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ACCESS TO THE INTERNET IN THE EU: A POLICY PRIORITY, A FUNDAMENTAL, A HUMAN RIGHT OR A CONCERN FOR EGOVERNMENT?

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After outlining the relevant regulatory provisions governing access to the Internet in the EU (section 2) and its Member States (section 3), and after summarizing arguments supporting the introduction of the right to Internet access, the authors seek to broaden the scope of social and legal debates on Internet access in the EU. In particular, they question (a) whether the Internet is a vital element to achieve a decent standard of living in the Gigabit society (section 4); and (b) whether it deserves a place alongside the fundamental rights or human rights (section 5) and under what conditions it could be incorporated among the EU fundamental rights (section 6). The following sections of the chapter reflect on the potential scope of a right to Internet access (sections 7 and 8) and how eGovernment could facilitate the introduction of such a right (section 9). Considerations about limitations of a right to Internet access are addressed in section 10.

Access to the Internet is inherently an Internet governance matter and therefore its regula- tion should entail a multi-stakeholder debate.[8] Access to the Internet then would be seen not only in a technical way as a communication service but as 'the set of devices, services, facilities and skills that allow people to connect to and use Internet services, applications and content'.[9] Perhaps, this shift in approach could strengthen the EU's role within the broader context of Internet governance.

The authors suggest that the EU debate on Internet access should employ a human rights-based approach to Internet access because the social benefits brought by the Internet cannot be defined by numbers. The authors conclude that acknowledgment or recognition of Internet access as a fundamental right would be valuable as it would encourage policy- and law-makers, as well as civil society, to reconsider the scope and limitations imposed on this right.

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1. INTRODUCTION

Figures reporting the take-up of the Internet in the European Union (EU) are impressive,[2] but the significance of the Internet lies not in the number of its users. It lies in a wide range of possibilities that opened up for individuals and organizations in both the private and public sectors. It is widely acknowledged that the Internet facilitates the enjoyment of individuals' rights and that, at the same time, it challenges the role of various institutions, including public administrations (or governments). In the EU, the vastly increased accessibility of Internet services has allowed public administrations and governments to redefine themselves, both internally and externally.[3] Internally, meaning that traditional functions and services of government have moved to the online sphere (eGovernment), and externally, meaning that governments employ the Internet in order to facilitate citizens' participation in policy-making (e-democracy).[4]

Despite the empowerment of citizens and the transformative nature of the Internet, the EU legislators measure the impact of the Internet in terms of its economic benefits. In the EU, Internet access is considered to be a policy objective, which can accelerate the completion of the Digital Single Market. For example, the European Community (EC) estimates that 'a 10% increase in broadband penetration could yield a 1–1.5% increase in annual GDP or could raise labour productivity by 1.5% over the next five years'.[5] This means to an end-based approach is well reflected in the foreword of Jean-Claude Juncker for the EC Communication titled *A Digital Single Market Strategy for Europe*:
<quotation>By creating a connected Digital Single Market, we can generate up to EUR 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society.[6]</quotation>

Building on the observation that economic incentives are the main driver for adopting measures promoting the deployment of Internet infrastructure and content in the EU, this chapter aims at contributing to the wider debates on Internet governance. The authors explain the role that the EU plays by reflecting on the EU policies and measures applicable to Internet access. The EU as an intergovernmental body can be considered to be a key stakeholder of Internet governance, as its achievements go further than most of the multi-stakeholder platforms, such as the United

1 * The authors would like to thank Foivi Mouzakiti, a Ph.D Student at Queen Mary University, London, for numerous discussions and intellectual exchanges on the topic. Additionally, the authors are grateful to Prof. Wolfgang Benedek for constructive comments and suggestions that helped to improve the quality of this chapter.

2 For example, according to the estimates provided by the European Commission, 97 per cent of European Union (EU) citizens have access to fixed broadband connections at the speed of at least 2 Mbps at end-user level; 70.9 per cent of users can enjoy Next Generation Access (NGA) connectivity level in the EU; the percentage of households with access to the Internet reached an impressive 83 per cent in 2015. For more details see EC, *Staff Working Document Accompanying the Communication 'Connectivity for a Competitive Digital Single Market: Towards a European Gigabit Society'*, SWD(2016)300 final (Brussels, 14 September 2016) 7, and Eurostat, 'Information Society Statistics – Internet, Level of Access, Use and Activities: Level of Internet Access – Households', http://ec.europa.eu/eurostat/statistics-explained/index.php/Digital_economy_and_society_statistics_-_households_and_individuals (accessed 21 November 2017).

3 P. Dunleavy, H. Margetts, J. Tinkler and S. Bastow, *Digital Era Governance: IT Corporations, the State and e-Government* (Oxford University Press, 2006).

4 Michael Margolis, 'E-Government and Democracy' in R. Dalton and H.D. Klingemann (eds), *The Oxford Handbook of Political Behavior* (Oxford University Press, 2007).

5 European Commission, *The Digital Agenda for Europe: Driving European Growth Digitally*, COM (2012)748 final, 8.

6 European Commission, *A Digital Single Market Strategy for Europe*, COM(2015)192 final, 16.

Nations World Summit on the Information Society (WSIS) or the International Telecommunications Union (ITU). The EU regulatory measures addressing the digital environment have brought tangible results within and beyond the territory of its Member States. [7] Indeed, the EU not only sets a policy agenda to attain certain objectives but it provides for extensive rules governing digital networks (i.e. Internet architecture) and services (i.e. content). Even though the authors deem that the EU policies and measures embody transferable knowledge that could potentiality shape the Internet's development on the global scale, they challenge the current EU regulatory approach and strategy promoting Internet take-up and usage.[8]

After outlining the relevant regulatory provisions governing access to the Internet in the EU (section 2) and its Member States (section 3), and after summarizing arguments supporting the introduction of the right to Internet access, the authors seek to broaden the scope of social and legal debates about Internet access in the EU. In particular, they question (a) whether the Internet is a vital element to achieve a decent standard of living in the Gigabit society (section 4); and (b) whether it deserves a place alongside the fundamental rights or human rights (section 5) and under what conditions it could be incorporated among the EU fundamental rights (sections 6 and 7). The following sections of the chapter reflect on the potential scope of a right to Internet access (section 8) and how eGovernment could facilitate the introduction of such a right (section 9). Considerations about limitations of a right to Internet access are addressed in section 10.

The authors believe that extending EU debates on Internet access beyond the telecommunications sector that owns the infrastructure layer (e.g. copper or fiber optic cables) would be beneficial. The debate on Internet access could become more open and inclusive in terms of the stakeholders and the definitions that are used. The current EU regulatory framework is shaped by the private sector, EU legislatures and governments, whereas the views and needs of civil society and citizens are often a minor consideration. Access to the Internet is inherently an Internet governance matter and therefore its regulation should entail a multi-stakeholder debate.[9] Access to the Internet then would be seen not only in a technical way as a communication service but as 'the set of devices, services, facilities and skills that allow people to connect to and use Internet services, applications and content'.[10] Perhaps, this shift in approach could strengthen the EU's role within the broader context of Internet governance.

The authors suggest that the EU debate on Internet access should employ a human rights-based approach to Internet access because the social benefits brought by the Internet cannot be defined by numbers. The authors conclude that acknowledgment or recognition of Internet access as a fundamental right would be valuable as it would encourage policy- and law-makers, as well as civil society, to reconsider the scope and limitations imposed on this right.

7 For example, consider the global reach of the EU Data Protection Directive 95/46/EC.
8 For example, see European Commission, *The Digital Agenda for Europe*, n. 4 above, 8.
9 United Nations World Summit on the Information Society (WSIS) in the Tunis Agenda For the Information Society 2005: 'A working definition of Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet'.
10 Global Commission on Internet Governance (GCIG), *One Internet* (Centre for International Governance Innovation and Chatham House, 2016).

