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Freedom of Expression as a Common Constitutional Tradition in Europe

Report of the European Law Institute





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The European Law Institute

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Executive Summary

This report summarises the insights on the state of the art of freedom of expression law in EU Member States, deriving from national reports prepared by experts of selected jurisdictions. The report is intended as a practical tool (checklist) to help practitioners, judges and public officials to identify commonalities and differences in legal approaches to key aspects of freedom of expression.

- Freedom of expression is a **fundamental civil right** that implies the right to hold and express one's opinions, as well as the right to receive and impart information and ideas, without prior authorisation (censorship) or other forms of interference by government or any form of public authority.
- **Freedom of expression is not absolute:** it can be **lawfully restricted** in order to balance it against other fundamental rights through a **proportionality test**.
- The proportionality test consists of **three steps**, namely:
 - (a) was the restriction **based on law**?
 - (b) did it pursue a **legitimate aim**?
 - (c) was the restriction **necessary** to pursue the aim?
- This right enjoys the highest protection, but mostly not as an individual right to self-realisation, but because it is **essential to** the functioning and improvement of democracy. However, some forms of **expression lie beyond constitutional protection**.
- A State-by-State analysis suggests that **EU Member States tend to** adopt an approach in line with the European Convention on Human Rights (ECHR), and implemented by the Strasbourg Court, ie **to allow for possible restrictions to freedom of expression**. However, freedom remains the rule and restrictions the exception, and limitations need to meet the requirements of the proportionality test.
- **Constitutions do not necessarily make these limits explicit.** In fact, many of the legal systems considered in this report rely, more or less explicitly, on the ECHR. However, **there are cases of even higher standards of protection**, reflecting a specific constitutional history and identity (so the ECHR would appear to be intended as establishing a minimum level (a 'floor'), not a maximum one (a 'ceiling') in the protection of freedom of expression).

1. Introduction and Methodological Remarks: the ELI Project on Freedom of Expression as a Common Constitutional Tradition in Europe

The purpose of this report is to offer a checklist of essential components of freedom of expression within the EU.

This is done on the basis of national reports prepared in respect of 22 countries by scholars from, or working in, each of them. Those reports were commissioned from national correspondents in the context of ELI's project on Freedom of Expression as a Common Constitutional Tradition in Europe, and this document is the final output of the project.¹ It was not the aim of this project to elaborate on the notion of 'tradition', but to attempt to reconstruct a tradition and survey the practice of the EU Member States in the relevant area of law.

The ELI project in general, and therefore this document as well, go beyond pure academic research and comparisons between the systems of EU Member States. Rather, the attempt is to provide a product of immediate applicability for judges and legal practitioners (checklist²), by giving them a synthetic

overview of the current state of the legal protection of freedom of expression in the EU, and this is what distinguishes this effort from the several existing pieces of comparative scholarship in the field.

This checklist of essential components of freedom of expression within the EU could be employed in order to verify compliance with constitutional traditions common to the Member States in this field. This instrument is intended as a practical tool aimed at helping legal practitioners to verify if a certain case or situation affecting freedom of expression can be placed inside or outside the boundaries of constitutional traditions common to the Member States, potentially also in the context of the implementation of the so-called rule of law conditionality for access to EU funds (see Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget).

¹ The complete list of countries covered by the national correspondents (in brackets) is as follows: Austria (Christoph Grabenwarter), Belgium (Jan Velaers), Bulgaria (Anna-Maria Atanasova and Philip Dimitrov), Croatia (Sanja Baric and Matija Milos), Cyprus (Achilleas Emilianides), Czech Republic (Martina Grochová), Denmark (Frederik Waage), Estonia (Madis Ernits), Finland (Tomi Tuominen), France (Guy Scoffoni), Germany (Sven Kaufmann), Greece (Stylianios-Ioannis Koutnatzis, Georgios Dimitropoulos and Panagiota Micheli), Hungary (Fruzsina Gárdos-Orosz), Ireland (Federico Fabbrini and Ciaran Burke), Italy (Paolo Passaglia and Elettra Stradella), Latvia (Kristaps Tamužs), Poland (Piotr Bogdanowicz), Portugal (Catarina Santos Botelho), Slovenia (Boštjan Zalar and Jaka Kukavica), Spain (Josep Maria Castellà Andreu and Marco Antonio Simonelli), Sweden (Iain Cameron), United Kingdom (Colm O'Cinneide and Daniella Lock); in addition, a report on freedom of expression under EU law (Sven Kaufmann). In the following pages, unless otherwise specified, the quotation marks refer to the pertinent national report.

