Public consultation – 2016 Annual Colloquium on Fundamental Rights on 'Media Pluralism and Democracy'

This response was prepared by Dr. Éva Simon, Advocacy consultant to the European Liberties Platform[·]

5. In the context of media freedom and pluralism, what should be the role of the State, if any, in the regulation of media? What should be the role of self-regulation?

Media freedom and media pluralism are closely related. In order to have free media "the press has to be independent and pluralistic: independent of governmental, political or economic control or of control of materials essential for its production and dissemination."[1] The state is required to 'respect' the right to freedom of expression, which includes freedom of the media. The right imposes both negative and positive obligations on the state. The negative obligation is to refrain from interfering with freedom of expression and the positive obligation is to ensure freedom of the media with certain limits.

Media pluralism denotes a situation where the public has access to different sources of information and opinions, and relies on the state to have certain positive roles to facilitate an appropriate market environment. There are two dimensions to media pluralism: external and internal. External pluralism (diversity of sources and of distribution) means that no single media player has an overwhelming influence over the media landscape and therefore overwhelming influence on political debates. Internal pluralism, on the other hand, means that certain media services shall offer different points of view and different opinions. External pluralism requires the state to regulate competition and ownership, while internal pluralism requires the state to regulate, or media market players to self-regulate, content while at the same time respecting media freedom.

Although content regulation is needed to produce internal pluralism, heavy content regulation can cause unnecessary interference with free speech. According to the OECD, "[m]any undue limitations are intended to 'help' enhance ethics and quality, or 'balance' freedom of the press against other important values, like state security, social peace, or personal rights."[2] An example of non-censoring content regulation is the requirement that a certain percentage of European works be carried by audiovisual media services. This requirement puts a serious burden on commercial and community linear services as well as on-demand services and, because of this, has a negative impact on the freedom of the media. That is, this effort to help European industry and serve European values results in repressive content regulation. Any

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[·] The author thanks the partners of the European Liberties Platform for their comments and feedback. The final product does not necessarily represent the position of all partners of the ELP.
[1] UNESCO, 'Press Freedom and Development', (2008), available on: http://unesdoc.unesco.org/images/0016/001618/161825e.pdf.
[2] OECD, 'The Media Self-regulation Guidebook', (2008), available on: http://www.osce.org/fom/31497?download=true.

content requirement has to undergo close investigation to avoid undue interference. The requirement for media providers to include a certain percentage of European works is justifiable for Public Service Media but not for community or commercial media.

Accordingly, the author is of the view that regulation of media content should be strictly limited. General limits on free speech are applicable to all members of the audiovisual sector. However more specific content requirements such as measures to promote internal pluralism, requirements for providers to carry a certain percentage of European works and limits on advertisement are justified only in relation to Public Service Media (PSM). This is because PSM uses public money to pursue public service objectives; namely "to reflect the plurality of voices and genres in entertainment, sports, culture and information. The objective is to reflect the cultural diversity of a country. (…) The importance of sharing and expressing a plurality of views and ideas is to give voice to competing views."[3]

With regard to commercial media services, the state's role should be to ensure external market pluralism. External pluralism ensures competition between media content suppliers, and this in turn ensures that the public has access to a wide variety of sources of information and opinions. However, the state should not aim to ensure internal pluralism with regard to commercial and community media services, because this would result in interfering with the content provided by commercial and community media. This would amount to unnecessary legal interference that fails to respect media freedom.

Recent market developments show that both vertical media integration and horizontal integration can have serious negative effects on media pluralism. Vertical concentration is eliminating independent market players because different phases of production and distribution are being integrated into a smaller number of organisations. Horizontal concentration is reducing the number of media providers in given media sectors (e.g. print, online on-demand). The reduction in players offering services in the media market is dramatically decreasing the availability and variety of content and services.[4]

The role of the State

One of the objectives of rule of law and legal systems is to provide stability and certainty for the benefit of enterprises, regulators and, ultimately, the public. There are two possible methods of regulation: legislators either try to regulate expected conditions in advance, through *ex ante* regulation, or wait for particular processes to develop and regulate them afterwards, through *ex post* regulation. Competition law is a typical *ex post* regulatory tool. In the case of the media, especially areas that are

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[3] European Broadcasting Union, 'Public Service Values', (2014), available on: https://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-Public_Service_Values.pdf.

[4] However, even diverse media content will not automatically lead to diverse media consumption. OFCOM, the British communications regulator rejected this notion because the mere existence of certain content does not automatically mean that content is consumed and/or has any influence on the consumer. Accordingly, the state should invest in secondary measures such as media literacy to influence media consumption.

deeply affected by rapid evolution in technology, *ex ante* regulation can have a repressive impact on technological development and innovation.

Ex ante regulation is needed when competition law itself is insufficient to address market failures. A recent example of this kind of intervention can be seen in the European Commission's recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation of telecoms markets in 2014. The danger of *ex ante* regulation that is not based on adequate knowledge of the market being regulated is illustrated by the Audiovisual Media Services Directive (AVMSD), which regulated on-demand services without proper market analysis.[5] The AVMSD opened the opportunity for repressive member states (e.g. Hungary) to overregulate online press by applying the principles of AVMSD to on-demand services. The regulation of forms of media subject to technological development requires more patience on behalf of legislators.

