



Time to step up: The EU and freedom of expression

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About Index

Index on Censorship is an international organisation that promotes and defends the right to freedom of expression.

Index uses a unique combination of journalism, campaigning and advocacy to defend freedom of expression for those facing censorship and repression, including journalists, writers, social media users, bloggers, artists, politicians, scientists, academics, activists and citizens.

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	Media free- dom ¹	Political rights ²	Corruption ³	Democracy index ⁴	Soft power ⁵	Economic freedom ⁶
Austria	9.4	1	69	8.62	n/a	71.8
Belgium	12.94	1	75	8.05	3.8	69.2
Bulgaria	28.58	2	41	6.72	n/a	65
Cyprus	13.83	1	66	7.29	n/a	69
Croatia	26.61	1	46	6.93	n/a	61.3
Czech Republic	10.17	1	49	8.19	2.36	70.9
Denmark	7.08	1	90	9.52	4.78	76.1
Estonia	9.26	1	64	7.61	n/a	75.3
Finland	6.38	1	90	9.06	4.45	74
France	21.6	1	71	7.88	6.21	62
Germany	10.24	1	79	8.34	6.15	19
Greece	28.46	2	36	7.65	2.35	55.4
Hungary	26.09	1	55	6.96	n/a	67.3
Ireland	10.06	1	69	8.56	n/a	75.7
Italy	26.11	2	42	7.74	4.28	83
Latvia	22.89	2	49	7.05	n/a	66.5
Lithuania	18.24	1	54	7.24	n/a	72.1
Luxembourg	6.68	1	80	8.88	n/a	74.2
Malta	23.3	1	57	8.28	n/a	67.5
Netherlands	6.48	1	84	8.99	4.9	73.5
Poland	13.11	1	58	7.12	n/a	66
Portugal	16.75	1	63	7.92	2.81	63.1
Romania	23.05	2	44	6.54	n/a	65.1
Slovakia	13.25	1	46	7.35	n/a	68.7
Slovenia	20.49	1	61	7.88	n/a	61.7
Spain	20.5	1	65	8.02	4.68	68
Sweden	9.23	1	88	9.73	5.35	72.9
United Kingdom	16.89	1	79	8.21	6.78	14

1 Reporters Without Borders - Press Freedom Index 2013; 1 = free, 100 = not free.

2 Freedom House - Freedom in the World 2013; 1 = free, 10 = not free.

3 Transparency International - Corruption Perceptions Index 2012; 1 = not transparent, 100 = transparent.

4 The Economist - Democracy Index 2012; 0 = not democratic, 10 = most democratic.

5 Institute for Government - A 2011 Global Ranking of Soft Power; 1 = not powerful, 10 = most powerful.

6 Heritage Foundation and Wall Street Journal Economic Freedom Index; 1 = not free, 100 = most free.



Introduction

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

-- Article 2 – The Treaty On European Union

This policy paper looks at freedom of expression both within the European Union, a union of 28 member states with over 500 million people that accounts for about a quarter of total global economic output, but also how this union defends freedom of expression in the wider world. States that are members of the European Union are supposed to share “European values”, which include a commitment to freedom of expression. However, the way these common values are put into practice vary: some of the world’s best places for free expression are within the European Union – Finland, Netherlands, Denmark and Sweden – while other countries such as Italy, Hungary, Greece and Romania lag behind new and emerging global democracies.

This paper will look at freedom of expression, both at the EU level on how the Commission and institutions of the EU protect this important right, but also across the member states. Firstly, the paper will explore where the EU and its member states protect freedom of expression internally within the Union and where more needs to be done. The second section will look at how the EU projects and defends freedom of expression to partner countries and institutions. The paper will explore the institutions and instruments used by the EU and its member states to protect this fundamental right and how they have developed in recent years, as well as the impact of these institutions and instruments.

Outwardly, a commitment to freedom of expression is one of the principle characteristics⁷ of the European Union. Every European Union member state has ratified the European Convention on Human Rights (ECHR); the International Covenant on Civil and Political Rights (ICCPR) and has committed to the Universal Declaration of Human Rights. To complement this, the Treaty of Lisbon has made the EU Charter of Fundamental Rights legally binding which means that the EU institutions and member states (if they act within the scope of the EU law) must act in compliance with the rights and principles of the Charter. The EU has also said it will accede to the ECHR. Yet, even with these commitments and this powerful framework for defending freedom of expression, has the EU in practice upheld freedom of expression evenly across the European Union and outside with third parties, and is it doing enough to protect this universal right?

⁷ Philip Alston and J. H. H. Weiler, ‘An Ever Closer Union in Need for a Human Rights Policy’ in P. Alston (ed.), *The EU and Human Rights* (1999), <http://www.ejil.org/pdfs/9/4/693.pdf>

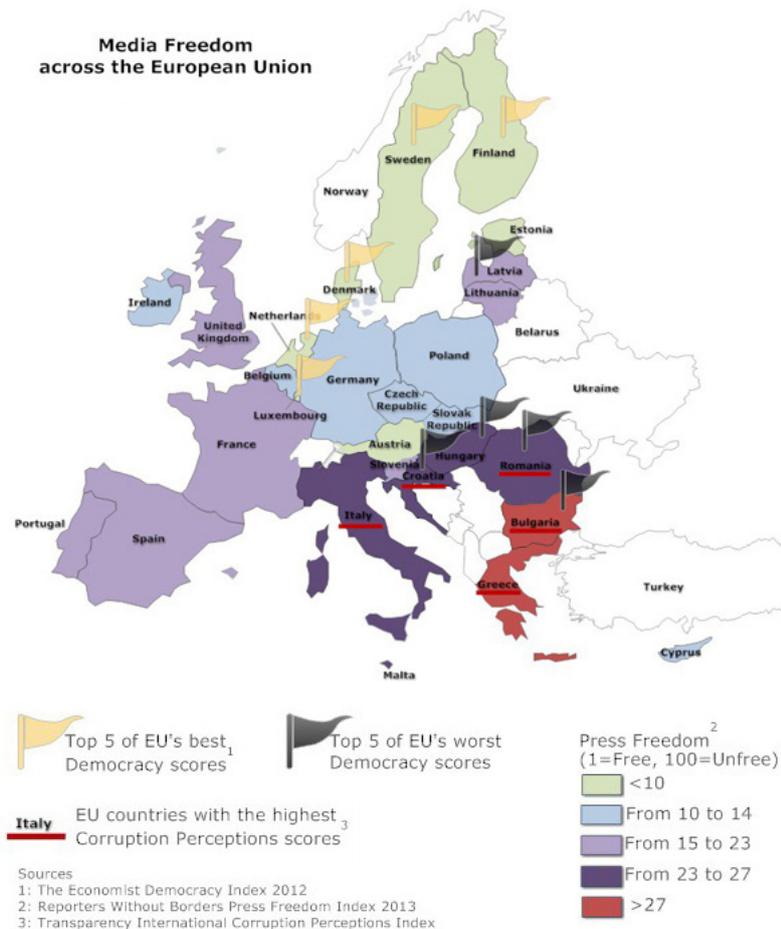


1 Freedom of expression within the European Union

This section will look at how the European Union and its member states are honouring their commitments to freedom of expression, internally, within the Union. The section will explore the commitments the EU has made to freedom of expression, the law of libel and privacy, freedom of information and hate speech and their impact on free speech. Following this, digital freedom and media freedom will be explored looking at media regulation, media plurality and threats to media freedom. The section will cover both the state of freedom of expression internally within EU member states, but also what the EU as an organisation has done to uphold and protect freedom of expression and where more needs to be done.

As shown in graph 1, the European Union contains some of world's freest countries with Austria, Estonia, Finland, the Netherlands, Sweden near the top of the Economist's democracy index and various press freedom indices. Yet, member states such as Italy, Hungary, Greece and Romania lag behind new and emerging global democracies in these indices. Even with their commitments to freedom of expression, member states have fallen short in a number of areas as this section will illustrate. This has set the European Union the challenge to help member states uphold "European values". The section will explore how the Union has attempted to meet this challenge.

The European Union's commitments to freedom of expression



Since the entering into force of the Lisbon Treaty on 1 December 2009, which made the EU Charter of Fundamental Rights legally binding, the EU has gained an important tool to deal with breaches of fundamental rights. The Lisbon Treaty also laid the foundation for the EU as a whole to accede to the European Convention on Human Rights. Amendments to the Treaty on European Union (TEU) introduced by the Lisbon Treaty (Article 7) gave new powers to the EU to deal with state who breach fundamental rights.

The EU's accession to the ECHR, which is likely to take place prior to the European elections in June 2014, will help reinforce the power of the ECHR within the EU and in its external policy. Commission lawyers believe that the Lisbon Treaty has made little impact, as the Commission has always been required to assess whether legislation is compatible with the ECHR (through impact assessments and the fundamental rights checklist) and because all EU member states are also signatories to the Convention.⁸ Yet external legal experts believe that accession could have a real and significant impact on human rights and freedom of expression internally within the EU as the Court of Justice of the European Union (CJEU) will be able to rule on cases and apply European Court of Human Rights jurisprudence directly. Currently, CJEU cases take approximately one year to process, whereas cases submitted to the ECHR can take up to 12 years. Therefore, it is likely that a larger number of freedom of expression cases will be heard and resolved more quickly at the CJEU, with a potential positive impact on justice and the implementation of rights in the EU.⁹

⁸ Off-record interview with a European Commission lawyer, Brussels (February 2013).

⁹ Interview with Prof. Andrea Biondi, King's College London, 22 April 2013.

The Commission will also build upon Council of Europe standards when drafting laws and agreements that apply to the 28 member states.¹⁰ Now that these rights are legally binding and are subject to formal assessment, this may serve to strengthen rights within the Union.¹¹ For the first time, a Commissioner assumes responsibility for the promotion of fundamental rights; all members of the European Commission must pledge before the Court of Justice of the European Union that they will uphold the Charter.¹²

The Lisbon Treaty also provides for a mechanism that allows European Union institutions to take action, whether there is a clear risk of a “serious breach” or a “serious and persistent breach”, by a member state in their respect for human rights in Article 7 of the Treaty of the European Union. This is an important step forward, which allows for the suspension of voting rights of any government representative found to be in breach of Article 7 at the Council of the European Union. The mechanism is described as a “last resort”,¹³ but does potentially provide leverage where states fail to uphold their duty to protect freedom of expression.

Yet within the EU, some remained concerned that the use of Article 7 of the Treaty, while a step forward, is limited in its effectiveness because it is only used as a last resort. Among those who argued this were Commissioner Reding, who called the mechanism the “nuclear option” during a speech addressing the “Copenhagen Dilemma” (the problem of holding states to the human rights commitments they make when they join). In March 2013, in a joint letter sent to Commission President Barroso,¹⁴ the foreign ministers of the Netherlands, Finland, Denmark and Germany called for the creation of a mechanism to safeguard principles such as democracy, human rights and the rule of law. The letter argued there should be an option to cut EU funding for countries that breach their human rights commitments.

It is clear that there is a fair amount of thinking going on internally within the Commission on what to do when member states fail to abide by “European values”. Commission President Barroso raised this in his State of the Union address in September 2012, explicitly calling for “a better developed set of instruments”¹⁵ to deal with threats to these rights.

This thinking has been triggered by recent events in Hungary (see chapter on media regulation) and Italy (see chapter on media plurality), as well as the ongoing issue of corruption in Bulgaria and Romania, which points to a wider problem the EU faces through enlargement: new countries may easily fall short of both their European and international commitments.

Libel and privacy

The law of libel, privacy and national “insult” laws vary across the European Union. In a number of member states, criminal sanctions are still in place and public interest defences are inadequate, curtailing freedom of expression. The European Union has limited competencies in this area, except in the field of data protection, where it is devising new regulations. Due to the impact on freedom of expression and the functioning of the internal market, the European Commission High

¹⁰ Council of Europe, ‘The Council of Europe and the European Union: different roles, shared values’ (May 2007), <http://hub.coe.int/en/web/coe-portal/european-union?dynLink=true&fromArticleId=&dlgroupId=10226&layoutId=772> accessed on 6 September 2013.

¹¹ Interview with lawyer, Brussels (February 2013).

¹² European Commission, ‘Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union’ (19 October 2010), http://ec.europa.eu/justice/news/intro/doc/com_2010_573_4_en.pdf accessed on 3 December 2013.

¹³ Strategy for the effective implementation, *ibid*.

¹⁴ Andrew Gardner, European Voice, ‘Hungary throws down gauntlet to EU’ (11 March 2013), <http://www.europeanvoice.com/article/2013/march/hungary-throws-down-gauntlet-to-eu/76628.aspx> accessed on 6 September 2013.

¹⁵ José Manuel Durão Barroso, President of the European Commission, ‘State of the Union 2012 Address’ (12 September 2012), http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm accessed on 9 September 2013.

Level Group on Media Freedom and Pluralism recommended that libel laws be harmonised across the European Union.¹⁶ It remains the case that the European Court of Human Rights is instrumental in defending freedom of expression where the laws of member states fail to do so. Far too often, archaic national laws have been left unreformed and therefore contain provisions that have the potential to chill freedom of expression.

	Yes	No
Is defamation a criminal offence?	Austria, Belgium, Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden	Croatia, Cyprus, Ireland, Romania, United Kingdom
Are there specific legal provisions protecting politicians from insult or criticism?	Austria, Belgium, Czech Republic, Denmark, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Sweden	Bulgaria, Cyprus, Finland, Greece, Hungary, Ireland, Latvia, Malta, Slovakia, Slovenia, Spain, United Kingdom

Nearly all EU member states still have not repealed criminal sanctions for defamation – with only Croatia,¹⁷ Cyprus, Ireland, Romania and the UK¹⁸ having done so. The parliamentary assembly of the Council of Europe called on states to repeal criminal sanctions for libel in 2007¹⁹, as did both the Organization for Security and Co-operation in Europe (OSCE) and UN special rapporteurs on freedom of expression.²⁰ Criminal defamation laws chill free speech by making it possible for journalists to face jail or a criminal record (which will have a direct impact on their future careers), in connection with their work. Romania's parliament voted to re-introduce prison sentences for libel and insult in December 2013. The legislation will now need to be signed into law by the President. Civil society is deeply concerned by these measures. Of particular concern is that parliamentarians have misused the recent European Commission cooperation and verification mechanism report that called for "freedom of the press [to be] accompanied by a proper protection of institutions and of individuals' fundamental rights as well as to provide for effective redress" to justify these mea-

16 P.3, 'A free and pluralistic media to sustain European democracy', The Report of the High Level Group on Media Freedom and Pluralism (January 2013), http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf accessed on 24 July 2013.

