

Draft EU Human Rights Guidelines on Freedom of Expression

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1. Introduction and Purpose of the EU guidelines on Freedom of Expression

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-multiple choices reply-(optional)

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-open reply-(compulsory)

The European Commission should develop comprehensive, clear guidelines to establish a clear framework for how the European Union approaches the issue of freedom of expression. Such guidelines should be respected rigorously within the EU itself. The guidelines should cover all media and platforms and be robust enough to serve as a tool to bolster democracy in any jurisdiction that adheres to them. It is crucial for the EU to promote the letter and spirit of existing international legal instruments with relevance for Freedom of Expression: • Universal Declaration of Human Rights • International Covenant on Civil and Political Rights (ICCPR) • International Covenant on Economic, Social and Cultural Rights (ICESCR) • European Convention on Human Rights • Charter of Fundamental Rights of the European Union Important analysis on the practical interpretation and application of the principles of international law in this area can be found in the reports of UN Special Rapporteur Frank La Rue on the promotion and protection of the right to freedom of opinion and expression. With regard to the Internet, his 2011 report is of particular importance. The guidelines should highlight the significance of the Internet, new technologies and new platforms such as social media that have not been included in other existing guidelines, to ensure the exercise of these rights. It is also crucial for the EU to develop a coherent view on issues such as the practical application of recognised safeguards (such as that restrictions must be based on law) in an online environment that is privately owned. Activities of the EU and individual member states which seek to replace the rule of law - to varying extents - with ad hoc repressive measures implemented by private companies based on unpredictable terms of service are an affront to basic principles of international law, undermining the EU's ability to speak credibly on freedom of expression.

2. Definition of Freedom of Expression

2.1. Definition of Freedom of Expression

-multiple choices reply-(optional)

1) Freedom of opinion - 2) The right to impart information and ideas - 3) The right to seek, receive information

Freedom of opinion

-open reply-(compulsory)

This right can be subject to restrictions the measures adopted are the least restrictive means available for protecting the rights of others and such restrictions is compatible with democratic principles. This right can only be exercised when arbitrary restrictions are not placed

on freedom of communication. In this context, the UN Human Rights Committee, in its Comment No.16, referred to a positive obligation of states to prevent unlawful and arbitrary interferences. Far from respecting this positive obligation, European member states are increasingly demanding interferences in freedom of communication by private actors in ways which often would not be possible for those states to enforce by law. As long as the EU has no clear concept of what is either legally or politically acceptable in this area, coherent analysis for its internal practices, it has no hope of communicating internationally on this point. Articles such as this one - <http://www.globaltimes.cn/content/786493.shtml#.UdxavW1mMcs> show how incoherent EU policy is at the moment.

The right to impart information and ideas

-open reply-(**compulsory**)

Freedom of expression includes freedom of information and thus safety for journalists, bloggers and whistleblowers. The right to freedom of expression includes the right not only to impart but also to seek and receive information. This freedom is an essential building block for other freedoms, such as freedom of expression, and increasingly essential for democracy to be effectively practiced. This right can be subject to restrictions if the measures chosen are the least restrictive means available for protecting the rights of others and such restriction are compatible with democratic principles. Network neutrality is particularly important in this area. It is crucial for the open Internet to be protected. As the Committee of Ministers of the Council of Europe has pointed out, "exceptions to this principle should be considered with great circumspection and need to be justified by overriding public interests." In the digital age, a robust defence of open networks is essential to ensure the freedom to impart information.

The right to seek, receive information

-open reply-(**compulsory**)

The right to have access to information. This is linked to freedom of connection, already recognised by some countries (See p.23 of the UNESCO paper, "Freedom of Connection, Freedom of Expression – The changing legal and regulatory ecology shaping the Internet" available at <http://unesdoc.unesco.org/images/0019/001915/191594e.pdf>). This right can be subject to restrictions if it is the least restrictive means available for protecting the rights of others and such restriction is compatible with democratic principles. It is important in this context to ensure that the right to seek information is not restricted unless such restrictions are clearly prescribed by law. This means that Internet companies should not be permitted to have terms of service which are so vague that the companies are, in essence, granting themselves the right to restrict freedom of communication in an arbitrary fashion and that, when they choose to ban (or downgrade, in the case of search engines) legal content on their services, this is made very clear when individuals sign up to the service. Whereas privacy is crucial to the effective exercise of this right, we find ourselves in a situation where the availability of privacy enhancing technologies is restricted by arbitrary restrictions by European Internet companies - see <https://blog.torproject.org/blog/tale-new-censors-vodafone-uk-t-mobile-uk-o2-uk-and-t-mobile-usa>. "Voluntary" blocking - outside the rule of law - is actively promoted and even funded by the European commission. Such blocking by mobile operators was actively praised by the European Commission. Competition is not enough in this context, as terms of service are increasingly similar and the user may not know of a problem until it is too late.