It is generally accepted that the principal reason justifying state intervention in the media market is to ensure the equitable use of scarce resources. In particular, in the past the number of radio and television channels was traditionally limited by the finite number of transmission frequencies available.[6] This doctrine originated in the Red Lion decision in the United States,[7] which was seen as an exception to the prohibition of state intervention in the field of freedom of speech.[8] Television and radio broadcasting have always been regulated in detail, in contrast to print and online media where there are no such limits on the means of dissemination. Currently, however, limitations on resources are much fewer. Digitalization, internet based services and multiplex channels have increased the opportunities for broadcast media and radio. To reflect this, the EU should design a lighter regulatory framework for the audiovisual media sector.

Accordingly, the scope of regulation of AVMSD should be reduced. Linear media services should be regulated separately from online media services and from on-demand services. The author's opinion is that the revision of AVMSD should lead to lighter regulation: the AVMSD should be applicable to linear services, while on-demand services and other services, which fall under the Directive on electronic commerce should be regulated separately.[9] As noted, content regulation is only justifiable in relation to public service broadcasting. The author's opinion is that on-demand services are more similar to the online press. Therefore, online press and on-demand services should be covered similarly, with lighter regulation under the Directive on electronic commerce.

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[5] Directive 2010/13 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ L 95, 15.4.2010).

[6] For further discussion, see: Simon, E., 'Methods of Implementing Rules Relating to On-Demand Services' in 'Media Freedom And Pluralism: Media Policy Challenges In The Enlarged Europe', Klimkiewicz, B. (ed), Central European University Press, (2010), pp 61-76.

[7] *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

[8] Barendt, E., 'Structural and Content Regulation of the Media: United Kingdom Law and Some American Comparisons', [1997/1998] Yearbook of Media and Entertainment Law, pp 75-95.

[9] Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000).

Aside from regulating the media market, the state can take at least two other steps to support media freedom and pluralism. First, for regulators to exercise their regulatory powers properly, it is essential that they have proper knowledge of the market they regulate, of its players, consumers and emerging trends and patterns. Therefore regulatory bodies should be given the responsibility and resources to monitor, analyse and maintain continuous discussion with market players.

Second, to promote and safeguard media freedom and pluralism, those states that have not already done so, should be required to establish an independent and impartial media ombudsperson. The main duty of the media ombudsperson should be to report and raise awareness on the state of media freedom and pluralism, consumer protection, child protection, media literacy and media pluralism. The media ombudsperson should have the power to intervene to prevent excessive content regulation that interferes with media freedom and should work closely with competition authorities and media regulatory authorities, including the European Regulators Group for Audiovisual Media Services (ERGA) to ensure that regulations are developed and applied in ways that promote media freedom and pluralism. The EU should also support the creation of a network of national media ombudspersons along the same lines as the Article 29 Working Party, which brings together national data protection authorities.

The role of self-regulation

There are several self-regulatory regimes present in member states. A typical field of self-regulation is journalism. By promoting standards contained in codes of ethics, self-regulation helps to maintain the credibility of the media. This is beneficial for the public, because media consumers often seek guarantees about the value of journalists' information. Codes of ethics provide guidance on editorial standards, while complaint mechanisms offer 'quality assurance' by ensuring compliance with these standards. [10]

Media self-regulation has certain advantages. It helps to foster a culture of freedom of expression without interference from the state and other political influence. Self-regulation can also allow the regulator to avoid potentially damaging *ex ante* regulation while evaluating how the given sector is functioning and give proper consideration to what kind of *ex post* regulation is needed. States only need to intervene if self-regulatory regimes fail to fulfil their functions.

The weakness of self-regulation is that it is a market-based decision-making process and market players join voluntarily. Self–regulation can be promoted and supported by the state and by the EU, but ultimately, it must be initiated and run by the market players themselves. There is also no guarantee that all the relevant or important market participants will join a given self-regulatory regime, or that that the workings of self-regulatory regimes will be made transparent to the public. Finally, complaints mechanisms under self-regulatory regimes can cause undue delays. Where these complaints mechanisms are ineffective, they simply postpone litigation or prevent recourse to the courts altogether by being so slow as to cause statutes of limitation for civil law suits to elapse. It may be possible to address some of these weaknesses

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[10] OECD, 'The Media Self-regulation Guidebook', (2008), available on:
http://www.osce.org/fom/31497?download=true.

through 'regulated self-regulation' that either fits in with a legal framework or has its basis laid down in legislation.

If the self-regulatory regime does not fulfil its objectives, the state should intervene, either by legislating or by proposing co-regulation. Because co-regulation serves public policy goals, governmental organizations including authorities participate in shaping co-regulatory systems. As explained by Prosser, there must be "some sort of connection between the non-state regulatory system and the state (though not necessarily a statutory one; contract will suffice), that some discretionary power is left to the non-state system, but that the state uses regulatory resources to guarantee the fulfilment of the regulatory goals".[11] Self-regulation is typically initiated by market players or other non-governmental stakeholders, while co-regulation is typically initiated by the government.

6. Could you provide specific examples of problems deriving from the lack of independence of media regulatory authorities in EU Member States?

MRAs should be independent of financial, political or other forms of influence from governments, political parties and other stakeholders such as business and religious leaders. "Independence, transparency and effectiveness are crucial elements that should be guaranteed in order for the three authorities (media authority, competition authority and telecom authorities) to act as watchmen of media pluralism and freedom."[12] Independence ensures that MRAs take their decisions impartially and are seen as credible and legitimate by state institutions, media market players and the general public. This contributes to public trust in the media.

A lack of independence can lead MRAs to take biased decisions. Biased decision-making can have a serious negative impact on the media market, in particular on media pluralism. It is typical in Western European countries for at least some of the seats in the Board of MRAs to be taken by persons who previously held positions in the media sector. This has led some MRAs to take decisions that benefit the media industry over the public interest.