The main author of the report, Prof Riccardo de Caria, would like to express his gratitude towards all contributors. Besides the national correspondents, the author is extremely grateful for the help received from the Project Reporters, Mario Comba and Sabino Cassese, the project team members (Marta Cartabia, Giacinto della Cananea, Michele Graziadei, Andras Sajo, and Guy Scoffoni), and all those who have brought their invaluable contribution to the project (including Celestina Iannone; members of the Advisory Committee Piet Eeckhout, Anne Birgitte Gammeljord, Lord Lisvane, Paolo Passaglia, Ornella Porchia and Bostjan Zalar; members of the Consultative Committee Moustapha Ebaid and Andras Varga; the members of the project team of the twin project on Fundamental Constitutional Principles: Piotr Bogdanowicz, Iain Cameron, Jörg Fedtke, Francis Jacobs, Jeffrey Jowell, Takis Tridimas; the participants to all the meetings, conferences and seminars of the project, and particularly those where an earlier draft of this article was presented, namely at the conference in Heidelberg in January 2020, convened by Armin von Bogdandy and Sabrina Ragone, and the webinar held online in October 2020, convened by Giacinto della Cananea). The author would also like to express his gratitude to Armando de Crescenzo and Gabriele Marino Noberasco for their contributions concerning particularly the case law of the ECtHR and the research on existing comparative legal scholarship, respectively, and finally to all the ELI bodies and members of the Secretariat involved in the project, with a special mention to Tomasz Dudek.

Considering its practical purpose, the Project Team wanted to streamline this report by leaving out the reference to some specific national cases mentioned in the national reports. They are in any case featured in an article by the main author of this report, which is expected to be published in the *Rivista Trimestrale di Diritto Pubblico* in 2022.

² Since the beginning, this project has taken as a benchmark and a model the outstanding *Rule of Law Checklist* prepared by the Venice Commission, with the goal of going beyond a pure academic effort and aiming to offer a comprehensive, but at the same time concise, picture that could provide assistance to practitioners, judges and public officials.

The project sought to verify, with respect to the various areas of the law relating to freedom of expression, the extent to which there are constitutional traditions common to the EU Member States, and where, on the contrary, a common core is lacking. In this sense, this report aims at assessing the extent to which freedom of expression can be considered a common constitutional tradition in Europe (understanding the term ‘common constitutional tradition’ as a *terminus technicus* in terms of EU law).

An initial investigation carried out in the context of the ELI project showed that the judgments of the Court of Justice of the European Union (CJEU) did not contain textual references to the constitutional traditions common to the Member States with respect to freedom of expression (one case was issued after the project commenced, namely *Spiegel Online* (Case C-516/17)). It is hoped that the current checklist will serve as a useful ready to use tool for the Court itself and for legal practitioners, whenever the need to verify the existence of common traditions (also) arises in this area in the future.

The analysis presented here follows the outline of a questionnaire drawn up by the team of the ELI project on Freedom of Expression as a Common Constitutional Tradition in Europe. Question number 1 (on censorship) related to procedural aspects, while all the others tackled substantial issues. The questionnaire attempted to cover all the main areas of interest of freedom of expression, with particular reference to the most topical ones in this field, although, with the benefit of hindsight, some points may have been neglected, such as media pluralism and ownership as a safeguard of freedom of expression, and the fact that Europe tends to protect freedom of expression because it is functional to the protection of democracy (rather than as a self-realisation rationale, typical instead of the American First Amendment jurisprudence).

Also, since the entire project focused on constitutional traditions, the report devotes relatively limited space to some of the current topics in the public debate at EU level, relating to the impact of new technologies on freedom of expression, such as the issue of the power of censorship of private platforms. While it is acknowledged that the topic is critical today for shaping freedom of expression law, the impression is that it is still impossible to identify sufficiently well-defined (national, as well as European) traditions in this regard.