2. INTERNET ACCESS REGULATION IN THE EU

The EU, on several occasions, has emphasized that Internet access has opened up an endless array of possibilities for cost-efficient provision of services, active citizenship, as well as transparency and accountability of government.[11] The main view expressed in EU policy documents is instrumental: Internet access can contribute to improving the functioning of the internal market by generating economic wealth and it also can provide some social benefits to citizens.[12]

Internet access regulation falls under the scope of the EU telecom rules. Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended in 2009 by Directive 2009/136/EC seeks primarily to ensure the availability of 'good-quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market'.[13] The Universal Service Directive requires Member States to guarantee their citizens' access to at least one Internet service provider at a fixed point.[14] In the pursuit of this ambitious goal set out by the Directive, Member States have been given some leeway; they are only required to take measures facilitating 'reasonable requests for connection at a fixed location to a public communications network'.[15] The reference to 'reasonable requests' implies that in order to evaluate whether a request is reasonable, one needs to consider the overall context and circumstances under which the request to access the Internet was submitted.

The Universal Service Directive also establishes a minimum quality standard for Internet access, implying that the Internet speed has to have a sufficient capacity. In particular, it requires Member States to ensure that:
<quotation>the connection provided shall be capable of supporting voice, facsimile and data communications at data rates that are sufficient to permit functional Internet access, taking into account prevailing technologies used by the majority of subscribers and technological feasibility.[16]</quotation>

In contrast to several of its Member States, Internet access in the EU is not included among the fundamental rights and principles enshrined in its governing Treaties.[17] The legislative basis for EU action in the area of digital networks is found in Articles 170–172 of the Treaty on the Functioning of the European Union (TFEU). According to Article 170, the EU can adopt regulatory measures supporting the establishment and development of trans-European networks in the area of telecommunications on the condition that this will benefit EU citizens, economic operators and regional and local communities.[18] Articles 171 and 172 further specify EU competence in this particular area.

11 For example, European Commission, *The European eGovernment Action Plan 2011–2015 Harnessing ICT to Promote Smart, Sustainable & Innovative Government*, COM (2010)743 final; European Commission, *The Digital Agenda for Europe*, n. 4 above.
12 Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended in 2009 by Directive 2009/136/EC, recital 56.
13 Directive 2002/22/EC (Universal Service Directive), art. 1.1.
14 This objective is further specified in Universal Service Directive, art. 4.
15 See the Universal Service Directive.
16 *Ibid.* art. 4.1.
17 For example, the amendments to the Estonian and Greek Constitutions aim at facilitating access to the Internet. For more detail, see the next section.
18 Note, Treaty on the Functioning of the European Union (TFEU), Art. 170 also covers other key areas of infrastructure, namely, transport and energy.

One could suggest that the EU Charter of Fundamental Rights ('EU Charter') as the most recent codification of fundamental rights could have integrated the right to access the Internet among other EU fundamental rights.[19] However, this would be too bold a claim. The EU Charter compiles 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] and as they result from the constitutional traditions common to the Member States'.[20] In practice, this means that the EU has not considered including the right to Internet access into the most modern codification of fundamental rights because it was neither embodied in the constitutional traditions of its Member States nor endorsed by the ECHR framework.[21]

3. INTERNET ACCESS REGULATION IN THE EU MEMBER STATES

As described in the previous section, the EU Member States are obliged to adopt domestic measures implementing the objectives of the Universal Service Directive, such as providing access to a broadband connection at fixed points. However, a few Member States have decided to further strengthen the right to Internet access by enshrining it in their national legal frameworks. In 2000, the Estonian Parliament passed a law declaring that 'every person shall be afforded the opportunity to have free access to public information through the Internet in public libraries'.[22] A year later, the Greek Constitution was amended with a provision recognizing that 'all persons have the right to participate in the Information Society'. According to the amendment, 'facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State'.[23]

Considering that the governments of other Member States, as well as the jurisprudence, are in support of this right, it may be suggested that there is, in fact, a tendency towards integrating Internet access into the realm of human rights. For example, in 2010, the Finnish government acknowledged that 'a reasonably priced broadband connection will be everyone's basic right'.[24] In 2009, the French Constitutional Court stated that access to online services is necessary in order to exercise freedom of speech.[25] The UK Court of Appeal in *R* v. *Smith and others* recognized access to the Internet as an 'essential part of everyday living' to which access can be limited only under specific circumstances.[26] A few Member States (i.e. Finland, Spain and Malta) have gone so far as to include minimum speeds for Internet access in their legislative frameworks.[27]

In the following section, we will describe the EU vision of the Gigabit Society and the growing policy targets. We will also introduce the concept of 'universal services' and question to what extent services embodied within this concept can strengthen the claim for the right to Internet access.

19 The Charter was promulgated in 2000 and revised in 2007, together with the other provisions of the EU governing treaties.
20 Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (2010/C 83/01); Treaty on European Union (TEU), Art. 6.
21 Christopher McCrudden, *The Future of the EU Charter of Fundamental Rights*, Jean Monnet Working Paper No. 10/01 (18 March 2002) 9, available at http://ssrn.com/abstract=299639 (accessed 21 November 2017).
22 Public Information Act 2000, s. 33.
23 Greek Constitution, art. 5A(2).
24 Ministry of Transport and Communications, Press Release, *1 Mbit Internet Access a Universal Service in Finland from the Beginning of July* (29 June 2010), available at www.lvm.fi/en/-/1-mbit-internet-access-a-universal-service-in-finland-from-the-beginning-of-july-782612 (accessed 21 November 2017).
25 Constitutional Council, Decision no. 2009-580 (10 June 2009).
26 *R* v. *Smith and others* (Rev. 1) [2011] EWCA Crim 1772 (19 July 2011).
27 European Parliament, *Briefing: Broadband as a Universal Service* (April 2016), available at www.europarl.europa.eu/RegData/etudes/BRIE/2016/581977/EPRS_BRI(2016)581977_EN.pdf (accessed 21 November 2017).

4. EU VISION OF THE GIGABIT SOCIETY: AN OPPORTUNITY TO STRENGTHEN THE CLAIM FOR THE RIGHT TO INTERNET ACCESS?

In the EU, it is taken for granted that everyone should have access to the online environment. Access to the Internet is an economic enabler that can allow active participation in economic, political and civil spheres. It is a means to an end that can lead to the underlying EU objective: economic prosperity. In fact, the EC considers that today 'it's no longer about whether you are online or not, but whether you have a good quality connection at a good price'.[28]

Somewhat ignoring the fact that a significant segment of the EU population may remain unconnected, the focus of policy-makers has already shifted towards the universal availability of *fast* Internet access. In autumn 2016, the EC presented its roadmap paving the way for the European Gigabit Society.[29] According to the EU vision, members of this society will actively participate in, and make use of, various services and products available on very high-capacity networks.[30] The active use of very high-capacity networks will bring socio-economic benefits, such as new jobs and the completion of the Digital Single Market. In the European Gigabit Society, 'every EU citizen shall have the right to be connected'.[31] This right to be connected would entail access to 'a functional internet connection, at least at a fixed location, that is affordable and allows full engagement with the digital economy and society'.[32] Following the EC strategy, the European Gigabit Society will be achieved by (1) updating the legislative framework for electronic communications (i.e. developing a European Electronic Communications Code and the Body of European Regulators for Electronic Communications (BEREC) Regulation 1211/2009); (2) setting an action plan for 5G connectivity across Europe; and (3) policy and financial measures at all levels (e.g. a 'Wi-Fi for Europe' initiative could be developed at a EU, a national or a local level).

Based on the EU top-down regulatory approach and policy debates, it can be claimed that the discussion on a fundamental or human right to access the Internet is moot in the EU. The latest EU policy documents confirm this position as they further explore the possibility of recognizing access to the Internet as a 'universal service' and set aside the debate on the recognition of Internet access as a fundamental right.[33]

In the EU, 'universal services' are those services that 'are made available at the quality specified

28 European Commission, 'Visual Summary of Telecoms Reform', http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17180 (accessed 21 November 2017).

29 European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) 1316/2013 and (EU) 283/2014 as regards the promotion of Internet connectivity in local communities, Explanatory Memorandum.

30 According to the European Commission in ***Connectivity for a Competitive Digital Single Market: Towards a European Gigabit Society***, COM (2016)587 final: '"Very high-capacity network" means an electronic communications network which either consists wholly of optical fibre elements at least up to the distribution point at the serving location or which is capable of delivering under usual peak-time conditions similar network performance in terms of available down- and uplink bandwidth, resilience, error-related parameters, and latency and its variation. Network performance can be considered similar regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point'.