3. Scope of Freedom of Expression

3.1. *Scope of Freedom of Expression as enabler for the meaningful realisation of other human rights*

-multiple choices reply-(**optional**)

4) Internet as a tool to foster openness and development

Internet as a tool to foster openness and development

-open reply-(**compulsory**)

The Internet is key sector, providing many new platforms for opinions and options to seek and receive information. This value must be maintained and cherished. Key elements of safeguarding the usefulness of the Internet as a tool for fostering openness and development include: Strong, clear and enforced legal protection for net neutrality Strong, clear and enforced data protection laws Avoidance of restrictive measures such as web blocking Avoidance of government pressure on Internet intermediaries to "voluntarily" censor content Rapid redress in cases of abuses by companies. Networks and, where appropriate (search engines, for example), services must be "neutral" in relation to the content they provide access to. The strangling of the online environment by preferential treatment of services such as "Facebook Zero" - particularly in developing countries - shows how important this principle is.

3.2. *Scope of protection and*

1) Strict requirements for interference with this right and types of

Legitimate restrictions -multiple

choices reply-(optional)

information which may be legitimately restricted

Strict requirements for interference with this right and types of information which may be legitimately restricted

-open reply-(compulsory)

The "least restrictive alternative" criterion must be rigorously respected - regardless of the public relations and political pressures to do otherwise. The fact of a particular problem being serious does not automatically mean that any measure that nominally addresses the problem is proportionate. Any restrictive measure must be based on: Proportionality and purpose: Credible evidence on the nature and scale of the problem Credible analysis of the likelihood of the speed and effectiveness of any countermeasure which would render the restriction fully or partly ineffective A realistic assessment of the long term benefits of the measure compared with the long-term costs (in terms of freedom of expression, "slippery slope", competition, misuse, etc) Law: Clear, predictable and unambiguous law is essential, in order to circumscribe any restrictions. Any restrictions must be imposed by an independent tribunal.

4. Operational Guidelines

4.1. EU priorities

-multiple choices reply-(optional)

3) Fostering an understanding among public authorities of the dangers of unwarranted interference with impartial/critical reporting and fight against censorship and monitoring - 4) Promoting a free Internet that respects Human Rights including through EU cyber strategy - 6) Promote the respect of due diligence by companies, including in cyber - 7) Promote data protection and privacy in online and offline communications - 8) Promoting Human Rights through freedom of Expression(Freedom of association or assembly, protection of Whistle blowers)

Fostering an understanding among public authorities of the dangers of unwarranted interference with impartial/critical reporting and fight against censorship and monitoring

-open reply-(compulsory)

The European Union is bound by the Charter on Fundamental Rights. Member States are bound inter alia by the Charter of Fundamental Rights, the Convention on Human Rights, the International Covenant on Civil and Political Rights. It is important that EU Member States and the European Commission scrupulously respect key principles of those instruments, in particular: That restrictions on privacy must be necessary and in accordance with the law That restrictions on freedom of expression must be necessary and prescribed by law That restrictions on freedom of assembly must be necessary and prescribed by law There are far too many examples of both the EU and individual member states creating "worst practice" through: - lawless and disproportionate restrictions on privacy (such as the UK's Tempora programme) - disproportionate restrictions on privacy such as the EU's data retention Directive - lawless and disproportionate restrictions on freedom of expression such as the measures originally envisaged by the EU-funded CleanIT project - lawless and disproportionate restrictions on freedom of assembly through weak privacy protections as a result of weak transposition and weaker implementation of the EU's 1995 Data Protection Directive. Furthermore, some EU and other countries are acting in a lawless and extraterritorial way, to the detriment of privacy and the rule of law, the most egregious examples being Sweden's FRA, the UK's Tempora and the USA's Prism programme. We cannot effectively support these freedoms and basic concepts of international law in our foreign policy if we abuse these freedoms and these legal concepts so comprehensively in our own jurisdictions.