The method followed is thus a bottom-up analysis,

trying to identify sufficiently common features in the national constitutional traditions, which appeared to the project team as the course of action that was most in harmony with the black-letter of Article 6 of the Treaty on European Union (TEU), according to which, national constitutional traditions are structurally foundational, and it is from them that fundamental rights shall be derived, thus becoming general principles of EU law.

Indeed, as one of the reports produced within the framework of this project, on freedom of expression under EU law, (hereinafter: the EU report) explains:

[f]reedom of expression was first recognised as a fundamental right under EC law in 1989 in a public service dispute concerning the Commission’s refusal to establish the two applicants as officials (13 December 1989, *Oyowe & Traore v Commission*, C-100/88, para. 16). Today, it is well established that freedom of expression is a ‘fundamental pillar of a democratic society’ (6 March 2001, *Connolly v Commission*, C-274/99 P, para. 53) and an ‘essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU is based’ (6 September 2011, *Patriciello*, C-163/10, para.31, 21 December 2016, *Tele2 Sverige et Watson and Others*, C-203/15 and C-698/15, para. 93, and 23 April 2020, *Associazione Avvocatura per i diritti LGBTI*, C-507/18, para. 48).

The answers to the questionnaire were broken down by country, and national responses on the single issues were thus contrasted, in order to assess similarities and differences, and ascertain where common constitutional traditions would be identified. What follows is the essence of such analysis, and, in this regard, the reader should be aware that the present report should be considered in conjunction with the tables below that provide a tentative quantitative analysis of the issues considered, and on this basis some conclusions on commonalities and differences are drawn (Annex 1).

The following checklist uses the definition of ‘constitutional tradition’ that national correspondents provided implicitly, in answering the questionnaire. They did not report on what is meant by ‘constitutional tradition’ (also because the topics dealt with in the reports are not necessarily framed as a tradition in all Member States), but rather on what the ‘constitutional traditions’ in the field of freedom of expression are in their respective countries, and the checklist was elaborated on that basis.

Also, the project team members are fully aware that not all the 27 Member States are covered (six did not participate); however, the 21 countries covered account for around 90% of the EU-27 population, and the EU report was also factored into the analysis. On the other hand, the UK report was still included in the analysis, partly because the UK certainly contributed to the building of common constitutional traditions in the course of its now terminated membership, and partly because the UK is still a member of the Council of Europe; and as a matter of fact, Article 6.3 TEU famously couples common constitutional traditions with the ECHR as sources of the fundamental rights that 'shall constitute general principles of the Union's law'.

Moreover, the reader should also bear in mind that this document was drafted in reliance of the information contained in the national reports (which, in their turn, are based on the questionnaire). This implies first of all that, if some information is by any chance missing in the national reports, it will most probably also be missing in this report (only some additions were made, particularly with regard to relevant cases from the CJEU and the European Court of Human Rights (ECtHR)). Also, the national correspondents have expressed their own view of their respective constitutional tradition on freedom of expression; inevitably, on some occasions, the delicate nature of some of the issues dealt with might trigger the need for experts of the same legal system to make a comment, distinguish, and/or specify different views. The project team welcomes any suggestions in this regard and expresses the same openness on behalf of the national correspondents.

2. Definition and Key Findings

In broad terms, the analysis carried out allowed the project team to reach the following key findings:

- Freedom of expression is a **fundamental civil right** that implies the right to hold and express one's opinions, as well as to receive and impart information and ideas, without prior authorisation (censorship) or other forms of interference by the government or any form of public authority.³
- A fundamental, preliminary question to be asked in order to assess whether freedom of expression is protected is therefore: is the government **entitled to exercise censorship** of, or any other means of interference with, freedom of expression prior to the expression itself (eg prior governmental authorisation needed for the publication of a book or a newspaper)?
- In any case, even in the absence of prior governmental restraints, **freedom of expression is not absolute**: it can be lawfully restricted in order to balance it against other fundamental rights according to the proportionality test.
- This test provides **three steps**, namely:
 - (a) was the restriction **based on law**?
 - (b) did it pursue a **legitimate aim**?
 - (c) was the restriction **necessary** to pursue the aim?
- This right enjoys the highest protection, but mostly not as an individual right to self-realisation, but because it is **essential to** the functioning and improvement of **democracy**. However, **some forms of expression lie beyond constitutional protection**.

In general, freedom of expression involves, and can be identified with, **the freedom to express one's opinions without being subject to restrictions or prior authorisation (censorship) by government**.