31 European Commission, Explanatory Memorandum, n. 28 above.

32 *Ibid.*

33 European Commission, *Connectivity for a Competitive Digital Single Market*, n. 29 above. The concept of 'universal services' is present only in a few sectors, namely, energy, postal and telecommunications.

to all end-users in their territory, independently of geographical location, and, in the light of specific national conditions, at an affordable price'.[34] In general, the concept of universal services within the scope of the telecommunications sector allows the EU to regulate the extent to which its Member States intervene into the market. At the moment, the following services provided by the telecoms sector are considered to be 'universal services' in the EU: (1) access to a fixed line; (2) emergency calls (e.g. '112' European emergency number); (3) at least one comprehensive telephone directory of all subscribers; (4) access to the publicly available telephone services for all; (5) availability of payphones in public spaces.

The European Commission reviews the list of 'universal services' every three years. During the revision process, the EC takes into account social, economic and technological developments, including the affordability, availability and acceptability of new technologies.[35] The proposed European Electronic Communications Code suggests recognizing access to the Internet services on mobile networks as a universal service.[36] The European Parliament seems to be in favour of this proposal.[37] It can be argued that if the text of the proposal is approved as it is, it would allow for further take-up of the Internet services.[38] Another positive outcome of this would be a possibility for more diverse private entities providing access to network infrastructure to apply for various funding schemes supporting broadband deployment at a national level.

It can be suggested that foreseeing two different ways to access the Internet (i.e. a single narrowband network connection and a mobile broadband connection) in the list of universal services would further strengthen the right to Internet access. It would also require the Court of Justice of the European Union (CJEU) to review its position taken in *Base Company NV and Mobistar NV* v. *Ministerraad* in its future case law. The CJEU has concluded that within the current legislative set-up, 'subscriptions for mobile communication services, including Internet subscription services provided by means of those mobile communication services' do not fall within the scope of the foreseen 'universal services'.[39] Finally, expanding the list of 'universal services' by including broadband access to the Internet would require Member States to take appropriate measures ensuring the same conditions to access to the service for all citizens.[40] While this policy choice may result in a more coherent approach to Internet access, it should be noted that measures taken by the Member States may differ due to economic and political conditions.[41]

5. EU MEMBER STATES' RESPONSIBILITIES WITH REGARD TO INTERNET ACCESS: PROMOTION OF UNIVERSAL AVAILABILITY OF BROADBAND AND DIGITAL LITERACY

We discussed the current EU policy obliging Member States to take measures ensuring that its citizens are able to access the communications infrastructure at a reasonable price (section 3). This Internet access policy can be considered to be comprehensive as it includes measures

34 Universal Service Directive, art. 3.
35 *Ibid.* art. 15.
36 Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM/2016/0590 final, 2016/0288 (COD).
37 European Parliament, *Broadband as a Universal Service*, n. 26 above.
38 Currently, users are entitled to access the Internet only at fixed points, which may not be the preferred option by end-users.
39 C-1/14 *Base Company NV and Mobistar NV* v. *Ministerraad*, CJEU, Judgment of 11 June 2015.
40 The term 'citizens' in this context refers to consumers or end-users of the service.
41 Universal Service Directive, as amended in 2009 by Directive 2009/136/EC, recital 7.

that both address access to the communications infrastructure and encourage usage of online services.[42] In the following two paragraphs we reflect on different policy objectives and consider how they shape EU Member States' responsibilities concerning Internet access. Additionally, we aim at establishing a link between broadband penetration, eGovernment services and citizens' online engagement.[43]

The first set of policy objectives, promoting the universal availability of broadband, often defined by a high-speed Internet access, stem from the EU regulatory framework, including numerous policy documents.[44] Both the EC communications, 'the Digital Agenda for Europe (DAE)' and 'the Digital Single Market Strategy' affirm the EU's commitment to broadband development that is considered to have a superior capacity to support innovation and economic growth than its predecessor technologies.[45] The EC argues that 'the success of e-commerce, the reliability of e-health applications, the user experience of video and audio content in gaming and streaming all depend on the quality of networks'.[46] It is also crucial to recognize the dominant focus of EU policies promoting access to the Internet on economic benefits that outweigh possible social implications concerning easier exercise of human rights and the EU fundamental rights listed in the EU Charter.[47] In this context, we note that the EU is aware that reaching its ambitious targets depends heavily on the investment in broadband infrastructure.[48] In order to achieve its targets, the EU has laid down the framework for the liberalization of the telecommunications markets and the introduction of exceptions to the strict state aid rules. The EU intends fuelling the telecommunications sector by various funding schemes (in total EUR120 million). At the same time, the EU insists that its Member States and private actors cooperate in the pursuit of very high-capacity networks.[49]

42 According to the Europe 2020 Strategy, these measures may include the development of operational high speed Internet strategies, as well as a legal framework for coordinating the effort to reduce the costs of network deployment (European Commission, *EUROPE 2020, A Strategy for Smart, Sustainable and Inclusive Growth*, COM(2010)2020 final). Additionally, Member States should encourage the usage of online services ranging from applications in the fields of eGovernment and eHealth to smart cities and home (European Commission, *EUROPE 2020*) . See favourably about this comprehensive approach, Colin Rhinesmith, *Digital Inclusion and Meaningful Broadband Adoption Initiatives* (Evanston, IL: Benton Foundation, January 2016), available at benton.org/broadband-inclusion-adoption-report. This author suggests that to attain digital inclusion, policy-makers should consider the combination of different measures.

43 OECD, *Measuring Innovation: A New Perspective* (OECD, 2010) 88–89; Xavier Fernández-i-Marín, 'The Impact of e-Government Promotion in Europe: Internet Dependence and Critical Mass' (2011) 3(4) *Policy and Internet*, art. 2.

44 Broadband entails the use of various high-speed transmission technologies, including digital subscriber line (DSL), cable modem, fiber optics, wireless, satellite, broadband over powerlines (BPL).

45 European Parliament, Resolution of 6 July 2011 on 'European Broadband: Investing in Digitally Driven Growth', 2013/C 33 E/09, para. A; International Telecommunications Union, *Impact of Broadband on the Economy* (2012) 3–27, available at www.itu.int/ITU-D/treg/broadband/ITU-BB-Reports_Impact-of-Broadband-on-the-Economy.pdf (accessed 21 November 2017); H. Gruber, J. Hätönen and P. Koutroumpis, 'Broadband Access in the EU: An Assessment of Future Economic Benefits', paper presented at 24th European Regional Conference of the International Telecommunication Society, Florence, Italy, 2013, available at www.econstor.eu/bitstream/10419/88492/1/773374760.pdf (accessed 21 November 2017). 'Very high-capacity networks' are a prerequisite for the European digital economy to flourish (European Commission, *Connectivity for a Competitive Digital Single Market*, n. 29 above.

46 European Commission, Explanatory Memorandum, n. 28 above.

47 The liberalization of the telecommunications markets had a limited impact on the deployment of new communication infrastructures and therefore it was necessary to provide a possibility for Member States to interfere (European Commission Communication, *European Broadband: Investing in Digitally Driven Growth*, COM(2010)472 final, 3–4). In the EU, whether the liberalized telecoms market receives public funds for the establishment or upgrade of broadband networks is subject to state aid rules (TFEU, Art. 107). Indeed, the high investment cost of an upgrade from 'basic broadband' networks to the so-called 'Next Generation Access' networks has deterred service providers from the rollout of networks (Filomena Chirico and Norbert Gaál, 'A Decade of State Aid Control in the Field of Broadband' (2014) 1 *EStAL* 28, at 30). In order to address this 'market failure', which is a situation in which markets, when left to their own devices, are unable to achieve an efficient outcome for society (European Commission, *EU Guidelines for the Application of State Aid Rules in Relation to the Rapid Deployment of Broadband Networks*, 2013/C 25/01, para. 37), public intervention may be warranted.

48 Richard Cawley, 'The Influence of European Union Policies and Regulation' in Wolter Lemstra and William H. Melody (eds), *The Dynamics of Broadband Markets in Europe: Realizing the 2020 Digital Agenda* (Cambridge University Press, 2014).