However, it is MRAs in Eastern and Southern Europe that are most frequently criticised by NGOs and international organisations such as the Council of Europe and the OSCE for their lack of independence. In these countries it is common for national MRA board members to have political affiliations. This has led MRAs to take decisions that benefit particular political parties over the public interest.

More generally, the lack of transparency in the decision-making process of MRAs makes it more difficult to expose existing biases – which would help to ensure that decisions are ultimately taken to best serve the public.

7. What competences would media regulatory authorities need in order to ensure a sufficient level of media freedom and pluralism?

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[11] For the key elements of self-regulation: see Prosser, T., 'Self-regulation, Co-regulation and the Audio-Visual Media Services Directive', 31 Journal of Consumer Policy March (2008), pp 99–113.
[12] Brogi, E., Dobreva, A., 'Monitoring Media Pluralism in Europe: Testing and Implementation of the Media Pluralism Monitor', Policy Report, (2014), available on: http://monitor.cmpf.eui.eu/results-2014/.

MRAs need the following mandate in order to ensure a sufficient level of media freedom and pluralism.

1.   Change in mandate to include fundamental rights considerations:

MRAs should consider media freedom and pluralism not only through the lens of competition rules, but also as fundamental rights issues. To help create media pluralism, regulators should intervene to address market distortion and scarcity of resources. However, MRAs should refrain from certain forms of market intervention, namely those that could directly or indirectly limit freedom of expression. In particular, print and online press do not require media specific market intervention.

2.   Redefine points of intervention

EU level and national level market definitions and market structure analyses are essential to point out those areas where MRAs need to intervene in the market. Overregulation can create a severe obstacle to market development and deprive users of the advantages of new technologies. At the same time, regulatory ignorance[13] can also create serious distortions in the media market (which can be seen in Eastern European and South European countries).

In the EU it is of utmost importance to have a common level of regulation with regard to market entry and ownership regulation to avoid overall market distortion both across the EU and in member states as well.

3.   New challenges to be addressed

a. New markets

The broadcasting sector has been undergoing significant technological and structural changes that have changed the conditions under which competition takes place. Horizontal and vertical convergence has reduced the number of players in the media market. The existence of multiple media platforms and other technological developments (means of transmission, content usage, tools) have lowered the barriers for new players to enter media market, and have made it easier for customers to switch suppliers and monitor pricing. Because the conditions of competition have changed, MRAs and competition authorities have to redefine markets and focus on emerging cross-ownership problems and be more active in pursuing violations of competition law to ensure more participants are active on media market.

b. Co-operation between authorities

MRAs should closely work with telecommunications authorities if they have not been integrated already, because of convergence between these two sectors. Proper regulation relies on co-operation between these regulatory authorities. However,

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[13] Regulatory ignorance refers to the attitude of regulators, when certain parts of media market, typically competition issues, are not regulated properly or not regulated at all.

effective co-operation does not necessarily require regulatory authorities themselves to be merged into a single organization.

c. New challenges

Network traffic discrimination can heavily affect media freedom, media pluralism and, consequently, access to media content for the user. MRAs should be responsible for ensuring network neutrality in order to protect freedom of expression and information over the internet.

8. What should be the role of public service media for ensuring media pluralism?

The role of PSM as originally conceived was to serve the democratic, social and cultural needs of society, by offering high quality news, political analysis, arts and entertainment, while giving a voice to the full diversity of opinions and helping to shape national identity. A strong PSM is characterized by high quality programming that is also able to raise standards in the national media market, as commercial media compete for customers. In contrast, a weak PSM consumes public resources without offering any value added programming when compared to commercial channels.

A strong PSM can play an important role in ensuring media pluralism by providing a platform for diverse opinions. However, they may also damage media pluralism in at least two ways. First, if their position in the market becomes so strong that they prevent commercial media (and the other viewpoints these bring) from thriving. Second, if the PSM becomes one-sided, which will distort the media market.

The current structure, role and organization of PSM varies from one member state to another. However, broadly speaking, PSM face three challenges when it comes to ensuring media pluralism.

First, in many (particularly ex-communist) member states, PSM are under heavy government influence or control. In the worst cases, these PSM simply become propaganda tools. In the best cases, PSM is obliged to give equal time to the views of the government and opposition political parties. Thus, the PSM is unable to deliver genuinely balanced coverage that presents a variety of viewpoints.

Second, European PSM have progressively been required to generate their own income. Commercialization has changed their function. PSMs have had to compete with commercial media for audiences and (in some countries) for advertising revenue. In a bid to attract viewers, PSM have shifted their focus away from serving their democratic, social and cultural functions and have had to concentrate more on entertainment. [14] This has undermined their ability to ensure a plurality of viewpoints, especially in the context of democratic participation and social commentary.

Third, in general, the market share of PSM across the EU has declined. This means that even if PSM still offer niche services, like politically diverse content and a voice to minorities, they are not reaching consumers.

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[14] Hallin D. C., Mancini P., 'Comparing Media Systems: Three Models of Media and Politics',
Cambridge University Press, (2004).

It is the opinion of the author that PSM should and should only continue to serve democratic, social and cultural functions, and promote media pluralism by ensuring diversity in their programming. Those PSM programs that are covered by other commercial media services should be cut down.