Blackstone's approach already foreshadowed this: free expression is ensured when the government 'lay[s] no previous restraints upon publication'.⁴

Article 11.1 of the Charter is broadly worded as well, echoing in some way the First Amendment of the US Constitution and guaranteeing this freedom 'without interference by public authorities and without frontier limits'. This wording is actually broader than that of Article 10 of the ECHR, because the latter provides for the possibility of 'formalities, conditions, restrictions or penalties' (on the relationship with the ECtHR's case law, see more broadly in the course of this report).

The State-by-State analysis suggests that Member States tend to adopt an approach in line with the ECHR, and implemented by the Strasbourg Court, ie to allow for the possibility of restrictions to freedom of expression. However, freedom should remain the rule and restrictions the exception, provided that such limits are established by law, pursue a legitimate aim, and are necessary to achieve such aim in a democratic society (the importance of freedom of expression as an instrument of implementation and protection of democracy was highlighted above, in the *Introduction*).

The constitutions examined do not necessarily make these limits explicit. In fact, many of the legal systems considered in this document rely, more or less explicitly, on the Convention. However, there are cases of even higher standards of protection, reflecting a specific constitutional history and identity (thus the ECHR would appear to be intended as establishing a minimum level (a 'floor'), not a maximum one (a 'ceiling') in the protection of freedom of expression).

As far as the prohibition of censorship itself is concerned, it appears to be the cornerstone of freedom of expression across all the countries examined: to be sure, it appears to be the 'most common' constitutional tradition.

³The word censorship is here used with a negative connotation. It refers to the act of a prior restriction to the expression. Admittedly, censorship may not be characterised as *absolutely* negative under all circumstances, but for the purposes of this work it is intended as a regime under which publications require prior governmental approval before being admitted to circulation. Censorship is thus used in this report in a different (and much wider) meaning than the one it commonly has in popular culture, where it ordinarily only refers to government control of movies, typically for the sake of protecting public decency. Instead, in this report, censorship encompasses all requirements of prior government authorisation for all forms of speech.

⁴W Blackstone, *Commentaries on the laws of England* (Clarendon Press, Oxford, 1765-1769, Volume IV) 151.

It should be noted that censorship implies prior governmental control, which is not the case when the government imposes 'internal' censorship on a publisher (eg preventing any hate speech on a social medium) and applies sanctions in the case of non-compliance. Such cases involve the horizontal application of fundamental rights and raise more complex and debated legal issues.

However, as far as governmental censorship is concerned (in the sense of a requirement of prior authorisation for publications), there appears to be virtual unanimity on the fact that its prohibition is a (quint)essential component of freedom of expression.

3. Proportionality Analysis

- Is a **proportionality test** always required, or are there forms of expression which are automatically prohibited?
- **In the case of a proportionality test**, are the elements required in order to restrict freedom of expression at least the following?:
 - (a) The restriction is prescribed by law;
 - (b) It pursues a legitimate aim (eg protection of the rights and freedoms of others, territorial integrity, security of the State, public security, public health, morals, prevention of disorder or crime);
 - (c) The restriction is necessary and suitable for the legitimate aim pursued.

In the absence of a conceptual elaboration on the applicable standards of scrutiny in Europe, comparable to that produced by the US Supreme Court, which distinguishes different types of speech and restrictions, fundamental rights, including freedom of expression, are subject to a **proportionality test**, even in countries where this is not expressly provided for.

Danish law, however, rejects this approach:

According to the general understanding of this provision in Danish legal literature, section 77 of the Constitutional Act of Denmark only provides a relative protection of freedom of speech which is limited to "Censorship and other preventive measures". Since section 77 does not include a content-based freedom of speech, the general understanding in Danish legal theory is that free speech is not subject to a proportionality test.

As for Finland, 'The Supreme Court does not ... use the term proportionality (Finnish: *suhteellisuus*) but instead talks about balancing (Finnish: *punninta*'); in fact, 'the Finnish Supreme Court's proportionality analysis is not always the most explicit'.

The proportionality test itself varies greatly among Member States, but some essential features are common and relate mainly to the elements to be considered in order to justify the restriction. In general, under the proportionality test, any restrictions must be

necessary to achieve an objective that must itself have a constitutional basis.