49 European Commission, ***Connectivity for a Competitive Digital Single Market***, n. 29 above.

The second group of measures aim at promoting digital literacy. Enhancing media literacy and digital skills is now perceived to be incremental in ensuring the meaningful broadband adoption. A meaningful broadband adoption means that states not only encourage the deployment of new and affordable networks but also proactively create the value of broadband access and services for its citizens.[50] For example, this could be done by connecting digital literacy training with relevant content and services or by adopting policies focusing on the so-called 'demand side'.[51]

Numerous EU policy documents recognize the need to address the demand side. In particular, the *New Skills Agenda for Europe* invites Member States to devise national digital skills strategies by 2017.[52] Important ingredients of this policy are digital literacy programmes,[53] awareness campaigns,[54] and the promotion of online public services, such as eGovernment.[55] Indeed, an increase in the availability of useful and practical content through online eGovernment platforms is expected to stimulate broadband adoption, and vice versa.[56] Of course, simply reducing the cost of broadband services is arguably a more straightforward task for states, not to mention one that is likely to deliver significant changes in broadband adoption levels. Indeed, affordability has been identified as one of the central impediments to broadband take-up.[57] A standard solution, which has been implemented in a number of EU Member States, is the provision of subsidies for the acquisition of the necessary equipment.[58] This may take the form of tax breaks, or more commonly, the provision of computers to low-income households and schools.[59] These initiatives may be welcome but they only partially remit the issue of affordability. A broadband connection results in a rolling cost, which some individuals may not be able to support. To address this issue, Public Internet Access Points in easily accessible public places, such as libraries or squares, have been established in many Member States.[60]

50 Rhinesmith, *Digital Inclusion and Meaningful Broadband Adoption Initiatives*, n. 41 above.

51 Robin Mansell and W. Edward Steinmueller, 'Digital Infrastructures, Economies, and Public Policies: Contending Rationales and Outcome Assessment Strategies' in William H. Dutton (ed.), *The Oxford Handbook of Internet Studies* (Oxford University Press, 2013) 512. Rhinesmith suggests that the meaningful broadband adoption entails the four-part digital inclusion strategy, including low cost broadband, digital literacy training, low-cost computers and public access computing (Rhinesmith, *Digital Inclusion and Meaningful Broadband Adoption Initiatives*, n. 41 above). In a similar vein, Kongaut and Bohlin propose two types of demand-side policies: first, those seeking to increase the value of broadband services; and second, those seeking to reduce the costs of these services (Chatchai Kongaut and Erik Bohlin, 'Towards Broadband Targets on the EU Digital Agenda 2020: Discussion on the Demand Side of Broadband Policy' (2015) 17 *Info* 1, at 3–4).

52 European Commission, *A New Skills Agenda for Europe: Working Together to Strengthen Human Capital, Employability and Competitiveness*, COM(2016)381/2, 7.

53 See ECORYS UK for the Departments for Culture Media and Sport, and Business Innovation and Skills, *Digital Skills for the UK Economy* (January 2016) 58, available at www.gov.uk/government/publications/digital-skills-for-the-uk-economy; European Commission, ISA, Joinup, Communities, 'Promoting Digital Literacy in Portugal Through a Multi-Stakeholder Initiative', https://joinup.ec.europa.eu/community/epractice/case/promoting-digital-literacy-portugal-through-multi-stakeholder-initiative (accessed 21 November 2017). Digital literacy programmes, especially those targeted at segments of the population with limited or no digital skills (e.g. the 'Grandparents & Grandchildren' initiative, www.geengee.eu/geengee/ (accessed 21 November 2017)), are likely to act as an incentive for broadband adoption.

54 The example that comes to mind is the United Kingdom's 'Do More Online' campaign, aiming to inform citizens and businesses of the benefits of broadband access. See www.greatbusiness.gov.uk/domoreonline/ (accessed 21 November 2017).

55 European Parliament, Resolution of 6 July 2011 on 'European Broadband: Investing in Digitally Driven Growth' [2011] OJ C33 E/89, para. 46.

56 European University Institute, Florence School of Regulation, *Broadband Diffusion: Drivers and Policies* (2011) 64–66, available at http://fsr.eui.eu/Documents/CommunicationsandMedia/FSRStudyonBBPromotion.pdf; World Bank Group, *Broadband Strategies Toolkit: Driving Demand* (May 2013) 187–94, available at http://broadbandtoolkit.org/6 (accessed 21 November 2017). Ultimately, the extent to which eGovernment services are able to boost broadband demand depends on the government's ability to meet its citizens' expectations. The more indispensable eGovernment becomes for citizens, the more one is likely to seek a broadband connection that would facilitate participation in online government. In other words, eGovernment services that fail to make a concrete difference in peoples' lives are unlikely to encourage demand for broadband. The same applies to other public services, such as eHealth and eEducation.

57 Tim Kelly and Maria Rossotto (eds), *Broadband Strategies Handbook* (World Bank Publications, 2012) 259–67.

58 *Ibid.*

59 *Ibid.* In Hungary, in 2015 it was suggested to reduce the VAT rate on Internet services from 27 per cent to to 18 per cent, see http://hungarytoday.hu/news/internetkon-hungarian-government-consider-lowering-vat-rate-internet-services-24722 (accessed 21 November 2017).

60 See e.g., European Commission, ISA, Joinup, Communities, Vaiva Nemanienė, *Rural Internet Access Points in Lithuania* (2007), available at https://joinup.ec.europa.eu/community/epractice/case/rural-internet-access-points-lithuania (accessed

Clearly, on the long path towards achieving universal access to the Internet at high-speed levels, governments stumble upon significant regulatory and financial obstacles. Some researchers suggest that governments could cover such obstacles by focusing on demand-side policies which also promote broadband take-up and can attain desirable digital inclusion targets. [61] Even though this suggestion is based on the thorough study of 30 OECD countries, it remains controversial to the extent it takes away emphasis from better infrastructure availability.[62]

6. SCENARIOS FOR RECOGNIZING INTERNET ACCESS AS AN EU FUNDAMENTAL RIGHT

Our analysis of policy documents and the applicable legislative framework suggests that in the EU, Internet access is considered to be part of the 'civil and political rights' spectrum to a lesser extent than to 'economic, social and cultural' rights. Access to the Internet may facilitate the enjoyment of fundamental rights to freedom of expression, assembly and political participation, but it is predominately regarded as a medium enabling economic participation. We are inclined to believe that the strong emphasis put on the economic benefits of the Internet by the EU may reduce the overall value that access to the Internet could have on European society. Therefore, in the paragraphs that follow we consider three possible scenarios for the recognition of Internet access as a fundamental right in the EU.

The *first scenario* concerns policies and actions taken by Member States. Following the reasoning embedded in Article 6 of the TEU, access to the Internet could be incorporated among the EU fundamental rights if the majority of Member States recognize it to be a fundamental right at a domestic level. Article 6 of the TEU foresees that general principles of EU law result from 'the constitutional traditions common to the Member States'. A similar message is included in the Preamble to the EU Charter, which as of the enforcement of the Lisbon Treaty is legally binding. The Preamble to the EU Charter notes that the EU is founded on common and 'universal values of human dignity, freedom, equality and solidarity'.[63] Furthermore, the EU should act proactively and ensure: ***the preservation and the development of … [the] common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.***[64]

The European Parliament resolution on the Open Internet and Net Neutrality in Europe could be

21 November 2017); *Public Internet Access Points (PIAPs) in Kortrijk* (2007), available at https://joinup.ec.europa.eu/community/epractice/case/public-internet-access-points-piaps-kortrijk; *Citizen Spots Extend Online Services to Thousand-desk Network* (2015), available at https://joinup.ec.europa.eu/elibrary/case/citizen-spots-extend-online-services-thousand-desk-network (accessed 21 November 2017); *Free Internet Zones are Available in Major Public Spaces in Lithuanian Cities*, available at www.lithuania.travel/en-gb/attractions/wi-fi-zone/17151 (accessed 21 November 2017).

61 Girish J. Gulati and David J. Yates, 'Different Paths to Universal Access: The Impact of Policy and Regulation on Broadband Diffusion in the Developed and Developing Worlds' (2012) 36(9) *Telecommunications Policy* 749–61, ISSN 0308-5961, available at http://dx.doi.org/10.1016/j.telpol.2012.06.013 (accessed 21 November 2017).