17 OSCE Representative on Freedom of the Media, 'OSCE media watchdog praises Croatia's abolition of prison sentences for defamation' (29 June 2006), <http://www.osce.org/fom/47481> accessed on 10 September 2013.

18 Index on Censorship, 'UK government abolishes seditious libel and criminal defamation' (13 July 2009)

19 PACE Resolution 1577 (2007), 'Towards decriminalisation of defamation', <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>

20 Index on Censorship, 'UN rapporteur calls for end to criminal defamation laws' (3 June 2011) <http://www.indexoncensorship.org/2011/06/un-rapporteur-calls-for-end-to-criminal-defamation-laws/>

tures. Many EU member states have tougher sanctions for criminal libel against politicians than ordinary citizens, even though the European Court of Human Rights ruled in *Lingens v. Austria* (1986) that:

“The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.”²¹

Of particular concern is the fact that insult laws remain in place in many EU member states and are enforced – particularly in Poland,²¹ Spain,²² and Greece²³ – even though convictions are regularly overturned by the European Court of Human Rights.²⁴ Insult to national symbols is also criminalised in Austria, Germany and Poland. Austria has the EU’s strictest laws in this regard, with the penal code criminalising the disparagement of the state and its symbols²⁵ if malicious insult is perceived by a broad section of the republic. This section of the code also covers the flag and the federal anthem of the state. In November 2013, Spain’s parliament passed draft legislation permitting fines of up to €30,000 for “insulting” the country’s flag. The Council of Europe’s Commissioner for Human Rights, Nils Muiznieks, criticised the proposals stating they were of “serious concern”.

There is a wide variance in the application of civil defamation laws across the EU – with significant differences in defences, costs and damages. Excessive costs and damages in civil defamation and privacy actions is known to chill free expression, as authors fear ruinous litigation, as recognised by the European Court of Human Rights in *MGM vs UK*.²⁶ In 2008, Oxford University found huge variants in the costs of defamation actions across the EU, from around €600 (constituting both claimants’ and defendants’ costs) in Cyprus and Bulgaria to in excess of €1,000,000 in Ireland and the UK.²⁷ Defences for defendants vary widely too: truth as a defence is commonplace across the EU but a stand-alone public interest defence is more limited.²⁸

Italy and Germany’s codes provide for responsible journalism defences instead of using a general public interest defence. In contrast, the UK recently introduced a public interest defence that covers journalists, as well as all organisations or individuals that undertake public interest publications, including academics, NGOs, consumer protection groups and bloggers. The burden of proof is primarily on the claimant in many European jurisdictions including Germany, Italy and France, whereas in the UK and Ireland, the burden is more significantly on the defendant, who is required to prove they have not libelled the claimant.²⁹

21 International PEN, ‘Insult Laws in the European Union: A Silent Threat’ (October 2007), <http://pen-international.org/wp-content/uploads/2011/10/DefamationEurope.pdf> accessed on 9 September 2013;

Article 135(2) of the Penal Code.

22 Article 208 of the Criminal Code.

23 Article 168(2) of the Criminal Code.

24 Ibid, International PEN.

25 Article 248 of the Criminal Code prohibits ‘disparagement of the State and its symbols, *ibid*, International PEN.

26 Index on Censorship submission to the Leveson Inquiry, ‘Submission to the Leveson Inquiry: Culture, Practice and Ethics of the Press’ (January 2012), <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Submission-by-Index-of-Censorship.pdf> accessed on 6 September 2013; Index on Censorship, ‘Libel Reform Campaign’s response to the Ministry of Justice consultation on civil litigation cost’ (10 February 2010), <http://www.libelreform.org/news/485-libel-reform-campaigns-response-to-the-ministry-of-justice-consultation-on-civil-litigation-costs> accessed on 6 September 2013.

27 p.4, Programme in Comparative Media Law and Policy Centre for Socio-Legal Studies, University of Oxford, ‘A Comparative Study of Costs in Defamation Proceedings Across Europe’ (2008), <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamation-report.pdf> accessed on 6 September 2013.

28 See for instance the analysis of European defamation law undertaken by the Council of Europe, ‘Legal provisions concerning defamation, libel and insult: Brief overview of related legislation in selected European countries’ (12 December 2003), [http://www.coe.int/t/dghl/standardsetting/media/Doc/DH-MM\(2003\)006rev_en.asp#TopOfPage](http://www.coe.int/t/dghl/standardsetting/media/Doc/DH-MM(2003)006rev_en.asp#TopOfPage) accessed on 9 September 2013.

29 Ibid.

Privacy

Article 8 of the European Convention on Human Rights protects the right to a private life throughout the European Union.³⁰ The right to freedom of expression and the right to a private right are often complementary rights, in particular in the online sphere (see surveillance, below). Privacy law is, on the whole, left to EU member states to decide. In a number of EU member states, the right to privacy can restrict the right to freedom of expression because there are limited protections for those who breach the right to privacy for reasons of public interest.

The media's willingness to report and comment on aspects of people's private lives, in particular where there is a legitimate public interest, has raised questions over the boundaries of what is public and what is private. In many EU member states, the media's right to freedom of expression has been overly compromised by the lack of a serious public interest defence in privacy law. This is most clearly illustrated by the fact that some European Union member states offer protection for the private lives of politicians and the powerful, even when publication is in the public interest, in particular in France, Italy and Germany. In Italy, former Prime Minister Silvio Berlusconi used the country's privacy laws to successfully sue the publisher of Italian magazine *Oggi* for breach of privacy after the magazine published photographs of the premier at parties where escort girls were allegedly in attendance.³¹ Publisher Pino Belleri received a suspended five-month sentence and a €10,000 fine. The set of photographs proved that the premier had used Italian state aircraft for his own private purposes, in breach of the law. Even though there was a clear public interest, the Italian Public Prosecutor's Office brought charges. In Slovakia, courts also have a narrow interpretation of the public interest defence with regard to privacy. In February 2012, a District Court in Bratislava prohibited the distribution or publication of a book alleging corrupt links between Slovak politicians and the Penta financial group. One of the partners at Penta filed for a preliminary injunction to ban the publication for breach of privacy.³² It took three months for the decision to be overruled by a higher court and for the book to be published.

The European Court of Human Rights rejected former Federation Internationale de l'Automobile president Max Mosley's attempt to force newspapers to give prior notification in instances where they may breach an individual's right to a private life, noting that the requirement for prior notification would likely chill political and public interest matters.³³ Yet prior notification and/or consent is currently a requirement in three EU member states: Latvia, Lithuania and Poland.³⁴

Other countries have clear public interest defences. The Swedish Personal Data Act (PDA), or personuppgiftslagen (PUL), was enacted in 1998 and provides strong protections for freedom of expression³⁵ by stating that in cases where there is a conflict between personal data privacy and freedom of the press or freedom of expression, the latter will prevail. The Supreme Court of Sweden backed this principle in 2001 in a case where a website was sued for breach of privacy after it highlighted criticisms of Swedish bank officials.

30 Privacy is also protected by the Charter of Fundamental Rights through Article 7 ('Respect for private and family life') and Article 8 ('Protection of personal data').

31 Ossigeno per l'informazione, 'Photos of Berlusconi at Villa Certosa, 5 months imprisonment for the former director of "Oggi" magazine' (4 March 2013), <http://www.ossigenoinformazione.it/2013/03/foto-berlusconi-a-villa-certosa-cinque-mesi-di-reclusione-a-ex-direttore-oggi-20410/> accessed on 9 September 2013.

32 John Boyd, The Daily.SK, 'Court Revokes Injunction Banning 'Gorilla' Publication' (11 Jun 2012), <http://www.thedaily.sk/court-revokes-injunction-banning-gorilla-publication/#ixzz2TAvxdcZB> accessed on 10 September 2013.

33 Mosley v United Kingdom (10 May 2011) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104712>

34 Index on Censorship, Submission to the Leveson Inquiry: Culture, Practice and Ethics of the Press (January 2012), <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/01/Submission-by-Index-of-Censorship.pdf> accessed on 9 September 2013.

35 Privacy International, Sweden Country Report, <https://www.privacyinternational.org/reports/sweden/i-legal-framework> accessed on 9 September 2013.

	Portugal	France	Denmark	Greece	Austria
Protection of access to information global ranking	65	73	79	91	93

When it comes to data retention, the European Union demonstrates clear competency. As noted in Index’s policy paper “Is the EU heading in the right direction on digital freedom?”, published in June 2013, the EU is currently debating data protection reforms that would strengthen existing privacy principles³⁶ set out in 1995, as well as harmonise individual member states’ laws. The proposed EU General Data Protection Regulation, currently being debated by the European Parliament, aims to give users greater control of their personal data and hold companies more accountable when they access data. But the “right to be forgotten”³⁷ clause of the proposed regulation has been the subject of controversy³⁸ as it would allow internet users to remove content posted to social networks in the past. This limited right is not expected to require search engines to stop linking to articles, nor would it require news outlets to remove articles users found offensive from their sites. The Center for Democracy and Technology referred to³⁹ the impact of these proposals as placing “unreasonable burdens” that could chill expression by leading to fewer online platforms for unrestricted speech. These concerns, among others, should be taken into consideration at the EU level. In the data protection debate, freedom of expression should not be compromised to enact stricter privacy policies.

Freedom of information

Freedom of information is an important aspect of the right to freedom of expression. Without the ability to access information held by states, individuals cannot make informed democratic choices. Many EU member states have failed to adequately protect freedom of information and the Commission has been criticised for its failure to adequately promote transparency and uphold its commitment to freedom of information.

When it comes to assessing global protection for access to information, not one European Union member state ranks in the list of the top 10 countries, while increasingly influential democracies such as India do. Two member states, Cyprus and Spain,⁴⁰ are still without any freedom of information laws. Of those that do, many are weak by international standards (see table below).⁴¹

In many states, the law is not enforced properly. In Italy, public bodies fail to respond to 73% of requests.⁴²

36 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:NOT> accessed on 10 September 2013.

37 Privacy International, ‘Our analysis of the European Commission’s proposal for a general Data Protection Regulation’ (19 September 2012), <https://www.privacyinternational.org/blog/our-analysis-of-the-european-commissions-proposal-for-a-general-data-protection-regulation> accessed on 9 September 2013.

38 Microsoft, ‘The EU’s Proposed Data Protection Regulation: Microsoft’s Position’ (16 March 2013), <http://www.microsoft.com/eu/on-the-issues/article/the-eus-proposed-data-protection-regulation-microsofts-position.aspx> accessed on 9 September 2013.

39 Centre for Democracy and Technology, ‘On The “Right to Be Forgotten”: Challenges and Suggested Changes to the Data Protection Regulation’ (9 May 2013), <https://www.cdt.org/paper/right-be-forgotten-challenges-and-suggested-changes-data-protection-regulation> accessed on 3 December 2013.

40 Overview of all FOI laws, Roger Vleugels (September 2012), <http://freedominfo.org/documents/Fringe%20Special%20-%20Vleugels2012oct.pdf>; Global Right to Information Rating, Centre for Law and Democracy, http://www.rti-rating.org/country_data.php

41 Global Right to Information Rating, *ibid*.

42 Access Info, ‘Italy: The Silent State’, <http://www.access-info.org/en/national-campaigns/390-italy-the-silent-state> accessed on 27 September 2013.

The Council of Europe has also developed a Convention on Access to Official Documents, the first internationally binding legal instrument to recognise the right to access the official documents of public authorities. Only seven EU member states have signed up to the convention.

Since the Lisbon Treaty came into force, both member states and EU institutions are both bound by freedom of information commitments. Article 42 (the right of access to documents) of the European Charter of Fundamental Rights now recognises the right to freedom of information for EU documents as a fundamental human right. Further, specific rights falling within the scope of freedom of information are also enshrined in Article 41 of the Charter (the right to good administration).

As a result, the European Commission has embedded limited access to information in its internal protocols. Yet, while the European Parliament has reaffirmed its commitment to give EU citizens more access to official EU documents, it is still the case that not all EU institutions, offices, bodies and agencies are acting on their freedom of information commitments. The Danish government used their EU presidency in the first half of 2012 to attempt to forge an agreement between the European Commission, the Parliament and member states to open up public access to EU documents. This attempt failed after a hostile response from the Commission.⁴³ Attempts by the Cypriot and Irish presidencies to unblock the matter in the Council also failed.

This lack of transparency can and has impacted on public's knowledge of how decisions that affect human rights have been made. The European Ombudsman, P. Nikiforos Diamandouros, has criticised the European Commission for denying access to documents concerning its view of the United Kingdom's decision to opt out from the EU Charter of Fundamental Rights. In 2013, Sophie in't Veld MEP was barred from obtaining diplomatic documents relating to the Commission's position on the proposed Anti-Counterfeiting Trade Agreement (ACTA).⁴⁴

Hate speech

Across the European Union, hate speech laws, and in particular their interpretation, vary with regard to how they impact on the protection for freedom of expression. In some countries, notably Poland and France, hate speech laws do not allow enough protection for free expression. The Council of the European Union has taken action on combating certain forms and expressions of racism and xenophobia by promoting use of the criminal law within nation states in its 2008 Framework Decision.⁴⁵ Yet, the Framework Decision failed to adequately protect freedom of expression in particular on controversial historical debate.

Throughout European history, hate speech has been highly problematic, from the experience and ramifications of the Holocaust through to the direct incitement of ethnic violence via the state run media during wars in the former Yugoslavia. However, it is vital that hate speech laws are proportionate in order to protect freedom of expression.

On the whole, the framework for the regulation of hate speech is left to the national laws of EU member states, although all member states must comply with Articles 14 and 17 of the ECHR.⁴⁶ A

43 Andrew Rettman, EU Observer, 'Talks collapse on access to EU documents' (13 June 2012), <http://euobserver.com/institutional/116609> accessed on 27 September 2013.