These objectives correspond first of all to those listed in Article 10.2 ECHR, according to which, limitations on freedom of expression can be envisaged:

in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary' (see also ECtHR, *Observer and Guardian v the UK*, 26 November 1991).

The constitutional basis of the above-mentioned limitations means that freedom of expression can be balanced against other constitutionally protected interests. There do not seem to be operational differences between systems that consider freedom of expression as a supreme fundamental right protected in the constitution and systems that do not make similar proclamations.

Freedom of expression has been the subject of a dialogue between courts, in particular the ECtHR and the CJEU, through which it has been implemented and applied to regulate even situations that were not originally expressly envisioned in legal provisions (eg problems posed today by new technologies, on which see below).

In the context of European democracies and in respect of the human rights mentioned in the preamble to the Convention, freedom of expression is not only important as such, but also because it plays a role in the protection of other Convention rights and in the construction of common constitutional traditions. Freedom of expression may also come into conflict with other interests and be restricted. However, one point remains: the ECtHR has repeatedly stated that freedom of expression 'constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's

self-fulfilment' (*Lingens v Austria*, 8 July 1986; *Şener v Turkey*, 18 July 2000; *Thoma v Luxembourg*, 29 March 2001; *Marônek v Slovakia*, 19 April 2001; *Dichand and Others v Austria*, 26 February 2002); but also that, 'the press plays a preeminent role in a State governed by the rule of law' (*Castells v Spain*, 23 April 1992; *Prager and Oberschlick v Austria*, 26 April 1995).

4. Unprotected Speech

The findings on proportionality also help to reconstruct the relationship between the protection of freedom of expression and some other potentially constitutional values that eventually leads to the identification of areas of unprotected speech.

4.1. Hate Speech and Discriminatory Speech

- **Hate speech** does not necessarily refer to speech with the same content in all the European jurisdictions considered.
- The case law on hate speech is very varied, but **there are specific categories of offences that are deemed to be outside the protection of freedom of expression** by both national courts and the Strasbourg court.
- Freedom of expression generally succumbs to the **prevailing need to fight discrimination** against certain protected grounds.

First of all, it is always necessary to keep in mind the caveat that the expression ‘hate speech’ does not necessarily refer to speech with the same content in all the European jurisdictions considered, so the details can certainly vary (especially since the expression itself does not necessary appear in constitutions and even in many laws). In any case, a generally valid definition in all the systems covered by this work could be considered the following one from Recommendation No R (97) 20 of the Committee of Ministers of the Council of Europe to Member States on ‘hate speech’:

the term ‘hate speech’ shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

The analysis carried out reveals the existence of a constitutional tradition common to most of the countries examined, aimed at excluding hate speech from the list of legitimate forms of expression, with some exceptions.

See in particular Italy and Latvia, whose respective reports are now quoted: as for Italy,

referring to the Constitutional Court’s case law, it is fair to claim the protected nature of political hate speech, as proved by decisions on communist hate speech (Constitutional Court judgment no 108/1974) and fascist hate speech (Constitutional Court judgment no. 1/1957; no. 74/1958; no. 15/1973). From this case law, the only limit to political hate speech seems to be the danger for public order. Although hate speech seems to fall within protected speech, some laws have prohibited it against racial, religious, and cultural minorities.

According to a different perspective, no general inference should be drawn from these decisions (that simply established that certain provisions of the criminal code, going back to fascism and still in force after the fall of fascism, could not be used to incriminate people for spreading political propaganda). On this view, such cases would arguably not warrant the conclusion that hate speech is protected.

As for Latvia:

[i]t is stipulated in doctrinal sources that hate speech in Latvia is constitutionally protected speech. Hence, restrictions of hate speech ought to be assessed by applying the traditional proportionality analysis. Nevertheless, in an analytical report of decisions of Latvian courts adopted from October 2012 until May 2018 it is indicated that in 13 of 25 court decisions concerning Article 78 of the Criminal Law (triggering of national, ethnic and racial hatred – see below for more details) it has been established that the speech in question is not protected by the Constitution, the Convention and the International Covenant on Civil and Political Rights (ICCPR). This has been affirmed by repeating a standard formula but without further analysis. The suggestion that hate speech might fall outside the scope of protection of Article 100 of the Constitution has been very indirectly supported by the Constitutional Court as well. In any case, hate speech may be held (and has been held) to be punishable.