62 *Ibid.*

63 Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union (2010/C 83/01); EU Charter, Art. 391.

64 *Ibid.* The latter implies that in a situation where many Member States developed measures recognizing access to the Internet as a fundamental right, the EU, in response to such a development, would be obliged to integrate the newly emerged right or principle among its fundamental rights. The EU top-down-driven regulation, as seen in the case of personal data protection regulations, can have a significant impact on Member States' constitutional rights. For example, Hungary, Slovakia and the Czech Republic have recognized the protection; Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer International Publishing, 2014) 175.

considered to be an example of such a proactive action. The resolution encouraged 'the competent national authorities to ensure that traffic-management interventions do not involve anti-competitive or harmful discrimination' and that 'specialized (or managed) services should not be detrimental to the safeguarding of robust "best effort" internet access'.[65]

When considering the probability of this scenario, relying on political developments in Member States, one should also take into account the impact and breadth of the term 'constitutional traditions common to Member States'. The CJEU, without examining the meaning of this term at length, recognized it as the source of inspiration for its case law, together with international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.[66] The Advocate General, in the request for a preliminary ruling in the *Omega* case, suggested that 'constitutional traditions common to Member States' provide 'the general legal opinion of all of the Member States [which] is essential to the particular evaluation of fundamental law'.[67]

According to the *second scenario,* the two European Courts may trigger the recognition of a fundamental rights character with regard to Internet access. The Preamble to the EU Charter notes that the EU fundamental rights are comprised, among many other things, of the case law of the CJEU and of the European Court of Human Rights (ECtHR).[68] The first one has been described as 'filling the void left by the legislative branch', also in the area of fundamental rights.[69] The second one has a well-established role in shaping the human rights landscape,[70] and has paved the way for the recognition of new human rights in treaties, such as the right to data protection.[71] With an increasing number of legal measures regulating online environment, both courts are confronted with cases raising questions about legal issues involving the Internet. Many cases concern the EU and states' attempts to regulate Internet content, its access and use. Freedom of

65 European Parliament, Resolution of 17 November 2011 on 'The Open Internet and Net Neutrality in Europe', 16.

66 C-36/02 *Omega*, CJEU, Judgment of 14 October 2004, para. 33.

67 ***Ibid***., Opinion of Advocate General Stix-Hackl, 18 March 2004.

68 While the two courts operate within different legal set-ups, case law of both courts not only provides legal interpretation upon applicants' requests but it often entails new and innovative solutions in response to the challenges of implementing prescribed legal obligations.

69 Oreste Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint' (2004) 3 *German Law Journal* 288. See Francesca Ferraro and Jesús Carmona, *Fundamental Rights in the European Union: The Role of the Charter after the Lisbon Treaty* (2015) 6, available at www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf (accessed 21 November 2017); Gabriel N. Toggenburg, '"LGBT" Go to Luxembourg: On the Stance of Lesbian Gay Bisexual and Transgender Rights before the European Court of Justice' (2008) *European Law Reporter* 5. The jurisdiction of the Court of Justice of the European Union is subject to certain limitations. The CJEU interprets and reviews the legality of legislative acts issued by the EU institutions and agencies that have legal effects on third parties. The CJEU was the first EU actor to explain that fundamental rights as they are recognized in Member States constitute and are part of the EU (at that time the European Community) general principles (Case 11/70 *Internationale Handelsgesellschaft*, CJEU, Judgment of 17 December 1970). Following the *Strauder* case, the CJEU has been expanding the list of EU general principles by introducing fundamental rights on a case by case basis. The growing case law of the CJEU resulted in a set of principles that were applicable in a particular area. This posed a potential risk of fragmented legal protection awarded to citizens in different policy areas. It can be suggested that judicial activism by the CJEU provoked political discussions on the limitations of the EU law which subsequently paved the way for the creation of the EU Charter. The EU Charter now provides a comprehensive protection system of fundamental rights in all policy areas falling within the EU competences. Furthermore, the CJEU via its case law often advance debates about societal issues, such as the recognition of lesbian, gay, bisexual and transgender rights.

70 The European Court of Human Rights (ECtHR) reviews acts issued by the participating states in light of the rights and freedoms enshrined in the European Convention on Human Rights (ECHR) and its amending protocols. The ECtHR judgments are adopted by a majority vote but a judge or a group of judges who participated in the judicial process can provide a concurring or dissenting opinion. In cases where such opinions are attached to the main judgment, heated public debates tend to break out. For example, following on the observations of the ECtHR that the right to protect privacy entailed certain limitations with regard to the protection of individuals' data, the Council of Europe adopted a Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data No.108.

71 Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action' in *Reinventing Data Protection?* (Springer, 2009) 3–45.

expression and the right to privacy are most frequently contested rights. For example, the CJEU in *Scarlet Extended SA* v. *SABAM* concluded that requiring Internet Service Providers (ISPs) to use systems filtering and blocking electronic communications may impinge on the fundamental rights of that ISP's customers to protection of their personal data and their freedom to receive or impart information.[72] The ECtHR on several occasions has recognized that access to the Internet and its capacity to store and communicate vast amounts of information are crucial 'in enhancing the public's access to news and facilitating the dissemination of information in general'.[73]

As ICT mediate a growing portion of societal interactions between different actors, it can be anticipated that both courts will have to address questions arising from the use of the Internet in the near future. Perhaps, in one of these cases it may be necessary to address the meaning of access to the Internet. As a result of legal interpretation, new and innovative elements can be introduced in legal practice. To avoid 'judicial activism' criticisms, uncontrolled extensions and innovations are not warranted. For example, in *Jankovskis* v. *Lithuania*, the ECtHR recognized that 'Internet access has increasingly been understood as a right' but the court has not further elaborated on what such a right could mean.[74] Instead, the ECtHR limited its findings to the context of the case and it has concluded that 'Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners'. [75] At the same time, it is widely recognized that both the CJEU and the ECtHR function in a particular legal system, where they may have to rely on high level documents representing political agreements between countries.[76] This point is closely linked with the third scenario.

Thirdly, there is a scenario of formal recognition of Internet access as a fundamental right in the EU through developments at an international level.[77] While at first it may seem that legislative developments in Member States may carry the most potential to introduce new fundamental rights into the EU Charter (see our first scenario, discussed above), this third scenario may be similarly realistic. The 2011 UN Report on the right to freedom of opinion and expression, prepared by the UN Special Rapporteur on the area, Frank La Rue, fuelled this debate on the recognition of Internet access as a fundamental right, urging states to work towards attaining the objective of

72 C-70/10 *Scarlet Extended SA* v. *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, CJEU, Judgment of 24 November 2011, para. 50.

73 *Ahmet Yıldırım* v. *Turkey*, Application no. 3111/10, ECtHR, 18 December 2012; *Delfi* v. *Estonia*, Application no. 64569/09, ECtHR, 16 June 2015; *Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt* v. *Hungary*, Application no. 22947/13, ECtHR. The ECtHR so far has relied on the margin of appreciation doctrine, which neither requires setting some minimum criteria for Internet content suppression nor invoke proportionality or necessity tests, which go beyond the requirement of the rule of law (*Delfi* v. *Estonia*, Application no. 64569/09). Additionally, see W. Benedek and M.C. Kettemann, *Freedom of Expression and the Internet* (CoE, 2013) 75–78.

74 *Jankovskis* v. *Lithuania*, Application no. 21575/08, ECtHR, 17 January 2017, para. 62.

75 *Ibid.* para. 55.

76 Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint', n. 68 above.