The EU should evaluate the current state of PSM services, in particular how they are funded, how they are managed and monitored and how well they fulfil the function of a PSM, and their impact on free competition in the media market. Based on this information, the EU should establish minimum criteria to which all PSM should conform.

9. How should public service media be organised so that they can best ensure the public service mandate?

PSM differ greatly from one member state to another, according to the socio-political and cultural context. As discussed above, PSM across the member states share one or more problems. The BBC is often put forward as a model for PSM. However the landscape and context are so varied across Europe that it would not be appropriate to advocate for a strict single organizational structure for all member states. A better solution to ensure PSM fulfil their social, educational, cultural and political roles would be to require PSM to conform to certain principles, leaving discretion over the details of how this is done to each of the member states. The organisational structure should be shaped to meet these criteria since there is more than one way of guaranteeing these principles.[15]

Some of the minimum criteria have been already established at the EU level, including:[16]

- A high degree of independence;
- A precise definition of the public service remit;
- Regular supervision to verify proper use of public funding and execution of the public service mandate;
- Transparency in financing and especially in public funding, state aid, and revenue from government advertising.

In the view of the author, the EU could help to support the objectives of PSM by establishing a European public service news agency. This agency would gather and share information about EU law and policy-making among national PSM. The agency would help national PSM achieve its goal of disseminating ideas and creating discussion about political developments by offering information about EU-level politics, ensuring transparency in EU decision making and enhancing democratic participation in EU politics. This differs from the existing news services of the Council, Commission and Parliament, which work more like spokespersons of these

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[15] See Protocol No 29 to the TFEU on the system of public broadcasting in the Member States and European Commission Communication on the application of State aid rules to public service broadcasting, (OJ C 257, 27.10.2009), p. 1-14.

[16] See also: Ridinger, M., 'The Public Service Remit and the New Media', Iris Plus, (2009), available on: http://publi.obs.coe.int/documents/205595/264587/IRIS+plus+2009en4LA.pdf/3febdb44-89f8-452a-98fc-fa63067e5452.

institutions. By providing a service to national PSM, the agency could also help national PSM conserve their sometimes stretched resources. A new EU public service news agency should meet the minimum criteria set out above.

12. Please indicate any best practice on how to ensure an appropriate level of transparency and plurality of ownership in this area.

Plurality relies on transparency. That is, the state cannot guarantee media pluralism unless there is transparency of media ownership and unless there is transparency in the decision-making process of MRAs.

The author supports EU-wide transparency. Information about media ownership and the decision-making process of MRAs should not only be available to national authorities. Information for all member states should also be published in an EU-level open database, which is accessible to the general public. At the moment there is no standard approach to disclose ownership information. A recent report by Access !nfo and the Open Society Foundations recommends that to be genuinely accurate and useful for the public and regulators, information about media ownership should be collected and made publicly available. This information should include the following: "indirect and beneficial holdings, affiliated interests, linked holdings in other companies, and potentially significant commercial or political influences, for instance from public advertising or donations" and media interests of politicians. Access !nfo Europe[17] has elaborated the following recommendations, which the author supports:

- Disclosure of essential basic ownership information
- Information is findable and free
- Information is regularly updated
- Data is reusable and in open formats
- Progressive increase in transparency
- Transparency of influence
- Clear and precise legal framework about provisions regarding disclosure ownership and reporting obligations
- Oversight by an independent body
- Direct disclosure to the public
- Transnational access and comparability

These requirements should cover not only television and radio but also online and print press as well. However, small entities and individual journalists and bloggers should have the right to publish anonymously. The author is of the opinion that the right to speak anonymously is an important part of freedom of expression. In those cases where ownership does not have impact on media market the right to speak anonymously should be ensured.

One of the key challenges is to measure and define a sufficient level of both external and internal plurality. Clear definitions of media plurality are a key element of regulation, otherwise blurry requirements and market uncertainty may result in

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[17] Access !nfo, 'Ten Recommendations on Transparency of Media Ownership Research', (2013), available on: https://www.access-info.org/wp-content/uploads/TMO_Recommendations_05_November_2013.pdf.

incorrect decisions. As a good example of how to measure media plurality see Ofcom's advice on a measurement framework for media plurality.[18]

15. Please indicate any best practice to address challenges related to government or privately financed one-sided media reporting while respecting freedom of speech and media pluralism.

One-sided media reporting by PSM is a symptom of governmental influence, which can be addressed by taking steps to ensure PSM's independence.[19] These steps will not entirely prevent governmental influence but can decrease the impact of government pressure. One measure is to ensure PSM is not financed by the government through regular taxation, but rather by the public directly. For example, by collecting license fees on households owning a television. Besides collecting license fees, the distribution of these funds is also crucial to ensure the independence of PSM. Another measure is a ban on advertising in PSM. This would prevent the government from exercising influence over PSM by giving or withholding advertising revenue.

One-sided reporting by commercial media is largely protected by freedom of speech. Although it may be difficult to directly prevent one-sided reporting by commercial media, at least three steps can be taken to prevent it from having a disproportionately damaging impact. First, if the authorities take proper steps to promote media pluralism, this can help to guarantee a plurality of opinions and sources of information. Second, self-regulatory bodies and media ombudspersons can intervene if one-sided reporting breaches codes of ethics. Third, public education, self-regulatory bodies, media ombudspersons and media authorities can promote media literacy so that the public can recognize one-sided reporting.

       C. Journalists and new media players

28. Have you experienced, or are you aware of, any obstacles to investigative journalism, which may include legal provisions in force or a lack of resources?