44 Freedom Info, 'European Court Backs Confidentiality for Trade Talks' (25 March 2013), <http://www.freedominfo.org/2013/03/european-court-backs-confidentiality-for-trade-talks/> accessed on 27 September 2013.

45 Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008), http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/133178_en.htm accessed on 6 September 2013.

46 'Article 14 - discrimination' contains a prohibition of discrimination; 'Article 17 - abuse of rights' outlines that the rights guaranteed by the Convention cannot be used to abolish or limit rights guaranteed by the Convention.

number of EU member states have hate speech laws that fail to protect freedom of expression – in particular in Poland, Germany, France and Italy.

Article 256 and 257 of the Polish Criminal Code criminalise individuals who intentionally offend religious feelings. The law criminalises public expression that insults a person or a group on account of national, ethnic, racial, or religious affiliation or the lack of a religious affiliation. Article 54 of the Polish Constitution protects freedom of speech but Article 13 prohibits any programmes or activities that promote racial or national hatred. Television is restricted by the Broadcasting Act, which states that programmes or other broadcasts must “respect the religious beliefs of the public and respect especially the Christian system of values”. In 2010, two singers, Doda and Adam Darski, were charged with violating the criminal code for their public criticism of Christianity.⁴⁷ France prohibits hate speech and insult, which are deemed to be both “public and private”, through its penal code⁴⁸ and through its press laws⁴⁹. This criminalises speech that may have caused no significant harm whatsoever to society, which is disproportionate. Singer Bob Dylan faces the possibility of prosecution for hate speech in France. The prosecutor’s office in Paris confirmed that Dylan has been placed under formal investigation by Paris’s Main Court for “public injury” and “incitement to hatred” after he compared the relationship between Croats and Serbs to that of Nazis and Jews.

The inclusion of incitement to hatred on the grounds of sexual orientation into hate speech laws is a fairly recent development. The United Kingdom’s hate speech laws contain specific provisions to protect freedom of expression⁵⁰ but these provisions are not absolute. In a landmark case in 2012, three men were convicted after distributing leaflets in Derby depicting a mannequin in a hangman’s noose and calling for the death sentence for homosexuality.⁵¹ The European Court of Human Rights ruled on this issue in its landmark judgment *Vejdeland v. Sweden*, which upheld the decision reached by the Swedish Supreme Court to convict four individuals for homophobic speech after they distributed homophobic leaflets in the lockers of pupils at a secondary school. The applicants claimed that the Swedish Supreme Court’s decision to convict them constituted an illegitimate interference with their freedom of expression. The ECtHR found no violation of Article 10, noting even if there was, the interference served a legitimate aim, namely “the protection of the reputation and rights of others”.⁵²

The widespread criminalisation of genocide denial is a particularly European legal provision. Ten EU member states criminalise either Holocaust denial, or the denial of crimes committed by the Nazi and/or Communist regimes.⁵³ At EU level, Germany pushed for the criminalisation of Holocaust denial, culminating in its inclusion from the 2008 EU Framework Decision on combating cer-

47 The police charged vocalist and guitarist Adam Darski of Polish death metal band Behemoth with violating the Criminal Code for a performance in 2007 in Gdynia during which Darski allegedly called the Catholic Church “the most murderous cult on the planet” and tore up a copy of the Bible; singer Doda, whose real name is Dorota Rabczewska, was charged with violating the Criminal Code for saying in 2009 that the Bible was “unbelievable” and written by people “drunk on wine and smoking some kind of herbs”.

48 Article R625-7

49 Article 24, Law on Press Freedom of 29 July 1881

50 The Racial and Religious Hatred Act 2006 amended the Public Order Act 1986 by adding Part 3A to criminalising attempting to “stir up religious hatred.” A further provision to protect freedom of expression (Section 29J) was added: “Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.”

51 Derby Crown Court -v- Ihjaz Ali, Razwan Javed and Kabir Ahmed, ‘Sentencing Remarks of HHJ Burgess’ (10 February 2012), <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf> accessed on 10 September 2013.

52 p. 155, Fundamental Rights Agency, ‘Fundamental rights: challenges and achievements in 2012: Equality and non-discrimination’ (2012), http://fra.europa.eu/sites/default/files/annual-report-2012-chapter-5_en.pdf accessed on 6 September 2013.

53 Austria, Belgium, Czech Republic, France, Germany, Hungary, Lithuania, Luxembourg, Poland and Romania, see also <http://www.indexoncensorship.org/tag/holocaust-denial/>

tain forms and expressions of racism and xenophobia by means of criminal law.⁵⁴ Full implementation of the Framework Decision was blocked by Britain, Sweden and Denmark, who were rightly concerned that the criminalisation of Holocaust denial would impede historical inquiry, artistic expression and public debate.

Beyond the 2008 EU Framework Decision, the EU has taken specific action to deal with hate speech in the Audiovisual Media Service Directive.⁵⁵ Article 6 of the Directive states the authorities in each member state “must ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality”.

Hate speech legislation, particularly at European Union level, and the way this legislation is interpreted, must take into account freedom of expression in order to avoid disproportionate criminalisation of unpopular or offensive viewpoints or impede the study and debate of matters of historical importance.

Media freedom

There are a number of challenges to media freedom within the EU, in particular media ownership patterns, political and state pressure in the operation of the media and overly prescriptive regulation of the media. Media concentration in the EU poses a significant challenge. The media in the EU is significantly more concentrated than in North America, even when taking into consideration explanations of population, geographical size and income. Even by global standards, media concentration in the EU is high.⁵⁶

Another challenge arises from national media regulation, which may both fail to protect plurality and, allow an unnecessary and unacceptable amount of political interference in the way the media works. While the EU does not have an explicit competency to intervene in all matters of media plurality and media freedom, it is not neutral in this debate. A number of initiatives are underway to help better promote media freedom, and in particular media plurality. Free expression advocates, including Index, welcome the fact that the EU is taking the issue of media freedom more seriously.

Media regulation

Across the European Union, media regulation is left to the member states to implement, leading to significant variations in the form and level of media regulation. National regulation must comply with member states’ commitments under the European Convention on Human Rights, but this compliance can only be tested through exhaustive court cases. While the European Commission has, in the past, tended to view its competencies in this area as being limited due to the introduction of the Charter of Fundamental Rights into EU primary law, the Commission is looking at its possible role in this area.⁵⁷ In part, the Commission is acting upon the guidance of the European Parliament, which has expressed significant concerns over the state of media regulation, and in particular with regard to Hungary,⁵⁸ where regulation has been criticised for curtailing freedom of expression.

54 Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (28 November 2008), http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33178_en.htm accessed on 10 September 2013.

55 European Commission, ‘Prohibition of incitement to hatred’ (4 December, 2012) http://ec.europa.eu/avpolicy/reg/tvwf/incit/index_en.htm

56 Eli Noam, ‘Media Concentration and Ownership in the Digital Age’, - EU Competencies in Respect of Media Pluralism and Media Freedom’ (29 October 2012) <http://www.slideshare.net/CmpfEui/legal-overview> accessed on 24 July 2013

57 Mark Thompson, LSE Media Blog, ‘Media Pluralism in Europe: Signs of Progress’ (1 February 2013), <http://blogs.lse.ac.uk/mediapolicyproject/2013/02/01/media-pluralism-in-europe-signs-of-progress/> accessed on 24 July 2013.

58 European Parliament resolution of 10 March 2011 on media law in Hungary, B7-0191/2011, <http://www.europarl.europa.eu/sides/>

The national models of media regulation across Europe vary significantly, from models of self-regulation to statutory regulation. These models of regulation can impact negatively on freedom of expression through the application of unnecessary sanctions, the regulator's lack of independence from politicians and laws that create a burdensome environment for online media. Statutory regulation of the print and broadcast media is increasingly anachronistic, raising questions over how the role of journalist or broadcaster should be defined and resulting in a general and increasing confusion about who should be covered by these regulatory structures, if at all. Frameworks that outline laws on defamation and privacy and provide public interest and opinion defences for all would provide clarity for all content producers. In the majority of countries, the broadcast media is regulated by a statutory regulator (due to a scarcity of analogue frequencies that required arbitration in the past), yet, often, the print media is also regulated by statutory bodies, including in Slovenia, Lithuania and Italy; or regulated by specific print media laws and codes, for example in Austria, France, Sweden and Portugal. As we demonstrate below, many EU member states have systems of media regulation that are overly restrictive and fail to protect freedom of expression.

In many EU member states, the system of media regulation allows excessive state interference in the workings of the media. Hungary's system of media regulation has been criticised by the Council of Europe, the European Parliament⁵⁹ and the OSCE⁶⁰ for the excessive control statutory bodies exert over the media. The model of "co-regulation" was set up in 2010 through a new comprehensive media law⁶¹, culminating in the creation of the National Media and Infocommunications Authority, which was given statutory powers to fine media organisations up to €727,000, oversee regulation of all media including online news websites, and act as an extra-judicial investigator, jury and judge on public complaints. The president of the Media Authority and all five members of the Media Council were delegated exclusively by Hungary's Fidesz party, which commanded a majority in Parliament. The law forced media outlets to provide "balanced coverage" and had the power to fine reporters if they didn't disclose their sources in certain circumstances. Organisations that refused to sign up to the regulator faced exemplary fines of up to €727,000 per breach of the law. While the European Commission managed to negotiate to remove some of the most egregious aspects of the law, nothing was done to rectify the political composition of the media council, the source of the original complaint to the Commission.

Hungary is not the only EU member state where politicians have excessive influence over media regulators. In France, the High Council for Broadcasting (CSA), which regulates TV and radio broadcasting, has nine executives appointed by presidential decree, of which three members are directly chosen and appointed by the president, three by the president of the Senate, and three by the president of the National Assembly. According to the Centre for Media and Communication Studies, this system for appointing authorities has the fewest safeguards from governmental influence in the EU.⁶²

Many countries have statutory underpinning of the press, which includes the online press, including Austria, France, Italy, Lithuania, Slovenia and Sweden. Some statutory regulation can provide freedom of expression protections to those who voluntarily register with the regulatory body (for

getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN accessed on 25 July 2013.

59 EU Parliament resolution of 10 March 2011 on media law in Hungary <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN>

60 'Despite adjustments, Hungary's media law continues to violate OSCE commitments, says OSCE representative on freedom of the media', 8 March 2011, <http://www.osce.org/fom/75999>

61 Act on the Freedom of the Press and the Fundamental Rules on Media Content (the "Press Freedom Act") and the Media Services and Mass Media Act (or the "Media Act")

62 Center for Media and Communication Studies, 'Hungarian Media Laws in Europe', <http://medialaws.ceu.hu/thisreport.html> accessed on 3 December 2013.

instance in Sweden), but in many instances, the regulatory burden and possibility of fines for online media can chill freedom of expression.

The Leveson Inquiry in the UK was established after the extent of the phone-hacking scandal was discovered, revealing how journalists had hacked the phones of victims of crime and high profile figures. Lord Justice Leveson made a number of recommendations in his report, including the statutory underpinning of an “independent” regulatory body, restrictions to limit contact between senior police officers and the press that could inhibit whistleblowing, and exemplary damages for publishers who remain outside the regulator.⁶³ Of particular concern was the notion of statutory unpinning by what was claimed to be an “independent” and “voluntary” regulator. By setting out the requirements for what the regulator should achieve in law, it introduced some government and political control over the functioning of the media. Even “light” statutory regulation can be revisited, toughened and potentially abused. Combined with exemplary damages for publishers who remained outside the “voluntary” regulator (damages considered to be in breach of Article 10 of the European Convention of Human Rights by three eminent QCs), the Leveson proposals were damaging to freedom of expression.⁶⁴ The situation was compounded by the attempt by a group of Peers in the House of Lords to exert political pressure on the government to regulate the press, potentially sabotaging much-needed reform of the archaic libel laws of England and Wales. This resulted in the government bringing in legislation through the combination of a Royal Charter⁶⁵ (the use of the Monarch’s powers to establish a body corporate) and by adding provisions to the Crime and Courts Act (2013) that established the legal basis for exemplary damages. It is arguable that the Leveson proposals have already been used to chill public interest journalism.⁶⁶

In part a response to the dilemma posed by Hungary, but also to wider issues of press regulation raised by the Leveson Inquiry in the UK, vice president of the Commission Neelie Kroes has overseen renewed Commission interest in the area of media regulation. This interest builds upon the possibility of the Commission using new commitments introduced through the Charter of Fundamental Rights into EU primary law, such as Article 11 of the Charter, which states: “The freedom and pluralism of the media shall be respected.” The Commission is now exploring a variety of options to help protect media freedom, including funding the establishment of the Centre for Media Pluralism and Media Freedom and the EU Futures Media Forum. In October 2011, Kroes founded a High Level Group on Media Freedom and Pluralism to look at these issues in more detail. The conclusions were published in January 2013.⁶⁷

Many of the recommendations of the High Level Media Group are useful, in particular the first recommendation: “The EU should be considered competent to act to protect media freedom and pluralism at State level in order to guarantee the substance of the rights granted by the Treaties to EU citizens”. Yet some of the High Level Group’s conclusions do not provide a solution to questions of appropriate legislation within the EU. The group called for all member states to have “independent media councils” that are politically and culturally balanced with a socially diverse membership and have enforcement powers including fines, the power to order printed or broadcast apologies

63 Index on Censorship, ‘Index on Censorship responds to the Leveson Inquiry Report’ (February 2013), <http://www.indexoncensorship.org/2013/02/index-on-censorship-leveson-inquiry-report/> accessed on 6 September 2013.

64 Gill Phillips, Inform, ‘Briefing Note on Exemplary Damages and Costs’ (22 March 2013), <http://inform.wordpress.com/2013/03/22/briefing-note-on-exemplary-damages-and-costs-gill-phillips/> accessed on 6 September 2013.

65 Index on Censorship, ‘Index responds to the Royal Charter’ (March 2013), <http://www.indexoncensorship.org/2013/03/index-responds-to-the-royal-charter/> accessed on 6 September 2013.