Promoting a free Internet that respects Human Rights including through EU cyber strategy

-open reply-(compulsory)

Frank La Rue's analysis for the United Nations provides all of the necessary analysis on this point – the EU simply needs to devote adequate resources to implementing the principles – and to respect them domestically.

Promote the respect of due diligence by companies, including in cyber

-open reply-(compulsory)

Due diligence must not be over-stated as a solution to surveillance abroad and should not be considered to be a replacement for regulation of the activities of domestic companies active abroad or content regulation domestically. The Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights

(http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf) is a good starting point for reflection on this issue.

Promote data protection and privacy in online and offline communications

-open reply-(**compulsory**)

Freedom of communication means freedom to communicate fearlessly - without fear of arbitrary surveillance or other abuses of personal data. It is above all crucial that the EU ensure that its domestic data protection and privacy legislation is thorough and well-implemented. Without this, its efforts on an international stage will be severely hampered and will lose credibility. In addition, the EU should use all of the resources at its disposal to ensure that the Council of Europe's revision of Convention 108 is successful and continues to play - together with the EU's framework - its role as a global model for data protection.

Promoting Human Rights through freedom of Expression(Freedom of association or assembly, protection of Whistle blowers)

-open reply-(**compulsory**)

It is absolutely crucial that the EU develop adequate protection for whistleblowers. Recent revelations have shown that whistleblowers can play a vital role in defending democracy. This can only happen when adequate protections are given rather. The shameful behaviour of certain EU Member States in recent weeks has robbed the EU of its ability to say anything constructive on this subject.

4.2. Possible EU Actions

-multiple choices reply-(**optional**)

1) Public and Private diplomacy - 2) Trade measures - 3) Monitoring and situational analysis of freedom of expression rights abuses - 8) Media Freedom in the EU enlargement policy as well as in the 3rd countries covered by the Council of Europe membership

Public and Private diplomacy

-open reply-(**compulsory**)

This is needed first and foremost in order to ensure that Europe has standards which are worth exporting. The EU needs to be more diligent and forthright (regardless of which political family happens to be in power in a given Member State) regarding bad practices – lawless web blocking, censorship of journalists covering corruption cases, the effective destruction of a national data protection authority, the stranglehold of a political leader on media in his country, etc. Once this internal public and private diplomacy has been successful, we can then build on our good practice internationally.

Trade measures

-open reply-(**compulsory**)

Trade is a matter for negotiation whereas fundamental rights are not. Consequently, unless for very targeted, clear and absolute policy issues, fundamental rights should not be part of trade negotiations.

Monitoring and situational analysis of freedom of expression rights abuses

-open reply-(**compulsory**)

The EU should ensure that it gives its full support – as well as adequate financial backing, to the work of the OSCE, Council of Europe and Fundamental Rights Agency as well as private initiatives that are working independently to the same goal. The EU should not seek to duplicate the activities of existing bodies, unless significant shortcomings have been identified.

Media Freedom in the EU enlargement policy as well as in the 3rd countries covered by the Council of Europe membership

-open reply-(**compulsory**)

Recommendation 9 of the Media freedom and pluralism consultation introduces a proposal to make media freedom and pluralism a pre-condition for EU membership (<http://ec.europa.eu/digital-agenda/en/public-consultation-independent-report-hlg-media-freedom-and-pluralism>). Assuming that the EU manages to establish and maintain credible standards domestically, this would be a step forward. Furthermore, the EU should monitor the respect of the EU values and article 2 of the TEU once a country gains entry into the EU, because it is not enough to comply with fundamental rights to get in, you must keep on doing so once you are in. Comprehensive, credible and effective oversight and non-political enforcement is necessary. It is simply not credible that the reactions of the EU, both from the Commission (with honourable exceptions) and Parliament (without honourable exceptions) appear to be more based on the political family of the government of the country in question than the scale of the breaches.