1. New media area – obstacles of the nature of the media

Investigative journalism is expensive and time consuming for journalists but it is time consuming for their readers as well. In the print era reading long articles were part of our reading habits. In the online era this has changed. Even though people read more text in the online era, individuals tend to spend much less time on one specific topic, and tend to read shorter articles. Pieces of investigative journalism are not easy to consume online, unless other tools are used, such as video, photos or infographs. These tools make it easier for the public to consume pieces of investigative

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[18] OFCOM, 'Measurement framework for media plurality', (2015), available on: http://stakeholders.ofcom.org.uk/binaries/consultations/media-plurality-framework/statement/Measurement_framework_for_media_plurality_Statement.pdf.
[19] In ECtHR, *Manole and Others v. Moldova* (Application No. 13936/02, 13 July 2010) the European Court of Human Rights found that the Moldovan authorities violated freedom of expression by not sufficiently guaranteeing independence of Teleradio-Moldova between 2001- 2006. Teleradio Moldova was a State-owned broadcasting company, which became a public broadcasting company in 2002.

journalism. However, such tools are more expensive than simple text and require different skills from journalists and editors.

2. Obstacles of legal regulation

a) Access to information

Legal provisions are needed to ensure access to information. It is a serious obstacle to investigative journalism if access to information is hindered. Freedom of information is the core of investigative journalism. If either access to information is limited or the cost of obtaining information is significant than it can put serious burden on journalists.

b) Source protection

Legal provisions are needed to shield journalists' sources. Whistleblowers and those who disclose information to prevent damage to societies deserve a proper level of protection. Their work is beneficial for society but can be dangerous for themselves. Source protection is an appropriate tool to fight against corruption. The protection of whistleblowers is important to ensure this task.[20]

The Parliamentary Assembly of the Council of Europe, referring to its Resolution 1729 (2010) on the protection of whistleblowers stressed the importance of whistleblowing.[21] Whistleblowing in considered as a tool to increase accountability and strengthen the fight against corruption and mismanagement. The Parliamentary Assembly invited the Committee of Ministers to draw up a proposal for a strong internal whistleblowing mechanism.

The case-law of the European Court of Human Rights relating to the protection of whistleblowers is contradictory. In *Guja v Moldova* the Grand Chamber of the Court considered the dismissal of a civil servant who had leaked information with strong public interest to the press to be an unlawful restriction of the right to freedom of expression.[22] On the other hand, in a highly controversial case, *Pasko v Russia* the Court did not find a violation of the Convention, where military information was leaked.[23]

c) Libel, defamation

Libel and defamation rules can have a chilling effect on journalists. The risk of high fines or criminal prosecution places a heavy burden on investigative journalism. It should be noted that content regulation is also misused to obstruct investigative journalism, such as the right of reply or hate speech rules.

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[20] See, for example, Council of Europe, Committee of Ministers Recommendation CM/Rec (2014) 7 on the protection of whistleblowers, available on:
http://www.coe.int/t/dghl/standardsetting/cdcj/Whistleblowers/protecting_whistleblowers_en.asp.

[21] Recommendation 1916 (2010) of the Parliamentary Assembly of the Council of Europe on the protection of whistleblowers, 29 April 2010, availbel on: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17852&lang=en.

[22] ECtHR, *Guja v Moldova*, Application No. 14277/04, 12 February, 2008.

[23] ECtHR, *Pasko v Russia*, Application No. 69519/01, 22 October 2009.

3. Financing investigative journalism

The change in media usage (see answer for question 5) has had an effect on the resources available to fund investigative journalism. The lack of revenue has hit investigative journalism in the new media landscape. Investigative journalism is time and resource consuming on behalf of the journalist/publisher. Publishers also run a risk when publishing sensitive information about companies and politicians if media outlets rely on them as a source of information or for revenue through advertising. This can restrain editors from publishing pieces of investigative journalism.

4. Mass surveillance

Reports that show that mass surveillance has made some journalists reluctant to cover certain topics or to contact sources that could be put in danger. Fear of attracting the attention of the security services is a risk for investigative journalism.[24]

29. Do you consider that the level and intensity of investigative journalism, the number of journalists engaged in such activity, the resources available, the space in print and the time available in audiovisual media for the publication of results of investigations has changed over time?

If yes, please give specific examples.

As noted, all media usage has significantly changed. People read more text in the online era, but spend much less time on certain topics, read shorter articles or skip longer ones. Second, the formats through which information is presented have also changed. Videos and infographs have become common, alongside more traditional text. Third, it is much easier to enter the media market with fewer resources. These three elements produce different outcomes for investigative journalism in different media environments.

In those countries where journalism is well developed, investigative journalism is well established, along with relevant ethical and professional standards. Here, two levels of investigative journalism exist. First, there are well-known organizations

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[24] For examples in Europe, see: Bergareche, B., 'Groups call for EU action against mass surveillance', (2013), available on:
https://cpj.org/blog/2013/08/groups-call-for-eu-action-against-mass-surveillanc.php; Reporters Without Borders, 'Germany sues German foreign intelligence agency BND over communications mass surveillance', (2016), available on:
https://rsf.org/en/news/reporters-without-borders-germany-sues-german-foreign-intelligence-agency-bnd-over-communications. For a more global assessment, see: PEN American Center, 'Global Chilling The Impact of Mass Surveillance on International Writers', (2015).
Available on: http://www.pen-international.org/wp-content/uploads/2015/01/Global-Chilling_01-05-15_FINAL.pdf. For examples from the USA, see: PEN American Center, 'Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor', (2013), available on:
https://pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf; Holcomb, J., Mitchell, A., Purcell, K., 'Investigative Journalists and Digital Security, Perceptions of Vulnerability and Changes in Behavior', (2015), available on:
http://www.journalism.org/2015/02/05/investigative-journalists-and-digital-security/#fn-47633-1.

either print/online or other linear services including PSM that are involved in investigative journalism. These media outlets still have financial and human resources for investigative journalism. Second, alongside these media outlets small independent media centres have also emerged. Small centres usually publish online and reach their audience by social media. Cheap online tools give smaller entities the opportunity to reach their audience, which is positive because smaller entities often suffer from a lack of financial and human resources.