66 Index on Censorship, ‘Police apologise for withholding name of charged officer’ (May 2013), <http://www.indexoncensorship.org/2013/05/police-apologise-for-withholding-name-of-charged-officer/> accessed on 27 September 2013. <http://www.indexoncensorship.org/2013/05/police-apologise-for-withholding-name-of-charged-officer/>

67 European Commission, ‘High-Level Group on Media Freedom and Pluralism’ (21 January 2013), <http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism> accessed on 27 September 2013.

and, particularly concerning, the power to order the removal of (professional) journalistic status.⁶⁸ Political balance could be interpreted as political representation on the media councils, when the principle should be that the media is kept free from political interference.⁶⁹ This was an issue raised in particular by Hungarian NGOs during the consultation.⁷⁰ Also of particular concern is the suggestion that the European Commission should monitor the national media councils with no detail as to how the Commission is held to account, or process for how national media organisations could challenge bad decisions by the Commission. The Commission is awaiting the results of a civil society consultation. Depending on the conclusions of the Commission, stronger protections for media freedom may be considered when a state clearly deviates from established norms.

Media plurality

“Currently the EU does not have the legal competence to act in this area [media plurality] as part of its normal business. In practice, our role involves naming and shaming countries ad hoc, as issues arise.

Year after year I return to this Parliament to deal with a different, often serious, case, in a different Member State. I am quite willing to continue to exercise that political pressure on Member States that risk violating our common values. But there’s merit in a more principled way forward.”⁷¹

– Commission Vice President Neelie Kroes

Media plurality is an essential part of guaranteeing that the media is able to perform its watchdog function. Without a plurality of opinions, the analysis of political arguments in democracies can be limited.⁷² Media experts argue that the European Commission has the clear competency to promote media plurality, through legal instruments such as the Lisbon Treaty and the Maastricht Treaty, but also second EU legislation. Yet, the commission has until now left the promotion of media plurality up to member states. This section will outline the ways in which some member states have failed to protect media plurality. In recent years, Italy has been the most egregious offender. Italy’s failure to protect media plurality has heightened the pressure on the European Commission to act.

The Italian “anomaly”⁷³ in broadcast media included: duopoly domination in the television market, with the country’s former prime minister Silvio Berlusconi also owning the country’s largest private television and advertising companies and a legislative vacuum that failed to prevent media concentration, as well as public officials having vested interests in the media. Legislation purportedly designed to deal with media concentration, such as the Gasparri Law of 2004, may have helped preserve them.⁷⁴ When Mediaset owner Silvio Berlusconi became Prime Minister, he was in a powerful position, with influence over 80% of the country’s television channels through his private TV stations and considerable influence over public broadcaster RAI. This media concentration was condemned by the European Parliament on two occasions.⁷⁵ In order to promote media plurality,

68 p.7, High Level Media Group on Media Freedom and Pluralism

69 Kirsty Hughes, ‘Not the route to a free media’ (31 January 2013), <http://www.europeanvoice.com/article/imported/not-the-route-to-free-media/76291.aspx> accessed on 9 September 2013.

70 European Commission, ‘Public consultation on the Independent Report from the HLG on Media Freedom and Pluralism: responses from NGOs’ (15 July 2013), http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=2711 accessed on 26 November 2013

71 Neelie Kroes, “United in Diversity”, Pan-European Forum on Media Pluralism & New Media, European Parliament Brussels (27 June 2012), http://europa.eu/rapid/press-release_SPEECH-12-504_en.htm accessed on 25 July 2013.

72 Index on Censorship, ‘How the European Union can protect freedom of expression’ (December 2012)

73 OSCE Representative on Freedom of the Media, Visit to Italy: The Gasparri Law Observations and Recommendations (7 June 2005), <http://www.osce.org/fom/15827>

74 Ibid, report of the Representative on Freedom of the Media.

75 Resolution of 22 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) via <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&refer->

in July 2010, the European Commission ruled to remove restrictions on Sky Italia that prevented the satellite broadcaster from moving into terrestrial television, in order to promote media plurality.⁷⁶ It is possible that now the EU would have a clearer mandate to intervene using Article 11 of the Charter of Fundamental Rights of the European Union, which came into force in 2009.⁷⁷ The Commission, however, did not intervene to prevent the conflict of interest between Premier Silvio Berlusconi, his personal media empire and the control he could exercise over the public sector broadcaster.

There are a number of EU member states where media ownership patterns have compromised plurality. A 2013 study by the Centre for Media Pluralism and Media Freedom showed strong media concentrations prevalent across the EU, with the largest media groups having ownership of an overwhelming percentage of the media.⁷⁸ These media concentrations are significantly higher than the equivalent US figures.

	Netherlands	UK	France	Italy
Market share for three largest newspapers	98.2%	70%	70%	45%

	Italy	Germany	UK	France	Spain
Share of total advertising spend received by the two largest TV stations ^{80,81}	79%	82%	66%	62%	59%

However, the most concentrated market was the online market. The internet's ability to facilitate the cheap open transmission of news was expected to break down old media monopolies and allow new entrants to enter the market, improving media plurality.⁷⁹ There is some evidence to suggest this is happening: among people who read their news in print in the UK, on average read 1.26 different newspapers; those who read newspapers online read 3.46 news websites.⁸⁰ Yet, many have raised concerns over the convergence of newspapers, TV stations and online portals to produce increasingly larger media corporations.⁸¹ This is echoed by the European Commission's independent High Level Group on Media Freedom and Pluralism.⁸² The High Level Group calls for digital intermediaries, including app stores, news aggregators, search engines and social networks, to be included in assessments of media plurality. The Reuters Institute has called for digital intermediaries to be required to "guarantee that no news content or supplier will be blocked or refused access" (unless the content is illegal).⁸³

ence=P6-TA-2008-0459&language=EN#def_1_5; European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0459&language=EN>

76 Financial Times, 'Brussels lifts Sky Italia restrictions' (20 July 2010), <http://www.ft.com/cms/s/0/eb1f80c0-93e9-11df-83ad-00144feab49a.html#axzz2ZtruOyuG> accessed on 23 July 2013.

77 Miklós Haraszti, 'Media Pluralism and Human Rights', Council of Europe Commissioner for Human Rights (6 December 2011), <https://wcd.coe.int/ViewDoc.jsp?id=1881589> accessed on 25 July 2013.

78 Centre for Media Pluralism and Media Freedom, 'European Union Competencies in Respect of Media Pluralism and Media Freedom' (January 2013), <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>

79 Clay Shirky, 'Newspapers and Thinking the Unthinkable' (13 March, 2009), <http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable/>

80 Policy by the Numbers, 'The Internet and news plurality' (5 January, 2012) <http://policybythenumbers.blogspot.co.uk/2012/01/internet-and-news-plurality.html>

81 p.165, Lawrence Lessig, 'Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity' (Penguin, 2004)

82 The Report of the High Level Group on Media Freedom and Pluralism (January 2013), <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/HLG%20Final%20Report.pdf>

83 p.10, News Plurality in a Digital World (July 2012), <http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Work->

Media plurality has not been adequately protected by some EU member states. The European Commission now has a clearer competency in this area and has acted in specific national markets. MEPs have expressed concerns over the Commission's slow response to the crisis in Italian media plurality, a lesson that the Commission must learn from. In the future, with increasing digital and media convergence, the role of the Commission will be crucial for the protection of media plurality; otherwise this convergence could have a significant impact on freedom of expression in Europe.

Threats to media freedom and journalists

This section outlines the main threats to media freedom and the work of journalists, from political pressure or pressure exerted by the police, to non-legal means, such as violence and impunity. There have been instances where political pressure against journalists has led to self-censorship in a number of European Union countries. This pressure can manifest itself in a number of ways, from political pressure to influence editorial decisions or block journalists from promotion in state broadcasters to police or security service interventions into media investigations on political corruption.

The European Commission now has a clear competency to protect media freedom and should reflect on how it can deal with political interference in the national media of member states. As the heads of state or government of the EU member states have wider decision-making powers at the European Council this gives a forum for influence and negotiation, but this may also act as a brake on Commission action, thereby protecting media freedom.

Italy presents perhaps the most egregious example of political interference undermining media freedom in a EU member state. Former premier Silvio Berlusconi has used his influence over the media to secure personal political gain on a number of occasions. In 2009 he was thought to be behind RAI decision to stop broadcasting Annozero, a political programme that regularly criticised the government.⁸⁴ In the lead up to the 2010 regional elections, Berlusconi's party pushed through rules which effectively meant that state broadcasters had to either feature over 30 political parties on their talk shows or lose their prime time slots.⁸⁵ Notably, Italian state broadcaster RAI refused to show adverts for the Swedish film Videocracy⁸⁶ because it claimed the adverts were "offensive" to Silvio Berlusconi.

Under the government of Prime Minister Viktor Orbán, Hungary has seen considerable political interference in the media. In September 2011, popular liberal political radio station "Klubrádió" lost its licence following a decision by the Media Authority that experts believed was motivated by political considerations.⁸⁷ The licence was reinstated on appeal. In December 2011, state TV journalists went on hunger strike after the face of a prominent Supreme Court judge was airbrushed out of a broadcast by state-run TV channel, MTV.⁸⁸ Journalists have complained that editors regularly cave into political interference.⁸⁹ Germany has also seen instances of political interference in the public and private media. In 2009, the chief editor of German public service broadcaster ZDF, Nikolaus

ing_Papers/News_Plurality_in_a_Digital_World.pdf accessed on 3 December 2013.

84 Country Reports on Human Rights Practices for 2011, Bureau of Democracy, Human Rights and Labor, <http://www.state.gov/j/drl/rls/hrrpt/2011/humanrightsreport/index.htm#wrapper> accessed on 3 December 2013

85 Berlusconi silences TV critics, Index on Censorship, <http://www.indexoncensorship.org/2010/02/berlusconi-silences-tv-critics/>

86 Index interviewed the film's producer Erik Gandini (6 April 2010) <http://www.indexoncensorship.org/2010/04/silvio-berlusconi-television-premier/>

87 Charlie Holt, Index on Censorship, 'Hungary: independent voice faces closure' (7 September 2011),

<http://www.indexoncensorship.org/2011/09/hungary-independent-voice-faces-closure/> accessed on 10 December 2013

88 Thomas Escritt, Index on Censorship, 'Hungary: airbrushing row highlights media law failings' (13 December 2011), <http://www.indexoncensorship.org/2011/12/hungary-airbrushing-media-law-hunger-strike/> accessed on 10 December 2013

89 Roy Greenslade, The Guardian, 'Hungarian TV journalists on hunger strike' (15 December 2011),

<http://www.guardian.co.uk/media/greenslade/2011/dec/15/hungary-press-freedom> accessed on 10 December 2013

Brender, saw his contract terminated in controversial circumstances. Despite being a well-respected and experienced journalist, Brender's suitability for the job was questioned by politicians on the channel's executive board, many of whom represented the ruling Christian Democratic Union. It was decided his contract should not be renewed,⁹⁰ a move widely criticised by domestic media, the International Press Institute and Reporters Without Borders, the latter arguing the move was "motivated by party politics" which, it argued, was "a blatant violation of the principle of independence of public broadcasters".⁹¹ In 2011, the editor of Germany's (and Europe's) biggest selling newspaper, Bild, received a voicemail from President Christian Wulff, who threatened "war" on the tabloid if it reported on an unusual personal loan he received.⁹²

Police interference in the work of journalists, bloggers and media workers is a concern: there is evidence of police interference across a number of countries, including France, Ireland and Bulgaria. In France, the security services engaged in illegal activity when they spied on Le Monde journalist, Gerard Davet, during his investigation into Liliane Bettencourt's alleged illegal financing of President Sarkozy's political party.⁹³ In 2011, France's head of domestic intelligence, Bernard Squarcini, was charged with "illegally collecting data and violating the confidentiality" of the journalists' sources.⁹⁴ In Bulgaria, journalist Boris Mitov was summoned on two occasions to the Sofia City Prosecutor's office in April 2013⁹⁵ for leaking "state secrets" after he reported a potential conflict of interest within the prosecution team.⁹⁶ Of particular concern is Ireland, which has legislation that outlaws contact between ordinary police officers and the media. Clause 62 of the 2005 Garda Síochána Act makes provision for police officers who speak to journalists without authorisation from senior officers to be dismissed, fined up to €75,000 or even face seven years in prison.⁹⁷ This law has the potential to criminalise public interest police whistleblowing.⁹⁸

It is worth noting that after whistleblower Edward Snowden attempted to claim asylum in a number of European countries, including Austria, Finland, Germany, Italy, Ireland, the Netherlands, Spain, the governments of all of these countries stated that he needed to be present in the country to claim asylum. Others went further. Poland's Foreign Minister Radosław Sikorski posted the following statement on Twitter: "I will not give a positive recommendation", while German Foreign Minister Guido Westerwelle said although Germany would review the asylum request "according to the law", he "could not imagine" that it would be approved.⁹⁹ The failure of the EU's member states to give shelter to Snowden when so much of his work was clearly in the public interest within the European Union shows the scale of the weakness to stand up for freedom of expression.

90 World Report Germany, RSF, <http://en.rsf.org/report-germany,87.html>

91 Reporters San Frontiers, 'Refusal to renew ZDF editor-in-chief's contract would threaten broadcasting independence' (27 November 2009) <http://en.rsf.org/germany-refusal-to-renew-zdf-editor-in-27-11-2009,35100.html> accessed on 3 December 2013.

92 German president urged to resign over threats to newspaper editor, The Guardian, <http://www.guardian.co.uk/world/2012/jan/03/german-president-threat-bild-editor> accessed on 3 December 2013.

93 Le Parisien, 'Affaire Bettencourt : «Sarko m'a tué», une féroce charge contre la «Sarkozie»' (31 August 2011) <http://www.leparisien.fr/affaire-bettencourt/affaire-bettencourt-sarko-m-a-tuer-une-feroce-charge-contre-la-sarkozie-31-08-2011-1586596.php> accessed on 3 December 2013.

94 CPJ, 'Attacks on the press in 2011' (February 2012), <http://cpj.org/2012/02/attacks-on-the-press-in-2011-france.php> accessed on 3 December 2013.

95 SEEMO, 'SEEMO concerned at the growing number of press freedom violations in South East Europe' (17 April 2013) <http://www.seemo.org/activities/pressfreedom/13/press1306.html> accessed on 3 December 2013.

96 Novinite, 'Bulgarians to Rally against Freedom of Speech Restrictions' (7 April 2013), http://www.novinite.com/view_news.php?id=149333 accessed on 3 December 2013.