In fact, there are constitutions that expressly ban hate speech, like the Slovenian constitution: 'Article 63 of the Constitution Act declares as unconstitutional any incitement to national, racial, religious, or other inequality, as well as stirring up of national, racial, religious, or other hatred and intolerance.'

Freedom of expression in Europe does not include the possibility of insulting or otherwise openly expressing hatred towards those belonging to certain categories of people considered particularly in need of protection.

This prohibition is explicit in some countries but seems generally shared beyond them. The case of Hungary is interesting, where the criminalisation of hate speech was controversial, initially admitted and then declared illegitimate by the Constitutional Court, leading finally to a modification of the Constitution, and where the lack of protection of hate speech also against the 'people belonging to the Hungarian nation' was discussed (similarly, in Poland, hate speech appears to have recently become the object of attention only if directed against the Polish nation, and so not against minorities); see also Denmark, which recently repealed the criminal provisions punishing blasphemy, thus legitimising even extreme acts such as burning the Bible or the Quran.

In the laws of European countries, there are offences that punish, for example, incitement to hatred or contempt or violence against certain specific categories, the legitimacy of which has been confirmed both by national courts and by the Strasbourg Court: see for example *Garaudy v France* (4 July 2003), *Gündüz v Turkey* (4 December 2003), *Pavel Ivanov v Russia* (20 February 2007), *Balsytė-Lideikienė v Lithuania* (4 November 2008), *Soulas and Others v France* (10 July 2008), *Féret v Belgium* (16 July 2009), *Le Pen v France* (20 April 2010), *Fáber v Hungary* (24 July 2012), *Kasymakhunov and Saybatalov v Russia* (14 March 2013), *Hösl-Daum and Others v Poland* (7 October 2014), *Delphi AS v Estonia* (16 June 2015), *M'Bala M'Bala v France* (20 October 2015), *Belkacem v Belgium* (27 June 2017), *Smajić v Bosnia and Herzegovina* (8 February 2018), and *Williamson v Germany* (8 January 2019).

Alongside these laws, there are also those of countries that do not generally punish hate speech per se, but do punish conduct that may still conceptually fall within the broad notion of hate speech, although it is formally captured by other offences (Cyprus, the Czech

Republic, Slovenia, Sweden), even if sometimes it is conducted against individuals and not groups, and therefore protection from hate speech does not appear complete (Ireland).

In this regard, it is worth mentioning Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. In general terms, this Decision states at the outset that:

[r]acism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States'. As a result, it directs Member States to punish these forms of expression 'by effective, proportionate and dissuasive criminal penalties' (Article 3.1).

However, it also clarifies, in Article 7.2, that:

[t]his Framework Decision shall not have the effect of requiring Member States to take measures in contradiction to fundamental principles relating to freedom of association and freedom of expression, in particular freedom of the press and the freedom of expression in other media *as they result from constitutional traditions* or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.⁵

Linked to this is the issue of **anti-discrimination** law, both of national and increasingly EU origin. By outlawing unequal treatment of persons being in the same situation, on the basis of certain grounds (eg sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation), anti-discrimination law also forbids the expression of forms of thought that deviate from the rules on equal treatment of minorities. Quite often, there is a complex set of constitutional and lower-level rules (generally civil and/or administrative, but often mixed with criminal rules on hate speech, as in Bulgaria, Denmark, France, Latvia, and Slovenia) that punish

⁵Emphasis added.

manifestations of thought and discriminatory conduct in general (for example, in Croatia, Cyprus, Ireland, and Sweden). As a result, to guarantee equal treatment of all, including private individuals among themselves, discriminatory forms of expression are prohibited. This is also the case, for example, for opinions expressed by an employer or an entrepreneur in the choice of employees or contractors.

Sweden particularly deserves to be mentioned, where '[u]nder Criminal Code 16:9, a business cannot discriminate, in offering goods and services, on the basis of gender, sexual preference, ethnicity (including "foreigners" contra Swedish/EU citizens). This is regarded as a legitimate limitation on freedom of speech (and freedom to run a business).'