4.3. Examples of potentially abusive restrictions on freedom of expression as well as media freedom and pluralisms which EU should tackle

-multiple choices reply-(optional)

1) Harassment, intimidation and fostering of self-censorship - 2) Abusive application and/or criminal defamation laws and disproportionate civil sanctions, including laws related to the criticism of politicians. - 3) Abusive invocation of public morality or national security (including protection of the nation or national values or incorrect application of hate speech laws) - 4) Lack of the judiciary and/or national regulatory bodies - 5) Media ownership and/or concentration endangering the possibility of independence media - 8) Internet traffic controls and private sector restrictions on use of infrastructure - 10) Lack of respect to the right of privacy and data protection

Harassment, intimidation and fostering of self-censorship

-open reply-(compulsory)

Western companies and governments encourage self-censorship through the lawless access to consumer data. The European Commission itself describes abuses that come as a result of EU law, but which it has not acted against): "Law enforcement authorities indicated that they prefer to request data from domestic operators, who may have stored the relevant data, rather than launching mutual legal assistance procedure which may be time consuming without any guarantee that access to data will be granted" (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0225:FIN:en:PDF> – page 22). As the Prism scandal shows, this type of abuse becomes even greater when more sensitive data – particularly profiling data – are used. Secondly, the EU has increasingly called on private companies to use their terms of service as a law enforcement instrument. They do this by banning illegal content (making transparency on why content is removed very difficult) and by having terms of service which are so broad as to make it practically impossible for users to be able to reasonably guess what might be permitted. This inevitably results in self-censorship.

Abusive application and/or criminal defamation laws and disproportionate civil sanctions, including laws related to the criticism of politicians.

-open reply-(compulsory)

The European Union should fight against the criminalisation of defamation and the application of any such rules. The EU should also work to ensure that EU Member States maintain high standards in this regard. The draft of the new Spanish penal code aims to prohibit journalists to talk about corruption case in order to not interfere with judicial power. However, since so far the journalist were the one "discovering" corruption cases involving politicians most of the time, by prohibiting them to do so only really few corruption cases will come to light. The government is clearly trying to make the corruption "disappear" by prohibiting to talk about it in media.

Abusive invocation of public morality or national security (including protection of the nation or national values or incorrect application of hate speech laws)

-open reply-(compulsory)

The EU again, should fight to maintain high standards domestically on this point, and use this as a basis for supporting measures to fight this problem internationally. For example, the EU, as part of the Global Alliance against Child Abuse, is promoting the introduction – outside the rule of law – of upload filter technologies by Internet companies. There is no independent evidence of the effectiveness of such technologies and, therefore, any possible benefit is unproven. However, at the same time as Turkey was being condemned by the ECHR for its Internet blocking system, the EU was successfully persuading Turkey to join this lawless blocking system and, according to Commissioner Malmström, had put pressure on Russia to join. The EU's actions in this regard are reckless and profoundly antithetical to basic principles of both the Charter and international law.

Lack of the judiciary and/or national regulatory bodies

-open reply-(compulsory)

The EU has stood by and observed the abject failure of certain data protection authorities to implement EU law for the past 18 years. This type of failure prevents the EU from being able to speak credibly on this issue.

Media ownership and/or concentration endangering the possibility of independence media

-open reply-(compulsory)

Until the EU can credibly deal with media ownership problems domestically, it will be unable to speak authoritatively on the subject on an

international level.

Internet traffic controls and private sector restrictions on use of infrastructure

-open reply-(compulsory)

Several EU Member States have lawless web blocking which have never been assessed for proportionality, effectiveness or even purpose. Directive (2011/92/EC) even manages to permit lawless blocking while the impact assessment for the same Directive says that lawless blocking is in breach of the European Convention on Human Rights. Such incoherence must be addressed in order to permit the EU to speak credibly on this issue. Internet blocking is now variously used for restricting access to gambling websites (generally to protect national monopolies), sites accused of infringing copyright or facilitating infringements (despite this being of no obvious value for its stated purpose) and child abuse websites (without a purpose being stated). Some blocking by EU member states fails to respect the international law criterion of being based on law, some fail to respect the necessity criterion, some fail to respect the proportionality criterion, all fail to respect the criterion of being appropriate in a democratic society. How can the EU issue external guidance, when this is the quality of its internal practices.

Lack of respect to the right of privacy and data protection

-open reply-(compulsory)

Through an effective reform of the EU's data protection framework and strong support for the renewal of CoE Convention 108, the EU will have a strong basis for supporting privacy rights internationally, thereby supporting free speech, freedom of association and expression and democracy.

5. Implementation and evaluation

5.1. **Implementation and evaluation**

-multiple choices reply-(optional)

1) Implementation and evaluation

Implementation and evaluation

-open reply-(compulsory)

The EU should not seek to duplicate the work of existing international organisations such as the OSCE. Instead, it should politically and financially support existing monitoring work, including work and focus its monitoring domestically to ensure that the demands we place on others are reflected in the demands that we place on ourselves. Monitoring must happen both domestically and externally, in order to ensure consistency.