97 Index on Censorship submission to the Leveson Inquiry, 'Freedom of the Press, Governance and Press Standards: Key Challenges for the Leveson Inquiry' (July 2012), <http://www.indexoncensorship.org/wp-content/uploads/2012/07/Index-on-Censorship-Leveson-Inquiry-Free-Press.pdf>; Henry McDonald, 'Irish journalists accuse police of 'Stasi-like' monitoring' (11 May 2012), <http://www.guardian.co.uk/media/2012/may/11/irish-journalists-police-monitoring> accessed on 3 December 2013.

98 There is an official whistleblowing mechanism instituted by the law, but it is not independent of the police.

99 The Guardian, 'Edward Snowden asylum: countries approached and their responses' (4 July 2013), <http://www.theguardian.com/world/2013/jul/02/edward-snowden-nsa-asylum-application-list-countries> accessed on 13 September 2013.

Deaths, threats and violence against journalists and media workers

No EU country features in Reporters Without Borders' 2013 list of deadliest countries for journalists.¹⁰⁰ But since 2010, three journalists have been killed within the European Union. In Bulgaria in January 2010, a gunman shot and killed Boris Nikolov Tsankov, a journalist who reported on the local mafia, as he walked down a crowded street. The gunman escaped on foot.¹⁰¹ In Greece, Sokratis Giolia, an investigative journalist, was shot dead outside his home in Athens prior to publishing the results of an investigation into corruption.¹⁰² In Latvia, media owner Grigorijs Nemcovs was the victim of an apparent contract killing, which Reporters Without Borders claims appeared to be carefully planned and executed.¹⁰³ Nemcovs was also a political activist and deputy mayor, and his newspaper, *Million*, was renowned for its investigative coverage of political and local government corruption and mismanagement.

While it is rare for journalists to be killed within the EU, the Council of Europe has drawn attention to the fact that violence against journalists does occur in EU countries, particularly in south eastern Europe, including in Greece, Latvia, Bulgaria and Romania.¹⁰⁴ The South East Europe Media Organisation (SEEMO) has raised concerns over police violence against journalists covering political protests in many parts of south eastern Europe, particularly in Romania and Greece.¹⁰⁵

Conclusion

Within the European Commission, there has been considerable analysis about what should be done when member states fail to abide by "European values", Commission President Barroso raised this in his State of the Union address in September 2012, explicitly calling for "a better developed set of instruments"¹⁰⁶ to deal with threats to these perceived values and the rights that accompany them. With threats to freedom of expression increasing, it is essential that this is taken up by the Commission sooner rather than later.

To date, most EU member states have failed to repeal criminal sanctions for defamation, with only Croatia,¹⁰⁷ Cyprus, Ireland and the UK¹⁰⁸ having done so. The parliamentary assembly of the Council of Europe called on states to repeal criminal sanctions for libel in 2007¹⁰⁹, since then little action has been taken by EU member states. There also remain significant issues in the field of privacy law and freedom of information across the EU.

While the European Commission has in the past tended to view its competencies in the field of media regulation as limited, due to the introduction of the Charter of Fundamental Rights into EU primary law, the Commission is looking at a possible enhancement of its role in this area.¹¹⁰

100 CPJ, 'Journalists killed in 2012', <http://www.cpj.org/killed/2012/> accessed on 3 December 2013.

101 B92.net, 'Bulgaria mafia chronicler killed' (6 January 2010), http://www.b92.net/eng/news/region-article.php?yyyy=2010&mm=01&dd=06&nav_id=64276 accessed on 3 December 2013.

102 BBC News, 'Journalist Sokratis Giolias gunned down in Greece' (19 July 2010), <http://www.bbc.co.uk/news/world-europe-10684185> accessed on 3 December 2013.

103 RSF, 'Newspaper owner gunned down in apparent contract killing' (18 April 2010), <http://en.rsf.org/lettonie-newspaper-owner-gunned-down-in-18-04-2010,37062.html> accessed on 3 December 2013.

104 William Horsley for rapporteur Mats Johansson, 'The State of Media Freedom in Europe', Committee on Culture, Science, Education and Media, Council of Europe (18 June 2012).

105 SEEMO Press Freedom Report 2012, <http://www.seemo.org/activities/pressfreedom/press12ii.html>

106 José Manuel Durão Barroso, President of the European Commission, 'State of the Union 2012 Address' (12 September 2012), http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm accessed on 9 September 2013.

107 OSCE Representative on Freedom of the Media, 'OSCE media watchdog praises Croatia's abolition of prison sentences for defamation' (29 June 2006), <http://www.osce.org/fom/47481> accessed on 10 September 2013.

108 Index on Censorship, 'UK government abolishes seditious libel and criminal defamation' (13 July 2009)

109 PACE Resolution 1577 (2007), 'Towards decriminalisation of defamation', <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm>

110 Mark Thompson, LSE Media Blog, 'Media Pluralism in Europe: Signs of Progress' (1 February 2013), <http://blogs.lse.ac.uk/medi>

With media plurality limited across Europe and in fact potentially threatened by the convergence of media across media both online and off (and the internet being the most concentrated media market), the Commission must take an early view on whether it wishes to intervene more fully in this field to uphold the values the EU has outlined.

Political threats against media workers are too commonplace and risks to whistleblowers have increased as demonstrated by the lack of support given by EU member states to whistleblower Edward Snowden. That the EU and its member states have so clearly failed one of the most significant whistleblowers of our era is indicative of the scale of the challenge to freedom of expression within the European Union.

Digital freedom

The EU's position on digital freedom is analysed in more detail in Index on Censorship's policy paper "Is the EU heading in the right direction on digital freedom?"¹¹¹ The paper points out that the EU still lacks a coherent overarching strategy and set of principles for promoting and defending freedom of expression in the digital sphere. The EU has made a number of positive contributions: it plays a positive part in the global debate on internet governance; the EU's No-Disconnect Strategy, its freedom of expression guidelines and its export controls on surveillance equipment have all been useful contributions to the digital freedom debate, offering practical measures to better protect freedom of expression. Comparatively, some of the EU's member states are amongst the world's best for protecting online freedom. The World Wide Web Foundation places Sweden at the top of its 2012 Index of internet growth, utility and impact, with the UK, Finland, Norway and Ireland also in the top 10. Freedom House ranks all EU member states as "free", and an EU member state, Estonia, ranks number one globally in the organisation's annual survey, "Freedom in the World". But these indices merely represent a snapshot of the situation and even those states ranked as free fail to fully uphold their freedom of expression obligations, online as well as offline.

As the recent revelations by whistleblower Edward Snowden have exposed, although EU member states may in public be committed to a free and open internet, in secret, national governments have been involved in a significant amount of surveillance that breaches international human rights norms, as well as these governments' own legal commitments. It is also the case that across the EU, other issues continue to chill freedom of expression, including the removal or takedown of legitimate content.

Surveillance

Recent revelations by former US National Security Agency (NSA) whistleblower Edward Snowden into the NSA's PRISM programme have also exposed that mass state surveillance by EU governments is practised within the EU, including in the UK and France.

Mass or blanket surveillance contravenes Article 8 (the right to respect for private and family life) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights. In its jurisprudence, the European Court of Human Rights has repeatedly stated that surveillance, if conducted without adequate judicial oversight and with no effective safeguards against abuse, will never be compatible with the European Convention.¹¹²

apolicyproject/2013/02/01/media-pluralism-in-europe-signs-of-progress/ accessed on 24 July 2013.

111 Index on Censorship, 'Is the EU heading in the right direction on digital freedom?' (June 2013), <http://www.indexoncensorship.org/2013/06/is-the-eu-heading-in-the-right-direction-on-digital-freedom/>

112 In *Liberty v. UK* (58243/00) the ECHR stated: "95. In its case-law on secret measures of surveillance, the Court has developed the following minimum safeguards that should be set out in statute law in order to avoid abuses of power: the nature of the offences

This state surveillance also breaches pledges EU member states have made as part of the EU's new cybersecurity strategy, which was agreed in February 2013 and addresses mass state surveillance. The Commission stated that cybersecurity is predominantly the responsibility of member states, an approach some have argued gives member states the green light for increased government surveillance. Because the strategy explicitly states that "increased global connectivity should not be accompanied by censorship or mass surveillance", member states were called upon to address their adherence to this principle at the European Council meeting on 24th October 2013.¹¹³ The Council was asked to address revelations that external government surveillance efforts, such as the US National Security Agency's Prism programme, undermining EU citizens' rights to privacy and free expression. While the Council did discuss surveillance, as yet there has been no common EU position on these issues.

At the same time, the EU has also played a role in laying the foundations for increased surveillance of EU citizens. In 2002, the EU e-Privacy Directive introduced the possibility for member states to pass laws mandating the retention of communications data for security purposes. In 2006, the EU amended the e-Privacy Directive by enacting the Data Retention Directive (Directive 2006/24/EC), which obliges member states to require communications providers to retain communications data for a period of between six months and two years, which could result in member states collecting a pool of data without specifying the reasons for such practice. A number of individual member states, including Germany, Romania and the Czech Republic, have consulted the European Convention on Human Rights and their constitutions and have found that the mass retention of individual data through the Data Retention Directive to be illegal.

While some EU member states are accused of colluding in mass population surveillance, others have some of the strongest protections anywhere globally to protect their citizens against surveillance. Two EU member states, Luxembourg and the Czech Republic, require that individuals who are placed under secret surveillance to be notified. Other EU member states have expanded their use of state surveillance, in particular Austria,¹¹⁴ the UK¹¹⁵ and Bulgaria. Citizens of Poland are subject to more phone tapping and surveillance than any other citizens in the European Union; the European Commission has claimed the police and secret services accessed as many as 1,300,000 phone bills in 2010 without any oversight either by the courts or the public prosecutor.¹¹⁶ **Internet governance**

At a global level the EU has argued for no top-down state control of internet governance. There are efforts by a number of states including Russia, China and Iran to increase state control of the internet through the International Telecommunication Union (ITU). The debate on global internet governance came to a head at the Dubai World Conference on International Telecommunications

which may give rise to an interception order; a definition of the categories of people liable to have their telephones tapped; a limit on the duration of telephone tapping; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which recordings may or must be erased or the tapes destroyed"; A. v. France (application no. 14838/89), 23.11.1993: found a violation of Article 8 after a recording was carried out without following a judicial procedure and which had not been ordered by an investigating judge; Drakšas v. Lithuania, 31.07.2012, found a violation of Article 13 (right to an effective remedy) on account of the absence of a judicial review of the applicant's surveillance after 17 September 2003.

113 Index on Censorship, 'Tell Europe's leaders to stop mass surveillance #dontspyonme' (July 2013), <http://www.indexoncensorship.org/2013/07/dontspyonme-tell-europes-leaders-to-stop-mass-surveillance/>

114 Privacy International, 'Austria: Chapter II. Surveillance policies', <https://www.privacyinternational.org/reports/austria/ii-surveillance-policies> accessed on 10 December 2013

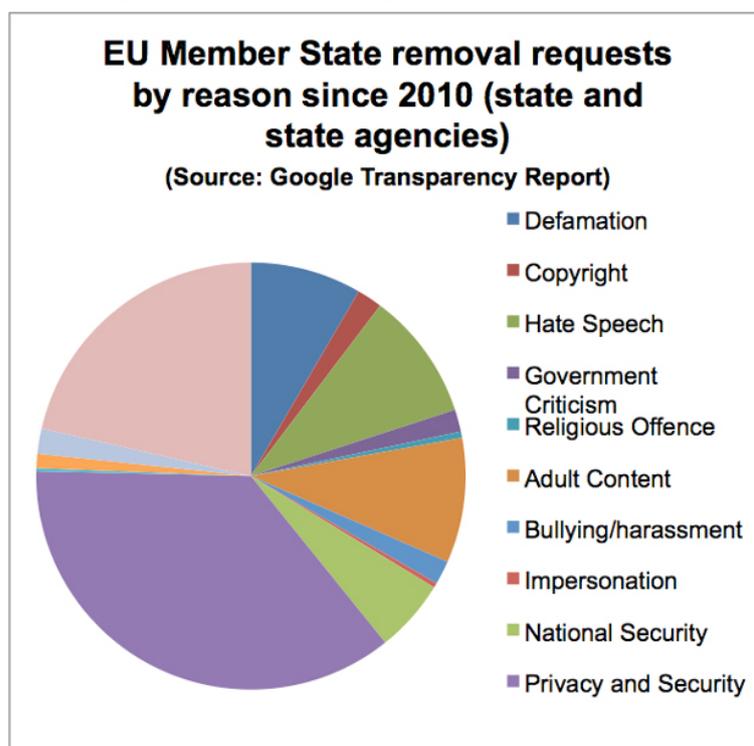
115 See RIPA, Index on Censorship submission to the Joint Committee on the draft Communications Data Bill, <http://www.scribd.com/doc/103686950/Comms-Data-Bill-Index-Submission-22-August-12>

116 Question from Marek Migalski MEP to the Commission (11 September 2012), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2012-008048+0+DOC+XML+V0//EN> accessed on 3 December 2013.

(WCIT) summit at the end of 2012 which brought together 193 member states. At the WCIT, a number of influential emerging democratic powers aligned with a top-down approach with increased state intervention in the governance of the internet. On the other side, EU member states, India and the US argued the internet should remain governed by an open and collaborative multistakeholder approach. The EU's influence could be seen through the common position adopted by the member states. The European Commission as a non-voting WCIT observer produced a common position for member states that opposed any new treaty on internet governance under the UN's auspices. The position ruled out any attempts to make the ITU recommendations binding and would only back technology neutral proposals - but made no mention of free expression. The absence of this right is of concern as other rights including privacy (which was mentioned) do not always align with free speech. After negotiations behind closed doors, all 27 EU member states and another 28 countries including the US abstained from signing the final treaty. That states with significant populations and rising influence in their regions did not back the EU and leaned towards more top-down control of the internet should be of significant concern for the EU.

Intermediate liability, takedown and filtering

European laws on intermediate liability, takedown and filtering are overly vague in defining what constitutes valid and legitimate takedown requests, which can lead to legal uncertainty for both web operators and users. Removal of content without a court order can be problematic as it places the content host in the position of judge and jury over content and inevitably leads to censorship of free expression by private actors. EU directorate DG MARKT¹¹⁷ is currently looking into the results of a public consultation into how takedown requests affect freedom of expression, among other issues. It is expected that the directorate will outline a directive or communication on the criteria takedown requests must meet and the evidence threshold required, while also clarifying how “expeditiously” intermediaries must act to avoid liability. A policy that clarifies companies' legal responsibilities when presented with takedown requests should help better protect online content from takedown where there is no legal basis for the complaint.