77 According to the Preamble to the EU Charter, the EU fundamental rights are also comprised of 'international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe'. In other words, this list provides several examples of how rights recognized at international level could eventually be incorporated in the EU fundamental rights framework.

universal Internet access in the name of fundamental rights.[78] Following up on the report, some scholars were considering the content of such a right and some even argued that access to the Internet is already protected by the current human rights framework.[79] However, suggestions and observations made by academics had little impact on perception of access to the Internet at an international level. In June 2016, the United Nations Human Rights Council adopted a resolution declaring states' measures preventing or disrupting access to or dissemination of information online to be infringements of human rights framework.[80] This resolution. by affirming 'that the same rights that people have offline must also be protected online' indicates that the perception of access to the Internet has been evolving at the global level.[81] States are now not only required to increase their efforts facilitating access to the Internet but also to ensure that any limitations, including the ones imposed due to security concerns, respect obligations stemming from the international human rights framework.[82]

In 2014, the Parliamentary Assembly of the Council of Europe went a step further than its previous recommendations or La Rue's report. In a resolution, underpinned by a logic similar to La Rue's report, the Council of Europe recommended that its Member States should 'ensure the right to Internet access' on the basis of 12 principles included in the Resolution on the Right to Internet Access.[83] The Council of Europe further elaborated its position in the Internet Governance Strategy for 2016–2019 in which the Internet is considered to be not only an enabler of individuals' rights, but also an enabler of democracy.[84] It is important to note that the ECtHR in its case law often refers to soft-law measures adopted by the Council of Europe and other internal organizations, as these measures signify a growing consensus on the perception of Internet access.

In sum, predicting the likelihood of each scenario is difficult. Nonetheless, mapping scenarios is a useful thought exercise that helps formalizing situations which can lead to a policy change. After describing actions that would take place in each scenario, we have a strong sense that these scenarios should not be considered in isolation. For example, the ECtHR may refer to a resolution adopted by the Council of Europe. In this situation, the second and third scenarios may be interlinked. Similarly, the first scenario could relate to the third one, if discussions and obligations stemming from international tools shaped policy actions at a domestic level. We deem that the possibility of two scenarios interacting with each other demonstrate legal complexity and increase the probability that access to the Internet is recognized as a fundamental right in the EU.

78 UN General Assembly, Frank La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, A/HRC/17/27 (16 May 2011). The Special Rapporteur acknowledged the Internet as a major facilitator of exercising the right to freedom of opinion and expression, as well as other rights reinforced by the freedom of opinion and expression (*ibid.* para. 22). The Special Rapporteur urged states to work towards attaining the objective of universal Internet access, since only then would the Internet realize its full potential as a medium enabling freedom of expression and opinion (*ibid.* para. 60). This position – that the Internet enables the exercise of many other rights – has been reaffirmed by a recently issued, non-binding United Nations Resolution. This Resolution builds on the idea 'that the same rights that people have offline must also be protected online', but it does not suggest that access to the Internet should be considered a new human right (United Nations, Human Rights Council, Resolution on the 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development', A/HRC/32/L.20 (27 June 2016).

79 Jason M. Tenenbaum, *503 Error, Service Unavailable: Access to the Internet as a Protected Right* (28 August 2013), available at SSRN: https://ssrn.com/abstract=2422566; Stephen Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14(2) *Human Rights Law Review* 175–95.

80 UN General Assembly, Human Rights Council, Thirty-second Session, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet', A/HRC/32/L.20 (27 June 2016).

81 *Ibid.*

82 *Ibid.*

83 Council of Europe, Parliamentary Assembly, Resolution 1987, 'The Right to Internet Access' (2014).

84 Council of Europe, *Internet Governance: Council of Europe Strategy*, CM(2016)10-final, para. 6.

7. ADDED VALUE OF INTERNET ACCESS AS A FUNDAMENTAL RIGHT IN THE EU

The main argument for granting human rights status to Internet access is based on the 'political' conception of human rights.[85] According to this conception, 'the distinctive nature of human rights is to be understood in light of their role or function in modern international political practice'.[86] This in practice means that access to the Internet should be recognized as a human right because the Internet is now deeply embedded in contemporary life and it has justifiably gained the status of a driving force of personal, social and economic growth. It is widely recognized that Internet access facilitates the exercise of various rights, such as freedom of expression and information, freedom of assembly and of association, and the right to education. It is an unpredictably strong force, since technological innovations powered by the Internet are rapid. Undoubtedly, the future of the Internet is difficult to anticipate. This unpredictability could be used as an argument *against* the creation of a new right on Internet access. At the same time, it must be recognized that it is reassuring that the concept of Internet access as a human right has emerged gradually. The investigation into the validity of such a new right needs to be further advanced[87] as any newly proposed measure to govern Internet access should be able to withstand the test of time.

Our discussion above reveals that recognizing access to the Internet as a human right on an international scale is presently attainable only within limits. At the same time, developments at the Council of Europe indicate an emerging consensus on Internet access recognition as a self-standing right in the European region. Here, the Internet is no longer seen as a medium determining the effectiveness of individuals' rights but it is considered to be valuable for its positive impact on a modern society.[88] The European developments demonstrate that over the period of time the perception of access to the Internet has evolved: from access to the Internet understood as a static structure (i.e. a medium to exercise certain rights) to a more dynamic notion. According to the current understanding, access to the Internet is a condition to enjoy benefits of democratic societies, in particular, the enjoyment of cultural, civil and political rights.[89] We think it is useful to understand access to the Internet as (1) a right to access information; (2) access to expression; and (3) an extension of other existing access rights, such as the right of access to public spaces or government documents.[90] Internet access is more than just an instrument serving the right to exercise freedom of expression and other interrelated rights; it is also a right to participate in public life. This conceptualization has implications when one questions the scope of state obligations with regard to such a right.

85 Rowan Cruft, S. Matthew Liao and Massimo Renzo, *Philosophical Foundations of Human Rights* (2015).
86 *Ibid.*
87 Michael L. Best, 'Can the Internet be a Human Right?' (2004) 4 *Human Rights and Human Welfare* 23; Brian Skepys, 'Is There a Human Right to the Internet?' (2012) 5(4) *Journal of Politics and Law* 15; Paul De Hert and Dariusz Kloza, 'Internet (Access) as a New Fundamental Right: Inflating the Current Rights Framework?' (2012) 3(3) *EJLT* 9–11; Nicola Lucchi, 'Freedom of Expression and a Right of Access to the Internet: A New Fundamental Right?' in E. Monroe, E. Price, Stefaan Verhulst and Libby Morgan (eds), *Routledge Handbook of Media Law* (Routledge, 2013); Tully, 'A Human Right to Access the Internet?', n. 78 above.
88 Council of Europe, Parliamentary Assembly, Resolution 1987, n. 82 above.
89 *Ibid.*
90 Perhaps the best example of such public space could be eGovernment portals which provide diverse content and services.

8. POTENTIAL SCOPE OF THE RIGHT TO INTERNET ACCESS

Whether Internet access merits recognition as an autonomous human right may be the core dilemma for policy-makers and academics, but additional and more critical questions remain unanswered. What would access to the Internet entail? Typically, the Internet can be understood as '1) a network infrastructure, 2) access at the transport layer and services, or 3) access to digital content and applications'.[91] Which of these three options should be placed at the core of the right to Internet access? Delineating the characteristics and scope of such a right is a complex task and any entitlements of individuals pursuant to such a right are far from clear.[92] Clarifying these matters becomes even more crucial if one also considers the likelihood of understanding Internet access not only as a fundamental right, but also as a fundamental right creating positive legal obligations.[93]

Perhaps, the extensive case law developed by the ECtHR, and its reliance on concepts and principles such as proportionality, reasonable effort and the margin of appreciation could offer some guidance at this point.[94] According to the ECtHR, positive human rights duties include an obligation to take active measures, such as the adoption of an enforceable legislative framework that ensures the protection of a particular right.[95] However, the scope of the positive obligations can be limited by the principle of margin of appreciation.[96] It is not known how this margin of appreciation will play out in conflicts related to Internet access. At the same time, it can be anticipated that positive measures taken by states are going to be constrained by available financial resources.

91 Nicola Lucchi, 'Internet Content Governance and Human Rights' (2014) 16 *Vanderbilt Journal of Entertainment and Technology Law* 809.

92 Tully, 'A Human Right to Access the Internet?', n. 78 above. For example, the European Commission is of the view that Member States should provide access to the communications infrastructure in 'outdoor spaces accessible to the general public', such as public offices, libraries, health centres and outdoor public spaces. See European Commission, Explanatory Memorandum, n. 28 above.