In those countries that do not have a long tradition of independent journalism, new centres have emerged, while traditional press including television and radio are not usually involved in investigative journalism. These new small investigative centres are not as dependent on the government or other market players as the traditional media, making it much easier for them to publish sensitive information.

The method of financing investigative journalism has also changed. Crowdfunding and crowdsourcing plays a significant role in financing online investigative journalists centres. For further detail see response to question 30.

30. Please indicate any best practice facilitating investigative journalism

1.Financial support

Some independent philanthropical foundations support investigative journalism. For example, the Open Society Foundation offers support through intermediaries in order to prevent the emergence of ethical problems that may result from financing journalism.[25] Another example is the Organized Crime and Corruption Reporting Project (OCCRP).[26] It is an international journalist consortium of 24 non-profit investigative centres and other news organisations. OCCPR's aim is to expose corruption worldwide. OCCRP is supported by grants by the United States Agency for International Development, the International Center for Journalists, the United States Department of State, the Swiss Confederation, the Open Society Foundations, Google Ideas and the Knight Foundation. Some of its projects are run in partnership with international journalist organisations.

2. Crowdsourcing

Cooperation is an important tool for facilitating investigative journalism both financially and to deliver accurate information. Probably the best known example of crowdsourced information is Wikipedia. Crowdsourcing is also an important tool in investigative journalism, because it gives journalists more insight and information on certain topics.[27]

3. Crowdfunding

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[25] See further information: http://journalismfund.eu/.
[26] See further inforamation: https://www.occrp.org/index.php.
[27] See further information: Vehkoo, J., 'Crowdsourcing in Investigative Journalism', Reuters Institute for the Study of Journalism, University of Oxford, (2013), available on: http://reutersinstitute.politics.ox.ac.uk/sites/default/files/Crowdsourcing%20in%20Investigative%20Journalism_0.pdf.

Crowdfunding is a tool to ensure independence for investigative journalists and small editorials. There are several independent centres for investigative journalism that work under different methods by using crowdfunding to ensure their independence: Krautreporter[28] in Germany, Byline[29] in the UK, de Correspondent[30] in the Netherlands, Athens Live[31] in Greece, Blankspot[32] in Sweden, Hithit[33] in the Czech republic, Direkt36[34] in Hungary. These centres are closely linked and cooperate even in crowdfunding.

4. Independent centres

Independent non-profit investigative centres serve as safe-harbours for journalists to avoid unwanted influence from publishers, the government or other media market players. These centres ensure independence for publishing sensitive investigative pieces of journalism. Investigative centres usually have agreements with websites or print papers to publish their articles. These independent centres cooperate with other investigative journalism centres and other well-known media outlets on trans-border cases like the Panama papers.

D. Hate speech online

31. What would be the most efficient ways to tackle the trivialisation of discrimination and violence that arises through the spreading of hatred, racism and xenophobia, in particular online?

European hate speech regulation differs according to the political and historical background of each of the member states. The Council Framework Decision on hate crime and hate speech did not result in a common level of regulation across the EU.[35]

Unfortunately, racist, particularly anti-refugee and anti-migrant, sentiments have become common in public discourse. To fight effectively against hatred and prejudice it is necessary to differentiate between different types of content according to the impact and context of the expressions in question. In particular, one must categorize and define illegal hate speech and distinguish this from distasteful speech that may be hateful but is not illegal. Criminal sanctions are only effective if used narrowly. In these cases the fight against hate speech can only be effective if proper criminal legislation is correctly enforced.

The author is of the opinion that in most cases racist, anti-refugee and anti-migrant speech is undesirable and distasteful but not illegal. Criminal law is often not the best tool to fight against intolerance. The content of public discourse, the opinions of politicians and public figures, education and media literacy can have a significant impact on eliminating hateful opinions. The author agrees with the Code of Conduct

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[28] https://krautreporter.de/168-krautreporter.
[29] https://www.byline.com/.
[30] https://decorrespondent.nl/en.
[31] http://athenslive.gr/.
[32] https://www.blankspotproject.se/.
[33] https://www.hithit.com/cs/home.
[34] http://www.direkt36.hu/en/.
[35] Council Framework Decision 2008/913/JHA of on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008).

on Countering Illegal Hate Speech Online that "broader society and in particular civil society organisations (CSOs) also have a crucial role to play in the field of preventing the rise of hatred online, by developing counter-narratives promoting non-discrimination, tolerance and respect, including through awareness-raising activities."[36]

The Council Framework Decision fails to define hate speech with sufficient precision. The recent report of the Commission on the implementation of the Council Framework Decision highlights the fact that a number of EU countries "have not transposed fully and/or correctly all the provisions of the Framework Decision on hate speech, in relation to the offences of denying, condoning and grossly trivialising certain international crimes".[37]

The author's opinion is that the Council Framework Decision defines hate speech too broadly. Even though trivialising international crimes can amount to hate speech, in some conditions, this type of speech may fall under the protection of freedom of expression. EU level or member state level lawmakers should abstain from content-based regulation because it is not the actual content of speech that stipulates hatred but rather the effect of the speech. Criminalizing certain topics or specific forms of expression decreases the level of freedom of expression. It is also easy to circumvent content-specific regulation by using hidden references that are easy to decipher for those who are involved in hatred. On the other hand, prohibiting certain themes leads to self-censoring in scientific debates.