The EU must take steps to protect web operators from vexatious claims from individuals over content that is not illegal. Across the EU, the governments of member states are increasingly using takedown requests. Google has seen a doubling of requests from the governments of Germany, Hungary, Poland and Portugal from 2010-2012; a 45% increase from Belgium and double-digit growth in the Netherlands, Spain and the UK.¹¹⁸ Governments are taking content down for dubious reasons that may infringe Article 10 rights of the ECHR. In 2010, a number of takedown requests were made in response to “government criticism” and four in response to “religious offence”. A significant 8% of takedown requests were in response to defamation offences. With regard to defamation charges, it must be noted that the public interest is not protected equally across all EU countries (see Defamation above).

Although corporate takedown is more prevalent than state takedown, particularly in the number of individual URLs affected, the outcome of the DG MARKET consultation must be to address both vexatious state and corporate takedown requests. The new communication or directive must be clearer than the EU e-Commerce directive has been with respect to the responsibility of member states. While creating a legal framework that was intended to protect internet intermediaries, the EU e-Commerce directive has failed to be entirely effective in a number of high-profile cases. EU member states use filters to prevent the distribution of child pornography with questionable effectiveness.¹¹⁹ However, filters have not been used by states to block other content after a Court of Justice of the European Union ruling stated EU law did not allow states to require internet service providers to install filtering systems to prevent the illegal distribution of content.¹²⁰ The Court made it clear at the time that such filtering would require ISPs to monitor internet traffic, an infringement under EU law. This has granted European citizens strong protections against systematic web filtering on behalf of states. There continue to be legal attempts to force internet intermediaries to block content that is already in the public domain. In a recent case, brought by the Spanish Data Protection authority on behalf of a complainant, the authority demanded that the search engine Google remove results that pointed to an auction note for a repossessed home due to social security debts.¹²¹ The claimant insisted that referring to his past debts infringed on his right to privacy and asked for the search results to be removed. In June 2013, the Advocate General of the European Court of Justice decided Google did not need to comply to the request to block “legal and legitimate information that has entered the public domain” and that it is not required to remove information posted by third parties.¹²² Google has estimated that there are 180 cases similar to this one in Spain alone.¹²³ A final decision in the case is expected before the end of this year, which could have profound implications for intermediate liability.

Freedom of expression within the European Union: Conclusion

The EU and its member states have made a number of positive commitments to protect online freedom, including the EU’s positioning at WCIT, the freedom of expression guidelines and the

118 Google Transparency Report (2010 – 2013), <http://www.google.com/transparencyreport/userdatarequests/> accessed on 16 July 2013.

119 Joe McNamee, ‘Out of sight, out of mind’, Index on Censorship, <http://www.indexoncensorship.org/2010/03/child-pornography-eu-blockin/>

120 EDRI, ‘Press statement and FAQ: Scarlet/Sabam Ruling a vital victory for Internet freedoms’ (24 November 2011), http://www.edri.org/scarlet_sabam_win accessed on 10 December 2013

121 Index on Censorship, ‘Spain’s Google privacy case “an interference with freedom of expression”’ (June 2013), <http://www.indexoncensorship.org/2013/06/jaaskinen-search-engines-not-required-to-block-access-to-legitimate-information/> accessed on 11 September 2013.

122 Court of Justice of the European Union, ‘Press Release No 77/13, Advocate General’s Opinion in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González’ (25 June 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-06/cp130077en.pdf> accessed on 11 September 2013.

123 Google Europe Blog, ‘Judging freedom of expression at Europe’s highest court’ (26 February 2013), <http://googlepolicyeurope.blogspot.be/2013/02/judging-freedom-of-expression-at.html> accessed on 11 September 2013.

comprehensive overarching digital freedom strategy would help ensure coherent EU policies and priorities on freedom of expression and further strengthen the EU's influence on crucial debates around global internet governance and digital freedom. With the next two years of ITU negotiations crucial, it's important the EU takes this strategy forward urgently.



2 The EU and freedom of expression in the world

This section will analyse the ways in which the European Union promotes and defends freedom of expression outside its borders, from its near-neighbourhood to international institutions and the wider world.

Collectively, the European Union of 28 member states has an important role to play in the promotion of freedom of expression in the world. Firstly, as the world's largest economic trading block with 500 million people that accounts for about a quarter of total global economic output, it still has significant economic power. Secondly, it is one of the world's largest "values block" with a collective commitment to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and perhaps more significantly, the European Convention on Human Rights. The Convention is still one of the leading supranational human rights treaties, with the possibility of enforcement and redress. Finally, Europe accounts for two of the five seats on the UN Security Council (Britain and France), so has a crucial place in the global security framework. The EU itself has limited foreign policy and security powers (although these powers have been enhanced in recent years), leaving significant importance to the foreign policies of the member states. Where the EU acts with a common approach it has leverage to help promote and defend freedom of expression globally.

First, this section will explore the instruments and institutions the European Union has at its disposal to promote freedom of expression in the wider world. Then the section will explore the neighbourhood policies of the European Union and how these and enlargement have impacted upon freedom of expression. Then the section will outline how effective the European Union has been in protecting freedom of expression in the wider world and at the United Nations.

How the European Union supports freedom of expression abroad

The European Union has a number of instruments and institutions at its disposal to promote freedom of expression in the wider world, including its place as an observer at international fora, its bilateral and regional agreements, the European External Action Service (EEAS) and geographic policies and instruments including the European Neighbourhood Policy (ENP) and the European Neighbouring and Partnership Instrument (ENPI). The EU places human rights in its trade and aid agreements with third party countries and has over 30 stand-alone human rights dialogues.¹²⁵ The EU also provides financial support for freedom of expression through the European Development Fund (EDF), the Development Co-operation Instrument (DCI), the European Instrument for democracy and human rights (EIDHR) and the European Endowment for Democracy (EED). The EU now also has a Special Representative for Human Rights. Since 1999, the EU has published an annual report on human rights and democracy in the world. The latest report,¹²⁶ adopted in June 2012, contains a special section on freedom of expression, including freedom of expression and “new media”. It recalls the EU’s commitment to “fight for the respect of freedom of expression and to guarantee that pluralism of the media is respected” and emphasises the EU’s support to free expression on the internet.

The European Union has two mechanisms to financially support freedom of expression globally: the European Instrument for democracy and human rights (EIDHR) and the European Endowment for Democracy (EED). The later was specially created after the Arab Spring in order to resolve specific criticism of the EIDHR: that it didn’t support political parties, non-registered NGOs and trade unions¹²⁷ and could not react quickly¹²⁸ to events on the ground. The EED is funded by, but is autonomous from, the European Commission, with support from member states and Switzerland. The aims of the EED, to provide rapid and flexible funding for pro-democratic activists in authoritarian states and democratic transitions, is potentially a “paradigm shift” according to experts¹²⁹ that will have to overcome a number of challenges, in particular a hesitation towards funding political parties and the most active and confrontational of human rights activists. The EU also engages with the UN on human rights issues at the Human Rights Council (HRC) and in the 3rd Committee of the General Assembly. The EU, as an observer along with its member states, is one of the more active defenders of freedom of expression in the HRC. Promoting and protecting freedom of expression was one of the EU’s priorities¹³⁰ for the 67th Session of the UN General Assembly (September 2012-2013). The European Union was also instrumental in the adoption of a resolution on the “Safety of Journalists” (drafted by Austria) in September 2012. The European Union is most effective at the HRC where there is a clear consensus among member states within the Union. Where there is not, for instance on the issue of blasphemy laws, the Union has been less effective at promoting freedom of expression.

125 The European External Action Service, ‘The EU’s human rights dialogues’, http://eeas.europa.eu/human_rights/dialogues/index_en.htm accessed on 25 July 2013.

126 EU External Action Service, ‘Human rights and democracy in the world report on EU Action in 2011’ (2012), http://eeas.europa.eu/human_rights/docs/2011_hr_report_en.pdf accessed on 3 December 2013.

127 EIDHR, ‘Democracy Support Revisited’, <http://tiny.cc/i892ww>

128 The Sudden collapse of a near perfect world, by Stefani Weiss and Franziska Brantner: ‘The EU needs to change its thinking in Tunisia and elsewhere’, *EuropeanVoice.com*, <http://www.europeanvoice.com/article/2011/february/the-sudden-collapse-of-a-near-perfect-world/70319.aspx>

129 The Institute of International and European Affairs, ‘A New Approach to Democracy Promotion in Europe’s Neighbourhood’ (7 February 2013), <http://www.iiea.com/blogosphere/a-new-approach-to-democracy-promotion-in-europes-neighbourhood> accessed on 27 September 2013.

130 The Council of The European Union, ‘EU Priorities for the 67th Session of the General Assembly of the United Nations’ (23 July 2012), http://eeas.europa.eu/delegations/un_geneva/documents/eu_un_geneva/20120725_euprioritiesga_en.pdf accessed on 27 September 2013.

The EU and its neighbourhood

The EU has had mixed success in promoting freedom of expression in its near neighbourhood. Enlargement has clearly been one of the European Union's most effective foreign policy tools. Enlargement has had a substantial impact both on the candidate countries' transition to democracy and respect for human rights. With enlargement slowing, the leverage the EU has on its neighbourhood is under pressure. Alongside enlargement, the EU engages with a number of foreign policy strategies in its neighbourhood, including the Eastern Partnership and the partnership for democracy and shared prosperity with the southern Mediterranean. This section will look at the effectiveness of these policies and where the EU can have influence.

The EU and freedom of expression in its eastern neighbourhood

Europe's eastern neighbourhood is home to some of the least free places for freedom of expression. The collapse of the former Soviet Union and the enlargement of the European Union has significantly improved human rights in eastern Europe. There is a marked difference between the leverage the European Union has on countries where enlargement is a real prospect and the wider eastern neighbourhood, where it is not, in particular for Russia and Central Asia. In these countries, the EU's influence is more marginal. Enlargement has clearly had a substantial impact both on the candidate countries' transition to democracy and their respect for human rights because since the Treaty of Amsterdam, respect for human rights has been a condition of accession to the EU. In 1997, the Copenhagen criteria were outlined in priorities that became "accession partnerships" adopted by the EU and which mapped out the criteria for admission to the EU. They related in particular, to freedom of expression issues that needed to be rectified.¹³¹ With the enlargement process slowing since the "big bang" in 2004, and countries such as Ukraine and Moldova having no realistic prospect of membership regardless of their human rights record, the influence of the EU is waning in the wider eastern neighbourhood.

After enlargement, the Eastern Partnership is the primary foreign policy tool of the European Union in this region. Launched in 2009, the initiative derives from the EU's Neighbourhood Policy (ENP), which is specific about the importance of democracy, the rule of law and respect for human rights. In this region, the partnership covers Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.¹³² Freedom of expression has been raised consistently during human rights dialogues with these six states and in the accompanying Civil Society Forum.¹³³ The Civil Society Forum has also been useful in helping to coordinate the EU's efforts in supporting civil society in this region. Although it has never been the main aim of the Eastern Partnership to promote freedom of expression, it has had variable success in promoting this right with concrete but limited achievements in Belarus, the Ukraine, Georgia and Moldova¹³⁴; with a more ineffectual role being seen in Azerbaijan.

In recent years, since the increased input of the EEAS in the ENP, the policy has become more markedly political, with a greater emphasis on democratisation and human rights including freedom of expression after a slow start.¹³⁵ In particular, freedom of expression was raised as a focus for

¹³¹ Christophe Hillion, Swedish Institute for European Policy Studies, 'Enlarging the European Union and deepening its fundamental rights protection' (June 2013), http://www.sieps.se/sites/default/files/2013_11epa.pdf accessed on 26 July 2013.

¹³² EU External Action Service, 'Eastern Partnership', http://eeas.europa.eu/eastern/index_en.htm

¹³³ Eastern Partnership Civil Society Forum, 'Working Groups: Democracy and Human Rights', <http://www.eap-csf.eu/en/about-eap-csf/working-groups/wg1-democracy-human-rights/> accessed on 10 December 2013

¹³⁴ Lessons from the Colour Revolutions, Index on Censorship, <http://ioc.sagepub.com/content/42/1/80.full>

¹³⁵ EurActiv.com, 'EU's neighbourhood policy becoming more political, say experts' (2 April 2013),

<http://www.euractiv.com/europes-east/eu-divide-compete-neighbourhood-news-518802> accessed on 3 December 2013; The ECFR graded EU policy in the area of rule of law, democracy and human rights in the Eastern Neighbourhood a C, European Foreign Policy

the ENP after its review in 2010-2011. This is a welcome development, in marked contrast to the technical reports of previous years. This also echoes the increased political pressure from member states that have been more public in their condemnation of human rights violations, in particular regarding Belarus. Belarus is one Eastern Partnership country where the EU has exerted a limited amount of influence. The EU enhanced its pressure on the country after the post-presidential election clampdown beginning in December 2010, employing targeted sanctions and increasing support to civil society.¹³⁶ This has arguably helped secure the release of some of the political prisoners the regime detained. Yet the lack of a strong sense of strategy and unity within the Union has hampered this new pressure to deliver more concrete results.¹³⁷ Likewise, the EU's position on Ukraine has been set back by internal divisions,¹³⁸ even though the EU's current negotiations on the Association Agreement includes specific reference to freedom of expression.¹³⁹ In Azerbaijan, the EU's strategic oil and gas interests have blunted criticism of the country's poor freedom of expression record.¹⁴⁰ Azerbaijan holds over 89 political prisoners,¹⁴¹ significantly more than in Belarus, yet the EU's institutions, individual member states and European politicians have failed to be vocal about these detentions, or other freedom of expression violations.¹⁴² In the EU's wider neighbourhood outside the Eastern Partnership, the EU has taken a less strategic approach and accordingly has been less successful in either raising freedom of expression violations or helping to prevent them. The European Union's relationship with Russia has not been coherent on freedom of expression violations. While the institutions of the EU have criticised specific freedom of expression violations, such as the Pussy Riot sentencing¹⁴³, they were slow to criticise more sustained attacks on free speech such as the clampdown on civil society and the inspections of NGOs using the new Foreign Agents Law.¹⁴⁴ The progress report of EU-Russia Dialogue for Modernisation fails to mention any specific freedom of expression violations in Russia. The EU has also limited its financial involvement in supporting freedom of expression in Russia, unlike in other post-Soviet states.¹⁴⁵ The EU is not united on this criticism: individual European Union member states such as Sweden and the UK¹⁴⁶ are more sustained in their criticisms of Russia's free speech violations, whereas other member states such as Germany tend to be less critical. It is argued that Russia's powerful economic interests have facilitated a significant lobbying operation¹⁴⁷ including former politicians¹⁴⁸ that works to reduce criticism of Russia's freedom of expression violations.¹⁴⁹

Scorecard 2013, European Council on Foreign Affairs (ECFR), http://ecfr.eu/page/-/ECFR73_SCORECARD_2013_AW.pdf accessed on 3 December 2013.