93 De Hert and Kloza, 'Internet (Access) as a New Fundamental Right', n. 86 above. Most human rights instruments, both at an international and at a European level, recognize negative (do not interfere) and positive (make possible) human rights obligations. Recognizing Internet access not only as a negative human rights obligation for states (i.e. 'do not interfere with my Internet access'), but also as a positive human rights obligation would oblige a state to guarantee that everyone within its jurisdiction enjoys Internet access by taking positive actions towards achieving that goal. The question becomes, what would be the scope of such actions?

94 Margin of appreciation is believed to prevent the ECtHR from inflating the human rights framework, Robin C.A. White, Clare Ovey and Francis Geoffrey Jacobs, *The European Convention on Human Rights* (5th edn, Oxford University Press, 2010) 20.

95 Council of Europe, *Health-related Issues in the Case-law of the European Court of Human Rights* (June 2015).

96 For example, in the 2003 judgment in *Sentges* v. *The Netherlands*, the ECtHR concluded that although ECHR, Art. 8 entails a positive duty to protect a person's physical and psychological integrity, these positive duties under Art. 8 did not extend to the state's obligation to provide a severely disabled person with a robotic arm. The state that had rejected the claim had therefore acted within the scope of 'the margin of appreciation afforded to it' (*Sentges* v. *The Netherlands*, Application no. 27677/02, ECtHR). The ECtHR decision explains that Art. 8 can be invoked only in exceptional cases. These exceptional cases would include situations where the 'State's failure to adopt measures interferes with that individual's right to personal development and his or her right to establish and maintain relations with other human beings and the outside world' (*ibid.*). Furthermore, an individual should be able to demonstrate 'a special link between the situation complained of and the particular needs of his or her private life'.

9. IMPACT OF EGOVERNMENT POLICIES ON THE SCOPE OF THE RIGHT TO INTERNET ACCESS

It seems that the EU approach focusing on enabling widespread access to the Internet (discussed above) aligns closely with Sandra Fredman's point of view. According to her, an assessment of whether a positive duty is fulfilled need not be based on a set of predetermined steps, but rather on the principles of effectiveness, participation, accountability and equality of the measures taken.[97] An important element in this discussion is whether governments are doing enough, and whether possible positive human rights obligations in this area are fulfilled, as the governments' increasingly rely on ICT services for the purpose of delivering eGovernment services. Questions such as the following could be asked: Do individuals have access to or posses a device enabling Internet access? Have they subscribed to an Internet service provider? Do they have skills to browse the web and find relevant information?

With various aspects of human activity gradually shifting into the online sphere, many government functions and services have become available online. The Internet, embedded in government functions, carries the promise of efficiency, increased convenience, flexibility and transparency that could not only reshape the provision of public services, but also the public administration's relationship with its citizens.[98] eGovernment is said to benefit both sides of the governance spectrum: citizens and government.[99] On the supply side, governments have improved the quality of their public services by moving a portion of their activities to cost-efficient online applications.[100] At the same time, the emergence of Web 2.0[101] and the associated social media platforms have generated an endless array of possibilities for interaction in the virtual sphere and thus increased the expectations of the demand side (i.e. the citizens).[102] That is a positive development for the EU, since its Member States are among the world eGovernment leaders.[103]

97 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 77.

98 H. Margetts, 'Transparency and Digital Government' in S. Hood and D. Heald (eds), *Transparency: The Key to Better Governance?* (Oxford University Press, 2006); John C. Bertot, Paul T. Jaeger and Justin M. Grimes, 'Using ICTs to Create a Culture of Transparency: E-government and Social Media as Openness and Anti-corruption Tools for Societies' (2010) 27 *Government Information Quarterly* 264,at 265–66. Consequently, the familiar 'e' prefix, already partnered with a handful of traditional notions ('e-commerce' being the most prominent example) has joined the term 'government'. Therefore, 'eGovernment' refers to the usage of Internet, as well as Internet and communications technologies (ICT), to carry out governmental functions.

99 P. Dunleavy, 'Governance and State Organization in the Digital Era' in C. Avgerou, R. Mansell, D. Quah and R. Silverstone (eds), *The Oxford Handbook of Information and Communication Technologies* (Oxford University Press, 2007) 410–25.

100 P. Henman, 'Government and the Internet: Evolving Technologies, Enduring Research Themes' in W. Dutton (ed.), *The Oxford Handbook of Internet Studies* (Oxford University Press, 2013) 294–98.

101 Tim O'Reilly, 'What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software' (2007) *Communications and Strategies* 17.

102 eGoverment therefore is expected to enhance transparency and active participation of citizens in policy-making. See S. Coleman and J. Blumler, *The Internet and Democratic Citizenship* (Cambridge University Press, 2009) 90–116; A. Meijer, B. Koops, W. Pieterson, S. Overman and S. ten Tije, 'Government 2.0: Key Challenges to Its Realization' (2012) 10 *Electronic Journal of E-Government* 59–60.

103 United Nations, *E-Government Survey 2014: E-Government for the Future We Want* (2014) 15. At the time of writing, 15 Member States of the EU are ranked as 'World E-Government Leaders' by the UN; as early as 2001, the United Kingdom, the Netherlands, Denmark and Germany were among the ten highest-ranking countries globally with regard to eGovernment capacity. While the prerogative of developing eGovernment services rests with the Member States, the EU has been setting the agenda for eGovernment. For more than a decade, the EU has been encouraging Member States to launch eGovernment high quality services that would serve interests of citizens and businesses. The EU has assumed the role of the coordinator to secure the level of homogeneity among different national policies. The coordination has proved to be necessary to facilitate the functioning of the Single Market. See Francesco Amoretti and Fortunato Musella, 'Toward the European Administrative Space: The Role of e-Government Policy' (2011) 3 *European Political Science Review* 35, at 36–37.

In the EU, a significant segment (47 per cent) of the overall population makes use of eGovernment services.[104] Therefore, we consider that a new argument supporting the recognition of access to the Internet as a universal service and a fundamental right in the EU could be developed on the basis of the number of individuals who use eGovernment services. All EU citizens should be entitled to access eGovernment services developed by public administrations without undue restrictions. Indeed, governments when digitalizing public services should consider creating accessible online services, providing access to equipment (e.g. Wifi access points, and user-friendly software) and teaching digital skills, which would allow society to make the most of the truly impressive research and policy-making effort that has been developed in pursuit of the EU's eGovernment vision.[105]

10. LIMITATIONS TO THE RIGHT OF INTERNET ACCESS

In general, restrictions limiting access to the Internet are perceived to be similar to restrictions to freedom of expression and therefore they can be divided in two groups. The first group includes Internet content suppression practices that hinder the possibility to access, receive or impart information.[106] The second group includes measures imposed on certain individuals, such as prison inmates or sex offenders.[107]

Human rights instruments, both at an international and a European level, specify the possibility of legitimate restrictions on content in order to protect the rights and interests of others.[108] Content that can be legitimately restricted include (but may be not limited to)child pornography,[109] hate speech[110] and incitement to commit genocide,[111] discrimination, hostility or violence.[112] In practice, any measure targeting the restriction of content must meet the criteria of legality, legitimacy and necessity, in order to be justifiable.[113]

In some cases, courts may go beyond their well-established practice and principles when addressing issues related to the online environment and introduce new concepts to explain the normative content of existing rights. For example, the ECtHR noted that the legal grounds for limiting

104 European Commission, *A Digital Single Market Strategy for Europe*, n. 5 above.

105 Ron Davies, *e-Government: Using Technology to Improve Public Services and Democratic Participation* (European Parliamentary Research Archive, 2015) 9–13; for an overview of the various reports and studies, see https://ec.europa.eu/digital-single-market/en/newsroom/reports-studies-etc/public-services (accessed 21 November 2017). Since 2006, the Commission has presented three eGovernment Action Plans, each outlining the steps to be taken over a five-year span. The third Action Plan covers the period 2016–2020, principally aimed at promoting the adoption of eGovernment practices across Member States. It focuses on the development of better and more cost-efficient public services for citizens and businesses through a spirit of cooperation among Member States. In line with its predecessor, the current Action Plan determines policy objectives in order to accommodate the objectives of the Digital Single Market Strategy. In particular, the third Action Plan aims to 'modernise public administration, achieve cross-border interoperability and facilitate easy interaction with citizens'.