There are many forms of expression that are full of hatred but not unlawful. These might be particularly visible because of the nature of online communication. Typically blogs, small websites and comments are available online that contain expressions that are full of hatred.

It is important to note that online communication differs from other (offline and linear audiovisual) communication in certain aspects. Online communication is quick, and comments and threads are usually active only for a few hours, or a few days at most. Most of these communication threads do not incite hatred that could lead to violence. Therefore we cannot consider these examples of distasteful speech are outlawed as hate speech. Even though these expressions remain searchable, most of the time no one is looking for them. These are heated discussions where hateful elements can appear without further consequences. It is also important to note that we should refrain from making martyrs of the perpetrators by imposing criminal sanctions against them for distasteful speech that does not meet the definition of criminally punishable hate speech. Shutting down hateful communication will not have the desired effect of silencing these voices. Rather these voices will simply move to different places on the internet.

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[36] European Commission, Code of Conduct on Countering Illegal Hate Speech Online, available on: http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf, 31 May 2016.
[37] Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law COM(2014) 27, 27.1.2014.

In the online world whenever there are illegal forms of expression they can be taken down by court order. In urgent cases, blocking is also a possibility or a request to the service providers/intermediaries to remove the content. Notice and take down measures are available according to the Directive on electronic commerce. However, over the last 16 years there have been many changes in technology and new services and new ways of communications have emerged. The Directive on electronic commerce should be revised accordingly.

With regard to the Code of Conduct on Countering Illegal Hate Speech Online, the joint parties should monitor and report on how it has been executed in practice. IT companies should indicate not only when they have blocked or removed hate speech, but what complaints they have received and what complaint procedures they have applied. Complaint mechanisms for individuals who feel that their content has been unfairly blocked or removed should be transparent. Effective remedies are needed if content that turns out not to amount to hate speech is removed or blocked. Ultimately, judicial review should be available as a safeguard against misuse of powers by IT companies.

E. Role of free and pluralistic media in a democratic society

33. How do developments in media freedom and pluralism impact democracy? Please explain.

Freedom of expression and access to information are pre-requisites for a well-functioning democracy. Media freedom and media pluralism derive from these basic rights. Safeguarding freedom of the media has a positive effect on the state of democracies.

Unless the public has access to reliable information and access to opposing opinions, they can not express their will properly and participate in the democratic process. Lack of media freedom and pluralism subverts democracy because it allows public opinion to be manipulated by those who control the media. From 'Brexit' we can learn at least one important lesson with regard to the media: without access to independent and reliable information and ethical journalism no informed decision can be made. The UK has strong PSM that is always used as a good example for other PSM across Europe. But even in the media environment of the UK, the standard of public debate about leaving or staying in the EU was low. It is widely accepted that much of the electorate cast their votes on the basis of inaccurate information.

New technological developments have been affecting media freedom and access to information dramatically. It has never been easier to have access to information, to connect to other people and to raise one's voice. But at the same time it has never been so difficult to emerge from the online noise. There are so many people communicating, writing blogs, trying to influence public opinion and competing for attention.
There are many different information sources available. It is not easy to distinguish between reliable and unreliable sources. At the same time there is a huge variety of sources. For a committed member of the public, it has become easier to get a full spectrum of information.

Even though there are similarities between countries, because of the spread of technological developments all over the world, there are remarkable differences between media systems, even among EU member states. Different political systems, societal structures, positions of PSM and media market developments create variants in media systems. The media and democratic political systems have a bidirectional impact. They can strengthen each other by strictly limiting undue interference by political parties and governments, or weaken each other by having direct link between the political sphere and the media.

34. Who do you think is the most suited to help increase media literacy? Please rank and explain why.

	The most important - 1	2	3	4	5
Family	x				
Friends	x				
School	x				
Public authorities				x	
Media, including online providers			x		
Dedicated learning systems using e.g. radio, TV, mobile phones and the internet (please specify)					x
Civil society				x	
Other (please specify)					

- Other - please specify
 public education

36. What would be concrete ways for free and pluralistic media to enhance good governance and transparency and thus foster citizens' democratic engagement (e.g. self-organisation for political purposes, participation in unions, NGOs, political parties, participation in elections)?

There are certain tools in the hands of media services that foster citizens' democratic engagement. 'Quality journalism' serves as a tool to ensure transparency and thus foster citizens' democratic engagement.

To ensure free and pluralistic media it is important to elaborate proper self-regulatory methods. It is important to develop member state level self-regulation for those media organizations that fall under the same jurisdiction and have the same cultural and political background. Besides country level self-regulation it would be effective to

have EU level media self-regulation. Similarly to European Broadcasting Union (EBU), a supranational self-regulatory regime would help to improve ethical standards, impartiality and media independence all over Europe. A supranational self-regulatory regime can create a melting pot for best practices in self-regulation. It would also increase the level of quality journalism and ethical standards. However, neither the Commission, nor the Council are in a position to foster a self-regulatory regime. It is the task of the media service players: service providers, content providers, journalists, and others to organize themselves and elaborate codes of conduct covering their services.