136 Civil Society Stability for Belarus, <http://cssb.lt/en> accessed on 3 December 2013.

137 Andrei Yahorau, 'Europe's Belarus failure' (18 September 2012), <http://www.indexoncensorship.org/2012/09/belarus-europe-failure/>

138 P. 87, ECFR, *ibid.*

139 EU-Ukraine Association Agenda 2011, http://www.eeas.europa.eu/ukraine/docs/2011_eu-ukraine_association_agenda_update_en.pdf accessed on 3 December 2013.

140 Index on Censorship, 'Meanwhile in Azerbaijan', (2012) <http://indexoncensorship.org/meanwhileinAz/>

141 The report of special rapporteur Strasser to the Council of Europe Committee on Legal Affairs and Human Rights (2012) http://www.assembly.coe.int/Communication/pressajdoc22_2012.pdf

142 European Stability Initiative, 'Cavri Diplomacy: How Azerbaijan silenced the Council of Europe' (2012), http://www.esiweb.org/pdf/esi_document_id_131.pdf accessed on 3 December 2013.

143 Statement by EU High Representative Catherine Ashton on the sentencing of "Pussy Riot" punk band members in Russia, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/132192.pdf

144 New Europe, 'EU worries about foreign agent law' (29 April 2013), <http://www.neurope.eu/article/eu-worries-about-foreign-agent-law> accessed on 3 December 2013.

145 European Foreign Policy Scorecard 2013, European Council on Foreign Affairs (ECFR), http://ecfr.eu/page/-/ECFR73_SCORECARD_2013_AW.pdf

146 UK Foreign & Commonwealth Office, 'Human Rights and Democracy 2012' (2013), <http://www.hrdreport.fco.gov.uk/human-rights-in-countries-of-concern/russia/> accessed on 3 December 2013.

147 Moskale w Brukseli [Moscovites in Brussels], Wprost <http://www.wprost.pl/ar/183946/Moskale-w-Brukseli/?l=1407>, available in English at http://robertamsterdam.com/2010/01/the_russian_lobbyist_invasion_of_brussels/

148 Euro Dialogue, 'German lobbyists work for gas pipelines' <http://eurodialogue.org/German-lobbyists-work-for-gas-pipelines> accessed on 3 December 2013.

149 Written evidence submitted by Index on Censorship to the House of Commons, Political and Constitutional Reform Committee (12 July 2012), <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpolcon/153/153vw12.htm>

In this region, the European Union's protection of freedom of expression is weakest in Central Asia. While the EU has human rights dialogues with Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, it has not acted strategically to protect freedom of expression in these countries. The EU dramatically reduced its leverage in Uzbekistan in 2009 by relaxing arms sanctions with little in return from the Uzbek authorities, who continue to fail to abide by international human rights standards. Arbitrary arrests, beatings and torture at the hands of the security services, as well as unfair trials of the regime's critics are all commonplace. The European Parliament's special rapporteur report of November 2012¹⁵⁰, took a tough stance on human rights in Kazakhstan, making partnership conditional on respect for Article 10 rights. But, this was undermined by High Representative Baroness Ashton's visit to the country in November 2012, where she failed to raise human rights violations at all.

This lack of willingness to broach freedom of expression issues continued during Baroness Ashton's first official visit to four of the five Central Asian republics: Kyrgyzstan, Uzbekistan, Tajikistan and Kazakhstan. In Kyrgyzstan she additionally attended an EU-Central Asia ministerial meeting, where the Turkmen government (one of the top five most restrictive countries in the world for freedom of expression) was represented. Baroness Ashton's lack of vocal support for human rights was condemned by local NGOs and international watchdogs.¹⁵¹

The EU and freedom of expression in its southern neighbourhood

In the aftermath of the Arab Spring, the EU shifted its neighbourhood policy in the southern neighbourhood. In response to the revolutions and social movements in the region, the EU shifted the focus of its neighbourhood policy from economic development towards human rights. On 8 May 2011, the EU High Representative and the European Commission issued a joint communication proposing "A partnership for democracy and shared prosperity with the southern Mediterranean".¹⁵² The EU now emphasises the "three Ms": money, market access and mobility, with the first "M" addressing the EU's commitment to financially support transition to democracy and civil society.¹⁵³ The strategy also heralded the creation of the Civil Society Facility for the neighbourhood (covering both the southern and eastern neighbourhoods), with an overall budget of €26.4 million for 2011 to strengthen civil society. In parallel, the European Instrument for Democracy and Human Rights (EIDHR) deployed a number of operations in the region to protect and promote freedom of expression, often without the consent of the host country.

The apparent efforts to promote freedom of expression in the southern neighbourhood after the Arab Spring are in stark contrast to the multilateral partnerships that the EU actually established, often with the now overthrown dictatorships. The Euro-Mediterranean Partnership (EUROMED), also known as the Union for the Mediterranean (UfM) and formerly known as the Barcelona Process, was re-launched in 2008 as a multilateral partnership between the EU member states and 15 Mediterranean partner countries in the EU's southern neighbourhood. Of the UfM's six key initiatives launched prior to the Arab Spring, none related to the promotion of human rights.¹⁵⁴ EU member states that border the Mediterranean Sea, in particular Italy, Spain and France, empha-

150 Report of the EU special rapporteur to Uzbekistan (November 2012), http://www.socialistgroup.eu/gpes/public/detail.htm?id=137582&request_locale=EN§ion=NER&category=NEWS accessed on 29 July 2013.

151 EU High Representative fails to publicly denounce rights violations in Central Asia, Civic Solidarity Platform <http://civicsolidarity.org/article/602/eu-high-representative-fails-publicly-denounce-rights-violations-central-asia> accessed on 29 July 2013.

152 High Representative of the Union for Foreign Affairs and Security Policy, 'A partnership for democracy and shared prosperity with the Southern Mediterranean' (8 March 2011), http://eeas.europa.eu/euromed/docs/com2011_200_en.pdf accessed on 29 July 2013.

153 High Representative of the Union for Foreign Affairs and Security Policy, 'A partnership for democracy and shared prosperity with the Southern Mediterranean' (8 March 2011), http://eeas.europa.eu/euromed/docs/com2011_200_en.pdf accessed on 29 July 2013.

154 Euro-Mediterranean Partnership (European External Action Service Regional policies, EUROMED, http://www.eeas.europa.eu/euromed/index_en.htm accessed on 29 July 2013.

sised cooperation on migration, energy supplies and help with counter-terrorism, while adopting a relatively passive approach toward democracy and human rights.¹⁵⁵

Critics contend the UfM was overly concerned with regional security and economic partnership at the expense of human rights, including the right to freedom of expression.¹⁵⁶ For example, in spring 2010, the EU began negotiations with Tunisia on advanced status within the European Neighbourhood Policy, with clear economic benefits for the country, even though, at the same time, the Ben Ali regime was clamping down on freedom of expression. Ben Ali's government even introduced a draconian NGO law during the period of the advanced status talks, in an attempt to prevent Tunisian activists from lobbying the EU to be tougher on human rights issues.¹⁵⁷ As a result, even with the new "three Ms" strategy, the EU and its member states suffer from a legacy credibility problem in the region and are often seen as former allies of repressive regimes.¹⁵⁸

The EU has continued to lack unity on the use of conditionality to enhance political and human rights reform. Germany, Finland and the Netherlands have generally been more supportive of this reform, whereas Italy and Portugal are less keen on penalising countries for failing to introduce reform. According to a survey of over 700 experts initiated by the European Commission, both the UfM and the EU have failed to deliver the expectations of key regional actors. Ninety-three per cent of those interviewed called on the EU to have a greater role in the region. The survey indicated that Turkey was perceived as the most active country in the region on the promotion of human rights, ahead of the US, followed by all EU countries combined.¹⁵⁹

In its near neighbourhood, the EU has had mixed levels of success in promoting freedom of expression. Enlargement continues to be the most effective tool at the EU's disposal in incentivising countries to improve their domestic situation for freedom of expression. With enlargement slowing, this leverage may diminish and other levels have become important. Therefore, it is arguable that the Eastern Partnership¹⁶⁰ and southern neighbourhood policy are test cases for how effective the EU can be beyond enlargement. Yet, with key regional actors in both the eastern and southern neighbourhoods all too aware of the EU's failings, and with expectations high as to what the EU can achieve, ensuring these policies are strategic and sustained in their demands for freedom of expression is essential.

The European Union in the wider world

Beyond its near neighbourhood, the EU also works to promote freedom of expression in the wider world. To promote freedom of expression and other human rights, the EU has 30 ongoing human rights dialogues with supranational bodies, but also large economic powers such as China. This section will look more closely at how the EU fares at promoting freedom of expression in the wider world, looking at its efforts in China more closely. It will also look at the human rights dialogues and

¹⁵⁵ Ibid.

¹⁵⁶ Instituto Europeo del Mediterraneo, 'The European Union and the Arab World: from the Rome Treaty to the Arab Spring' (2013), <http://www.iemed.org/publicacions-es/historic-de-publicacions/papersiemed-euromesco/the-european-union-and-the-arab-world-from-the-rome-treaty-to-the-arab-spring> accessed on 29 July 2013.

¹⁵⁷ Ibid; IFEX - Tunisia Monitoring Group Contribution to the Universal Periodic Review Mechanism - 13th Session of the Working Group of the Universal Periodic Review (UPR) (21st May - 1st June 2012), (18 November 2011), http://lib.ohchr.org/HRBodies/UPR/Documents/session13/TN/IFEX_TMG_UPR_TUN_S13_2012_InternationalFreedomofExpressionExchangeTunisiaMonitoringGroup.pdf accessed on 29 July 2013.

¹⁵⁸ European Solidarity Towards Equal Participation of People, 'EU criticised for not taking support to Arab countries serious enough' http://www.eurostep.org/wcm/index.php?option=com_content&view=article&id=1356&Itemid=223 accessed on 11 September 2013.

¹⁵⁹ ANSAMed, Euromed: Study reports UfM failure of action in Arab Spring (18 June 2012), http://ansamed.ansa.it/ansamed/en/news/nations/portugal/2012/06/18/Euromed-Study-reports-UfM-failure-action-Arab-Spring_7057029.html accessed on 29 July 2013

¹⁶⁰ Jan Techau, Carnegie Europe, 'Why the Eastern Partnership Is Crucial for the EU and the West' (10 September 2013), <http://carnegieeurope.eu/strategieurope/?fa=52913> accessed on 11 September 2013.

the forthcoming External Action Service freedom of expression guidelines, as well as at the EU at the UN.

The EU and freedom of expression in China

The focus of the EU's relationship with China has been primarily on economic development and trade cooperation. Within China some commentators believe that the tough public noises made by the institutions of the EU to the Chinese government raising concerns over human rights violations are a cynical ploy so that EU nations can continue to put financial interests first as they invest and develop trade with the country.¹⁶¹ It is certainly the case that the member states place different levels of importance on human rights in their bilateral relationships with China than they do in their relations with Italy, Portugal, Romania and Latvia. With China, member states are often slow to push the importance of human rights in their dialogue with the country.¹⁶² The institutions of the European Union, on the other hand, have formalised a human rights dialogue with China, albeit with little in the way of tangible results.

The EU has a Strategic Partnership with China. This partnership includes a political dialogue on human rights and freedom of the media on a reciprocal basis.¹⁶³ It is difficult to see how effective this dialogue is and whether in its present form it should continue. The EU-China human rights dialogue, now 14 years old, has delivered no tangible results.¹⁶⁴ The EU-China Country Strategic Paper (CSP) 2007-2013 on the European Commission's strategy, budget and priorities for spending aid in China only refers broadly to "human rights". Neither human rights nor access to freedom of expression are EU priorities in the latest Multiannual Indicative Programme and no money is allocated to programmes to promote freedom of expression in China. The CSP also contains concerning statements such as the following:

"Despite these restrictions [to human rights], most people in China now enjoy greater freedom than at any other time in the past century, and their opportunities in society have increased in many ways."¹⁶⁵

Even though the dialogues have not been effective, the institutions of the EU have become more vocal on human rights violations in China¹⁶⁶ in recent years. For instance, it included human rights defenders, including Ai Weiwei, at the EU Nobel Prize event in Beijing. The Chinese foreign ministry responded by throwing an early New Year's banquet the same evening to reduce the number of attendees to the EU event. When Ai Weiwei was arrested in 2011, the High Representative for Foreign Affairs Catherine Ashton issued a statement in which she expressed her concerns at the deterioration of the human rights situation in China and called for the unconditional release of all political prisoners detained for exercising their right to freedom of expression.¹⁶⁷ The European Parliament has also recently been vocal in supporting human rights in China. In December 2012, it adopted a resolution¹⁶⁸ in which MEPs denounced the repression of "the exercise of the rights

161 Wang Yiwei, 'Time to embrace a shared vision' (25 July 2013), http://usa.chinadaily.com.cn/opinion/2013-07/25/content_16827550.htm accessed on 25 July 2013.

162 ECFR, *ibid.*

163 It covers both press freedom for the Chinese media in Europe and also press freedom for European media in China.

164 Human Rights Watch, 'China: EU Rights Talks Sliding Toward Irrelevance' (25 May 2012), <http://www.hrw.org/news/2012/05/25/china-eu-rights-talks-sliding-toward-irrelevance> accessed on 29 July 2013.