106 Paul de Hert and Lina Jasmontaite, 'Internet Content Suppression' in Andreas J. Wiesand, Kalliopi Chainoglou, Anna Śledzińska-Simon and Yvonne Donders (eds), *Culture and Human Rights: The Wroclaw Commentaries* (Cologne: ARCult Media, 2016). Internet content suppression, sometimes referred as Internet censorship, may result from legislative (e.g. notice and take down requirement) or technical measures (e.g. filtering or blocking an Internet Protocol).

107 Alisdair A. Gillespie, 'Restricting Access to the Internet by Sex Offenders' (2011) 19(3) *International Journal of Law and Information Technology* 165.

108 *Ibid.*

109 Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2011] OJ L335/1, art. 25.

110 Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328; Europa, *Code of Conduct on Countering Illegal Hate Speech Online*, available at http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf (accessed 21 November 2017).

111 Convention on the Prevention and Punishment of the Crime of Genocide (1948), Art. 3(c).

112 International Covenant on Civil and Political Rights, Art. 20.

113 Tully, 'A Human Right to Access the Internet?', n. 78 above, 192.

individuals' Internet rights contain several requirements. In *Ahmet Yildirim* v. *Turkey*, concerning court orders (in third party cases) resulting in the generic blocking of access to online services, the ECtHR, when considering the formal and material criteria for blocking an online service, concluded that a wording 'prescribed by law' requires ensuring a certain quality of a regulatory measure.[114] In particular, the ECtHR ruled that a regulatory measure limiting individuals' rights in the online environment should be precise, accessible to the public and concern a person. Additionally, a regulatory measure limiting one's right should result in a predictable outcome and be compatible with the rule of law.

In *Jankovskis* v. *Lithuania*, the ECtHR clarified its stand on limitations of rights for prisoners, who are deprived of certain liberties. The ECtHR found that although 'Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners', in this particular case Mr Jankovskis should have been provided with a possibility to access the Internet. In particular, Mr Jankovskis should have been provided with a possibility to access a website that contained information about study programs in Lithuania.[115] The ECtHR based its ruling on the finding that the public has a right to receive information of general interest that is in the public domain.[116] The ECtHR also deemed that accessing this particular website was closely related to his right to pursue education while being in prison, which was provided by Lithuania. This judgment corresponds to the previous case of *Kalda* v. *Estonia*, which concerned access to three specific webpages providing legal advice.[117] Both cases demonstrate that the ECtHR does not accept the justification provided by the states that the restriction of Internet access by prisoners is necessary to deprive them of the ability to commit new crimes. The ECtHR is reluctant to consider access to the Internet in a broader meaning. In fact, the ECtHR limits itself to the specific circumstances of a case and it does not take an opportunity to elaborate on questions of societal relevance, such as a right to access the Internet or a right to access official information held by public administration or governments.

Finally, the ECtHR case law demonstrates that currently, questions concerning access to the Internet are addressed through the freedom of expression lens. This in turn means that the limitations that may be imposed on access to the Internet are similar to the restrictions to freedom of expression. These limitations have to be legal, proportional, justified and necessary in a democratic society; otherwise, they are at risk of infringing fundamental human rights. But would these limitations be similar if the discussion on a right to Internet access is decoupled from the freedom of expression that is the touchstone of many rights?

114 *Ahmet Yıldırım* v. *Turkey*, Application no. 3111/10, ECtHR, 18 December 2012, para. 57.
115 *Jankovskis* v. *Lithuania*, Application no. 21575/08, ECtHR, para. 59.
116 *Ibid.* paras 52–53.
117 *Kalda* v. *Estonia*, Application no. 17429/10, ECtHR, 19 January 2016. The ECtHR in *Kalda* v. *Estonia* sheds some light on this complex issue. Mr Kalda, an Estonian national who was sentenced to life imprisonment, was refused access to three websites due to security and economic considerations. Two of the websites were state-run and one belonged to the Council of Europe. Mr Kalda wished to access them in order to carry out legal research for the court proceedings in which he was involved. Given that Estonian law granted limited Internet access to prisoners, the Court found that the refusal in question violated Mr Kalda's freedom of expression. However, the Court stressed that ECHR, Art. 10 could not be interpreted as obliging contracting states to provide Internet access to prisoners. By analogy, a potential right to Internet access would be subject to similar restrictions.

11. CONCLUSION

In this chapter, we scrutinized the EU and its Member States' regulatory approaches to Internet access. We refer to Internet access as an element of the universal service idea, as a constitutional right, as a fundamental right and a human right without indicating a preference for any of these options. With our chapter, we aimed at contributing to the societal and legal debates on the recognition of Internet access as a fundamental right in the EU.

In spite of the techno-centric EU regulatory approach to Internet access, building upon the notion of access rooted in the telecoms sector, numerous policy documents and developments in the case law point to Internet access in EU Member States being more than a technical issue – it is an essential part of daily life. We deem that the recognition of a right to access the Internet as a universal service or a fundamental right may lead to positive policies, expand infrastructure and improve digital literacy. Whilst focusing on a satisfactory level of broadband coverage within the EU territory can foster the creation of a Digital Single Market, it does not demonstrate reasons for having a right to Internet access that would resonate with the human rights framework and that could be transferred to other regions and countries that are not driven by economic incentives. Access to the Internet may facilitate the enjoyment of fundamental rights and therefore it should not be regarded only as a medium enabling economic participation. A strong emphasis on the economic benefits of the Internet may reduce the overall value that access to the Internet could have on the European society. An ambition to connect everyone who does not have access to the Internet should not be limited to the development of better infrastructure. We pointed out that while the objective of having '[a]ccess to an inexpensive, world-class communications infrastructure and a wide range of services' set by the Lisbon Strategy served well and allowed the advancement of Internet take-up at a remarkable pace for more than a decade, more attention could be paid to policies and measures addressing the demand side.[118] Measures focusing on the demand side have recently surfaced in several policy documents and therefore access to the Internet is still primarily considered to be an enabler of economic growth. Building on the observations of Girish J. Gulati and David J. Yates, we suggest that instead of focusing on the potential economic benefits, the EU should emphasize the importance of demand-side policies promoting access, participation in societal debates and use of eGovernment services.[119]

In order to improve the current situation, the EU could consider, in the line of a 2014 Council of Europe Recommendation, recognizing access to the Internet as an autonomous fundamental right.[120] The Council of Europe position might be seen as a sign of sufficient political will among the European countries to include access to the Internet among other rights and recognize it as a self-standing right. We found that EU Member States, the Council of Europe and both European Courts in Luxembourg and Strasbourg are well equipped under the EU primary law to recognize access to the Internet as a fundamental right. In section 6 we discussed three plausible scenarios for recognizing access to the Internet as a fundamental right in the EU. The scenarios are based on the reading of the primary EU legislation, namely Article 6 of the TEU and the Preamble to the EU Charter.

118 Lisbon Strategy, European Council, Presidency Conclusions, available at www.europarl.europa.eu/summits/lis1_en.htm (accessed 21 November 2017).
119 Gulati and Yates, 'Different Paths to Universal Access', n. 60 above.
120 Council of Europe, Parliamentary Assembly, Resolution 1987 'The Right to Internet Access' (2014) para. 5.4.

Finally, we observed that currently, limitations to Internet access are similar to the ones imposed on the freedom of expression. Perhaps, the recognition of access to the Internet as a separate right would allow law- and policy-makers to reconsider the limits and scope of such a right. It would then be possible to discuss the following questions: What do we mean by access to the Internet and what kind of Internet we strive for? What kind of Internet access would serve our society as a medium capable of enabling the exercise of a human rights framework? How could a fair balance be struck between different rights, such as the right to access the Internet and the rights to privacy, security and freedom of expression?

The EU is a significant global player and it is reasonable to expect its regulatory approach may have ripple effects on a global scale. We strongly believe that the EU can have a positive impact on Internet governance and further development of the right to access the Internet at an international level, if it expands its perception of Internet access implications. A reasonable way to proceed forwards could be by reconsidering the role that eGovernment could play within the scope of the debates on the right to access the Internet. We suggest that the EU could strengthen its push for further developments and take-up of broadband services if it recognizes that access to the Internet is essential for the use of eGovernment services.

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