiblebusiness.org/swia/ict.html)

In relation to telecoms, DIHR in 2012 carried out a human rights impact assessment of the Swedish telecom operator Telia Sonera, focusing on freedom of expression, protection of children, and privacy. The tool used for the Telia Sonera human rights impact assessment is not publicly available, but DIHR would be happy to share it with the UN Special Rapporteur upon request.

In relation to EU policies, the DIHR and the European Training and Research Centre for Human Rights and Democracy in Graz recently conducted a *Case Study on ICT and Human Rights*. This study is part of the EU FP7 FRAME research project (Fostering Human Rights among European Policies). Drawing on case-studies of three EU directives – Directive 2000/31/EC on e-commerce, Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography, and Directive 2004/48/EC on intellectual property rights enforcement – the study illustrates how dealing with alleged illegal content through blocking, filtering and take-down of content within co- and self-regulatory frameworks shaped around ‘internet intermediaries’ challenges freedom of expression. The directives presuppose, accept or encourage self-regulation and, combined with schemes of limited liability, subject the intermediaries to an increasing pressure to implement public policy in the online domain. The study provides a number of suggestions to ensure that the EU addresses the human rights implications of co- and self-regulation, including the strengthening of safeguards and guidance for EU Member States and intermediaries to implement the said EU policy.

The study also addresses the external policies of the EU, focusing on the protection and support of Human Rights Defenders using digital means (‘Digital Defenders’). For this purpose, EU policies and instruments of relevance for Digital Defenders are analysed, including the implementation of the Internet Freedom Strategy and the No Disconnect Strategy. This part of the study also explores the related issues of safety of journalists, export control of surveillance technology by EU Member States, and the cooperation with other international organisations active in the field of online rights. The study provides proposals on how to improve the general environment for Digital Defenders and their right to freedom of expression, and how to enhance the coherence of EU action in this field.

The FRAME case study on ICT and Human Rights will be publicly available within the coming months.

Other relevant DIHR research publications include *Framing the Net – The Internet and Human Rights* by Rikke Frank Jørgensen (Edward Elgar, 2013) as well as *The State duty to protect against business-related human rights abuses – unpacking pillar 1 and 3 of the UN Guiding Principles on Business and Human Rights* by Stephanie Lagoutte (DIHR, 2014), available at:

[http://www.humanrights.dk/files/media/dokumenter/udgivelser/research/matters\\_of\\_concern\\_series/matters\\_of\\_concern\\_state\\_duties.pdf](http://www.humanrights.dk/files/media/dokumenter/udgivelser/research/matters_of_concern_series/matters_of_concern_state_duties.pdf).

Moreover, the ongoing research project *The Commercialised Public Sphere* examines how internet companies such as Google and Facebook frame human rights, and how this framing translates into architecture, user contracts and governance structures. For more information see:

[www.humanrights.dk/projects/commercialized-public-sphere](http://www.humanrights.dk/projects/commercialized-public-sphere).

Drawing on these experiences and previous work, the DIHR would like to highlight five specific areas that would benefit from further examination and standard setting by the UN Special Rapporteur.

**REMEDIES:** Access to remedies is a part of international human rights law and is particularly challenged in an online context, where infrastructure and services are governed largely by private actors. The issue has been raised, for example, in the Council of Europe *Guide to Human Rights for Internet Users*, adopted in 2014: [www.coe.int/en/web/internet-users-rights/guide](http://www.coe.int/en/web/internet-users-rights/guide). Access to Remedies is also part of the UN Guiding Principles on Business and Human Rights, yet the practical implications of these standards in an online context remain unexplored. Guidance and standards in this area are lacking.

**CO- AND SELF-REGULATION:** Internet companies are enlisted in various co- and self-regulatory regimes for tackling alleged illegal content on the internet, often without the necessary human rights safeguards. There is a need for guidance on adequate standards for freedom of expression compliance, transparency and accountability in the – both mandatory and voluntary – regimes for content regulation. Such guidance and standard-setting should help States ensure that any restrictions on access to internet content affecting users under their jurisdiction are based on a strict and predictable legal framework regulating the scope of any such restrictions and affording the guarantee of judicial or administrative oversight to prevent possible abuses.

**POSITIVE STATE OBLIGATIONS:** The EU, through the EU ICT Sector Guide, has played an active role in translating the UN Guiding Principles on Business and Human Rights to the ICT sector. Yet, there is limited analysis and guidance on the positive state obligations vis-à-vis these private actors, despite their crucial role and impact on individuals' ability to enjoy freedom of expression and the right to privacy in the online domain. Guidance to states on their

positive human rights obligations related to online freedom of expression is lacking and could include instructions on the level of state involvement in filtering, blocking and take-down of content that is necessary for state responsibility to be engaged, as well as obligations of the state to ensure that the practices of private companies are not at variance with human rights standards.

**TERMS OF SERVICE ENFORCEMENT:** Internet companies operate transnationally and are therefore subject to many different national laws and norms. In consequence, their terms of service, and affiliated report mechanisms, often represent a more narrow interpretation of freedom of expression, compared to international human rights law. Recent years have provided increased transparency regarding takedown requests that internet companies receive from governments. Numerous takedowns, however, are conducted every day as part of the company enforcing its terms of service. These internally defined criteria and processes have an impact on internet users' freedom of expression and information worldwide, yet they are rarely addressed as freedom of expression issues. There is a need for tackling this issue from a human rights perspective, and for ensuring greater transparency in terms of service enforcement.

**PRIVACY AND FREEDOM OF EXPRESSION:** Practises for data collection, data processing and data exchange are closely linked to online freedom of expression, just as both areas largely involve private actors. With the appointment of the UN Special Rapporteur on the right to privacy there is a unique opportunity for analysis on the interrelation between the two set of rights as well as for developing common positions on the human rights responsibility of the ICT sector.

The DIHR would be happy to elaborate on any of the points above, and to engage with the UN Special Rapporteur on this timely topic.

Yours sincerely,

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SENIOR RESEARCHER