165 China Strategy Paper 2007-2013, Annexes, 'the political situation', p. 11

166 European Foreign Policy Scorecard 2013, European Council on Foreign Affairs (ECFR), http://ecfr.eu/page/-/ECFR73_SCORECARD_2013_AW.pdf

167 "I urge China to release all of those who have been detained for exercising their universally recognised right to freedom of expression."

168 European Parliament motion, 'EU-China Relations' (20 December 2012), <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2012-0434&language=EN> accessed on 4 December 2013

to freedom of expression, association and assembly, press freedom and the right to join a trade union” in China. They criticised new laws that facilitate “the control and censorship of the internet by Chinese authorities”, concluding that “there is therefore no longer any real limit on censorship or persecution”. Broadly, within human rights groups there are concerns that the situation regarding human rights in China is less on the agenda at international bodies such as the Human Rights Council¹⁶⁹ than it should be for a country with nearly 20% of the world’s population, feeding a perception that China seems “untouchable”. In a report on China and the International Human Rights System¹⁷⁰, Chatham House quotes a senior European diplomat in Geneva, who argues “no one would dare” table a resolution on China at the HRC with another diplomat, adding the Chinese government has “managed to dissuade states from action – now people don’t even raise it”. A small number of diplomats have expressed the view that more should be done to increase the focus on China in the Council, especially given the perceived ineffectiveness of the bilateral human rights dialogues. While EU member states have shied away from direct condemnation of China, they have raised freedom of expression abuses during HRC General Debates.¹⁷¹

The Common Foreign and Security Policy and human rights dialogues

The EU’s Common Foreign and Security Policy (CFSP) is the agreed foreign policy of the European Union. The Maastricht Treaty of 1993 allowed the EU to develop this policy, which is mandated through Article 21 of the Treaty of the European Union to protect the security of the EU, promote peace, international security and co-operation and to consolidate democracy, the rule of law and respect for human rights and fundamental freedom. Unlike most EU policies, the CFSP is subject to unanimous consensus, with majority voting only applying to the implementation of policies already agreed by all member states. As member states still value their own independent foreign policies, the CFSP remains relatively weak, and so a policy that effectively and unanimously protects and promotes rights is at best still a work in progress. The policies that are agreed as part of the Common Foreign and Security Policy therefore be useful in protecting and defending human rights if implemented with support. There are two key parts of the CFSP strategy to promote freedom of expression, the External Action Service guidelines on freedom of expression and the human rights dialogues. The latter has been of variable effectiveness, and so civil society has higher hopes for the effectiveness of the former.

The External Action Service freedom of expression guidelines

As part of its 2012 Action Plan on Human Rights and Democracy, the EU is working on new guidelines for online and offline freedom of expression, due by the end of 2013. These guidelines could provide the basis for more active external policies and perhaps encourage a more strategic approach to the promotion of human rights in light of the criticism made of the human rights dialogues.

The guidelines will be of particular use when the EU makes human rights impact assessments of third countries and in determining conditionality on trade and aid with non-EU states. A draft of the guidelines has been published, but as these guidelines will be a Common Foreign and Security Policy document, there will be no full and open consultation for civil society to comment on the draft. This is unfortunate and somewhat ironic given the guidelines’ focus on free expression. The Council should open this process to wider debate and discussion.

169 Interview with European diplomat, February 2013.

170 China and the International Human Rights System, Sonya Sceats with Shaun Breslin, October 2012, Chatham House, http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/r1012_sceatsbreslin.pdf

171 UN Human Rights Council, 20th Session (28 June – 6 July) Item 4, Statement on behalf of the European Union, http://eeas.europa.eu/delegations/un_geneva/documents/eu_statements/human_right/20120628_item4.pdf

The draft guidelines place too much emphasis on the rights of the media and not enough emphasis on the role of ordinary citizens and their ability to exercise the right to free speech. It is important the guidelines deal with a number of pressing international threats to freedom of expression, including state surveillance, the impact of criminal defamation, restrictions on the registration of associations and public protest and impunity against human right defenders.¹⁷² Although externally facing, the freedom of expression guidelines may also be useful in indirectly establishing benchmarks for internal EU policies. It would clearly undermine the impact of the guidelines on third parties if the domestic policies of EU member states contradict the EU's external guidelines.

Human rights dialogues

Another one of the key processes for the EU to raise concerns over states' infringement of the right to freedom of expression as part of the CFSP are the human rights dialogues. The guidelines on the dialogues make explicit reference to the promotion of freedom of expression.¹⁷³ The EU runs 30 human rights dialogues across the globe, with the key dialogues taking place in China (as above), Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, Georgia and Belarus. It also has a dialogues with the African Union, all enlargement candidate countries (Croatia, the former Yugoslav republic of Macedonia and Turkey), as well as consultations with Canada, Japan, New Zealand, the United States and Russia. The dialogue with Iran was suspended in 2006. Beyond this, there are also "local dialogues" at a lower level, with the Heads of EU missions, with Cambodia, Bangladesh, Egypt, India, Israel, Jordan, Laos, Lebanon, Morocco, Pakistan, the Palestinian Authority, Sri Lanka, Tunisia and Vietnam. In November 2008, the Council decided to initiate and enhance the EU human rights dialogues with a number of Latin American countries.¹⁷⁴

It is argued that because too many of the dialogues are held behind closed doors, with little civil society participation with only low-level EU officials, it has allowed the dialogues to lose their importance as a tool.¹⁷⁵ Others contend that the dialogues allow the leaders of EU member states and Commissioners to silo human rights solely into the dialogues, giving them the opportunity to engage with authoritarian regimes on trade without raising specific human rights objections.¹⁷⁶

While in China and Central Asia the EU's human rights dialogues have had little impact, elsewhere the dialogues are more welcome. The EU and Brazil established a Strategic Partnership in 2007. Within this framework, a Joint Action Plan¹⁷⁷ (JAP) covering the period 2012-2014 was endorsed by the EU and Brazil, in which they both committed to "promoting human rights and democracy and upholding international justice". To this end, Brazil and the EU hold regular human rights consultations that assess the main challenges concerning respect for human rights, democratic principles and the rule of law; advance human rights and democracy policy priorities and identify and coordinate policy positions on relevant issues in international fora. While at present, freedom of expression has not been prioritised as a key human rights challenge in this dialogue, the dialogues are seen by both partners as of mutual benefit.¹⁷⁸ It is notable that in the EU-Brazil dialogue both

172 Index on Censorship, 'Free expression guidelines a crucial opportunity for EU' (June 2013), <http://www.indexoncensorship.org/2013/06/free-expression-guidelines-a-crucial-opportunity-for-eu/>

173 'EU guidelines on human rights dialogues with third countries – Update' (2001), <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf> accessed on 29 July 2013.

174 The European Union External Action Service, 'The EU's human rights dialogues - How does it work?', http://eeas.europa.eu/human_rights/dialogues/how/index_en.htm accessed on 29 July 2013

175 Edward McMillan-Scott MEP, EuObserver, 'EU human rights strategy: one year on' (27 June 2013), <http://euobserver.com/opinion/120657> accessed on 29 July 2013.

176 Human Rights Watch, 'Central Asia: Five Years of EU Engagement' (21 June 2012), <http://www.hrw.org/news/2012/06/20/central-asia-five-years-eu-engagement> accessed on 29 July 2013.

177 Council of the European Union, V European Union - Brazil Summit Joint Statement (4 October 2011), http://eeas.europa.eu/brazil/docs/2011_eu-brazil_summit_joint_statement_en.pdf on 4 December 2013

178 FRIDE, 'Brazil and the EU: partnering on security and human rights?' (April 2013), http://www.fride.org/download/PB_153_Bra-

partners come to the dialogues with different human rights concerns, but as democracies. With criticism of the effectiveness and openness of the dialogues, the EU should look again at how the dialogues fit into the overall strategy of the Union and its member states in the promotion of human rights with third countries and assess whether the dialogues can be improved.

The EU and freedom of expression in the world: Conclusion

Where the EU acts with a common approach among the member states, it has significant leverage to help promote and defend freedom of expression globally. To develop a more common approach, since the Lisbon Treaty, the EU has enhanced its set of policies, instruments and institutions to promote human rights externally, with new resources to do so. Enlargement has proved the most effective tool to promote freedom of expression with, on the whole, significant improvements in the adherence to the principles of freedom of expression in countries that have joined the EU or where enlargement is a real prospect. That this respect for human rights is a condition of accession to the EU shows that conditionality can be effective. Whereas the eastern neighbourhood has benefitted from the real prospect of accession (for some countries), in the southern neighbourhood, the EU has failed to promote freedom of expression by placing security interests first and also by failing to react quickly enough to the transitions in the southern neighbourhood following the events of the Arab Spring. The new strategy for this region is welcome and may better protect freedom of expression, but with Egypt in crisis, the EU may have acted too late. The EU must assess the effectiveness of some of its foreign policy instruments, in particular the dialogues for particular countries such as China.

The freedom of expression guidelines provide an excellent opportunity to reassess the criteria for how the EU engages with third party countries. Strong freedom of expression guidelines will allow the EU to better benchmark the effectiveness of its human rights dialogues. The guidelines will also reemphasise the importance of the EU, ensuring that the right to freedom of expression is protected internally within the EU and its member states. Otherwise, the ability of the EU to influence external partners will be limited.



Recommendations and conclusions

Headline recommendations

- After recent revelations about mass state surveillance the EU must develop a roadmap that puts in place strong safeguards to ensure narrow targeted surveillance with oversight not mass population surveillance and must also recommit to protect whistle-blowers
- The European Commission needs to put in place controls so that EU directives cannot be used for the retention of data that makes mass population surveillance feasible
- The EU has expanded its powers to deal with human rights violations, but is reluctant to use these powers even during a crisis within a member state. The EU must establish clear red lines where it will act collectively to protect freedom of expression in a member state
- Defamation should be decriminalised across the EU
- The EU must not act to encourage the statutory regulation of the print media but instead promote tough independent regulation
- Politicians from across the EU must stop directly interfering in the workings of the independent media
- The EU suffers from a serious credibility gap in its near neighbourhood - the realpolitik of the past that neglected human rights must be replaced with a coherent, unified Union position on how to promote human rights.

Recommendations

- The EU has expanded its powers to deal with human rights violations, but is reluctant to use these powers even during a crisis within a member state. The EU must establish clear red lines where it will act collectively to protect freedom of expression in a member state
- The EU should cut funding for member states that cross the red lines and breach their human rights commitments

Libel, privacy and insult

- Defamation should be decriminalised in line with the recommendations of the Council of Europe parliamentary assembly, and the UN and OSCE's special rapporteurs on freedom of expression
- Insult laws that criminalise insult to national symbols should be repealed

Freedom of information

- To better protect freedom of information, all EU member states should sign up to the Council of Europe Convention on Access to Official Documents
- Not all EU institutions, offices, bodies and agencies are acting on their freedom of information commitments. More must be done by the Commission to protect freedom of information

Media freedom and plurality

- The EU must revisit its competencies in the area of media regulation in order to prevent the most egregious breaches of the right to freedom of expression in particular the situations that arose in Italy and Hungary
- The EU must argue against statutory regulation of the print media and argue for independent self-regulation where media bandwidth is no longer limited by spectrum and other considerations
- Member states must not allow political interference or considerations of "political balance" into the workings of the media, where this happens the EU should be considered competent to act to protect media freedom and pluralism at a state level
- The EU is not doing enough to protect whistleblowers. National states must do more to protect journalists from threats of violence and intimidation

Digital

- The Commission must prepare a roadmap for collective action against mass state surveillance
- The EU is right to argue against top-down state control over internet governance it must find more natural allies for this position globally
- The Commission should proceed with a Directive that sets out the criteria takedown requests must meet and outline a process that protects anonymous whistle-blowers and intermediaries from vexatious claims

The EU and freedom of expression in the world

- The EU suffers from a credibility issue in the southern neighbourhood. To repair its standing in the wider world, the EU and its member states must not downgrade the importance of human rights in any bilateral or multilateral relationship
- The EU's EEAS Freedom of Expression guidelines are welcome. To be effective, they need to focus on the right to freedom of expression for ordinary citizens and not just media actors
- The guidelines need to become the focus for negotiations with external countries, rather than the under-achieving human rights dialogues
- With criticism of the effectiveness of the human rights dialogues, the EU should look again at how the dialogues fit into the overall strategy of the Union and its member states

Conclusion

The European Union contains some of the world's strongest defenders of freedom of expression, but also a significant number of member states who fail to meet their European and international commitments. To deal with this, in recent years, the European Union's member states have made new commitments to better protect freedom of expression. The new competency of the European Court of Justice to uphold the values enshrined in the European Convention of Human Rights will provide a welcome alternative forum to the increasingly deluged European Court of Human Rights. This could have significant implications for freedom of expression within the EU. Internally within the EU there is still much that could be done to improve freedom of expression. It is welcome that the EU and its member states have made a number of positive commitments to protect online freedom, with new action on vexatious takedown notices and coordinated action to protect the multi-stakeholder model of internet governance. Increasing Commission concern over media plurality may also be positive in the future. Yet there are a number of areas where the EU must do more.

The decriminalisation of defamation across Europe should be a focal point for European action in line with the Council of Europe's recommendations. National insult laws should be repealed. The Commission should not intervene to increase its powers over national media regulators, but should act where it has clear competencies, in particular to prevent media monopolies and to help deal with conflict of interests between politicians and state broadcasters. Most importantly, discussions of mass population surveillance at the European Council in October must be followed by a roadmap outlining how the EU will collectively take action on this issue. Without internal reform to strengthen protections for freedom of expression, the EU will not enjoy the leverage it should to promote freedom of expression externally to partner countries. While the External Action Service freedom of expression guidelines are welcome, they must be impressed upon member countries as a benchmark for reform.

Externally, the EU has failed to deliver on the significant leverage it could have as the world's largest trading block. Where the EU has acted in concert, with clear aims and objectives for partner countries, such as during the process of enlargement, it has had a big impact on improving and protecting freedom of expression. Elsewhere, the EU has fallen short, particularly in the southern neighbourhood and in its relationship with China, where the EU has continued human rights dialogues that have failed to be effective.

New commitments and new instruments post-Lisbon may better protect freedom of expression in the EU and externally. Yet, as the Snowden revelations show, the EU and its member states must do significantly more to deliver upon the commitments that have been agreed.

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