To enhance good governance and transparency it is important to ensure independence for the press: independence from political parties, from the state, from the government, from business and even from owners of the media.

Media independence relies on independent MRAs. Non-independent MRAs create media market distortions. Effective self-regulatory regimes have a positive effect on MRAs. Cooperation between MRAs and self-regulatory organizations can result in mutual monitoring and greater transparency. If a self-regulatory regime exists, then the scope of tasks to be fulfilled by MRAs should be limited in function of the tasks fulfilled by the self-regulatory bodies. There are certain areas that should not be left to self-regulation and should be covered by national authorities to ensure transparency, predictability and rule of law. These topics, among others, are ownership concentration, horizontal and vertical convergence issues, transparency (to create open databases of media services ownership) and spectrum allocation decisions.

38. Which measures would you consider useful to improve access to political information across borders? Please indicate any best practice.

Political information is what enables people to make informed decisions. Technologically, the internet, digital broadcasting and cable services make it entirely feasible for this information to cross borders. However, political information cannot cross borders unless service providers and public authorities allow or encourage it. In that sense, the main barrier to the cross-border flow of information is political. The existence of 24 EU languages also acts as an obstacle.

Two measures would improve access to political information across borders. First, open databases along the lines discussed in under questions 12 and 36. Second, enhanced cross border cooperation between journalists, between service providers and between MRAs. Open databases are important for journalists to have reliable sources of information on certain political issues and to implement knowledge sharing and cooperation in the field of investigative journalism. Cross border cooperation between journalists would also help to decrease language barriers. Investigative journalist centres, that discussed under question 30 is a good example of enhanced co-operation. Cooperation between service providers ensures access to services (linear, on-demand), while cooperation between MRAs has already been settled at EU level.

To enhance access to political information, the author suggests the establishment of a EU level public service news agency, as discussed under question 9. This could improve access to cross border political information.

39. Do you consider that social media/platforms, as increasingly used by candidates, political parties and citizens in electoral campaigns play a positive role in encouraging democratic engagement?

Yes

If yes, please give specific aspects and best practices that you would recommend.

A thorough answer to this question requires more research of practices in the EU. Qualitative and quantitative studies are needed to have a full picture of the usage of social media, how news is consumed and how it varies in different media systems. The author is of the opinion that it would be important to have not only market analysis about media companies, but also to measure the attitudes of people and media usage to better understand the media market in the member states.

Social entities foster democratic engagement: political parties, social movements and NGOs are an important part of our political discourse because they are vehicles of democratic engagement. Media market players (e.g. content providers, social networks, television) also participate and foster public debate.

From the Arab Spring to the recent Brexit decision there are several examples of how social media influenced democratic participation. The Arab spring, Hungary's protests against internet charges and Poland's pro-abortion protest, are good examples of how social media facilitates citizens' engagement and serves as tool to organize and spread information.

Social media can either be a content provider, or intermediary service provider, that offers information about political events to influence public opinion. Recently, for example, Facebook urged British voters to register for the referendum, a measure that appears to have met with success.[38]

When social media offers intermediary services for citizens it is an uncontroversial tool. However, when social media and communications companies offer content directly to the public it can have a negative effect on society. These companies prioritise information and can push hidden agendas to the public. For example, Facebook uses unknown algorithms to determine which news items are shown in news feeds and in advertisements.

For media participation to be truly beneficial for democratic engagement, it has to be transparent for the public. It is important to understand whether media, including social media fosters or obstructs democratic engagement and the ways in which it does so. People should have information about editorial decisions and about values followed by the media. The public needs this information if it is to have proper knowledge of the impact made by the media on political decision-making and to help explain social reactions.

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[38] Attn:, 'This Facebook Feature is Driving Voters to the Polls', (June 18, 2016), available on: http://www.attn.com/stories/9030/facebook-feature-urges-users-to-register-to-vote; and The Wall Street Journal, 'Facebook nudges voters to register', 18 January, 2016, available on: http://www.wsj.com/articles/facebook-nudges-voters-to-register-1453152122.

The ability of social media to enhance democratic participation varies according to internet penetration, age groups of users and cultural background. Political news consumption also depends on these factors. According to PEW research in 2014, news consumption in the USA relies heavily on social media.[39] For example, in the USA 52% of Facebook users seem to learn about political events on Facebook.[40] Social media is important not only because it allows individuals to share items of political news published by others. Social media also gives users the opportunity to participate in public debate directly by allowing them to comment on and cover news by posting photos or videos of news events.

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[39] This is not to say that figures for European countries would be the same. However, the cultural, social and political similarities between the USA and EU member states are such that one might expect a comparable trend in the growing importance of social media. Differences between the USA and the European population with regard to media usage that should be taken into account include the role of the print press and online press and the role of public service media and state intervention in the media market. There are also differences in media consumption between EU member states that may affect the role of social media in political participation. For example, in Germany the print press has a significantly larger impact on the public than in Eastern Europe. PSM serves as an important and reliable source of information in the UK, France and Germany, while in Eastern and Southern Europe PSM is captured either by the ruling political parties or the state.

[40] The full findings are available on: http://www.pewresearch.org/fact-tank/2016/05/09/facebook-twitter-mobile-news/ and http://www.pewresearch.org/fact-tank/2016/05/12/liberal-democrats-most-likely-to-have-learned-about-election-from-facebook/.

For further information contact:

Dr. Éva Simon, Advocacy consultant to the European Liberties Platform on media freedom and privacy

email: eva.simon@liberties.eu

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