A recent Polish case seems to indicate a different approach. It concerns:

Article 138 of the Code of Petty Offences. Under this provision an unjustified refusal to provide services was treated as an offence. Back in 2017 a printer who refused to print banners for an LGBTI foundation was fined, based on this provision. This led to a discussion regarding the right to refuse services on the basis of one's beliefs. ... [T]he Constitutional Tribunal ruled that Article 138 is unconstitutional. Following this judgment, right-wing organisations and publicists called for a boycott of LGBTI clients and right wing weekly 'Gazeta Polska' wanted to issue a special 'LGBT free zone sticker'. As a result, in July 2019 one of the activists requested a preliminary injunction from the Warsaw court against 'Gazeta Polska'. The court ordered them to hold up stickers for the time of the proceedings.

Apart from the Polish example mentioned above, this appears consistent with the 'Drittwirkung-friendly' approach of the Court of Justice of the EU: see, among many, the *Egenberger* case (Case C-414/16), as well as *NH v Associazione Avvocatura per i diritti LGBTI — Rete Lenford* (Case C-507/18, informally also known as the Taormina case), and more generally of the system of the Council of Europe, under Article 1 of Protocol 12 to the ECHR. Nonetheless, in *Lee v Ashers Baking Company Ltd*, the UK Supreme Court unanimously held that the

refusal by the owners of a Northern Irish bakery to bake a cake with the message 'Support Gay Marriage' on it did not constitute direct discrimination on grounds of sexual orientation or political opinion, when to do so would have been contrary to their sincerely held religious beliefs (the conclusion is similar to the well-known American case *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 US (2018)).

4.2. Crimes of Opinion

- The picture is nuanced with regard to the **criminalisation of certain forms of expression** such as condoning a crime or making an 'apology of crime' (*apologia di reato* in the Italian original, *apologie de crime* in French, namely the act of glorifying or justifying a criminal act, even without taking part in it or directly inciting to it⁶), offences against national institutions, or Holocaust denial, but there does not appear to exist a common constitutional tradition against the existence of crimes of opinion, some forms of which continue to exist in many jurisdictions.
- In the post-9/11 era, a significant tendency exists towards the **criminalisation or prohibition of terrorist or pro-terrorist speech**.
- However, the way in which the **balance** is struck **between freedom of expression**, on the one hand, **and** the need to safeguard **national security** and public safety that may be endangered by terrorist or pro-terrorist speech, on the other, seems to vary significantly across Europe, depending on quite diverse national traditions relating to crimes of opinion and incitement to commit a crime. Furthermore, national approaches to terrorist and pro-terrorist speech can also be influenced by the level of protection afforded to religious beliefs and religious speech, especially when religious-based terrorism is at stake.

The direction taken by most of the analysed countries (with the notable exception of the UK) and the CJEU in this regard is also consistent with the presence of **crimes of opinion** in some European systems (namely the Czech Republic, Denmark, Latvia, and Poland). Other countries, however, do not provide for such crimes

⁶Here, the word 'apology' is therefore taken as in Plato's Apology of Socrates, and refers to an act that is the opposite of the ordinary meaning of the English word 'apologise': in fact, those who commit 'apology of crime' are typically quite unapologetic. In the remainder of this report, the expression 'condoning/apology of crime' will be used.

(Bulgaria, Croatia, Finland, Portugal, and the UK; Cyprus has decriminalised these wrongs). In this regard, several national reports mention criminal sanctions for crimes related to defamation, libel or insult.

In particular, among crimes of opinion (beyond those punishing hate speech, on which see above), it is worth mentioning explicitly the continuing existence in several countries of crimes of opinion (beyond those punishing hate speech, on which see above) that punish, for example, even with several years' imprisonment, verbal attacks – albeit without threatening or violent content – on **public authorities**, or **the condoning/apology of crime**.

As for the former, the reference is to both republican (such as in the French, Italian, Polish or Slovenian cases) and monarchic (such as in the Danish case) authorities. The situation is different in Ireland, where 'statements insulting the Government cannot be regarded as an attack on the authority of the State and in that context the contempt of the authorities is not a crime'; and in Sweden, where the contempt of public authorities is not a criminal offence.

As for the condoning/apology of a crime, it is punished in Croatia, the Czech Republic, Denmark (although limited to support for terrorism), France, Italy, Latvia, and Poland (the opposite is true in Austria, Bulgaria, Cyprus, Finland, Ireland, Slovenia, Sweden, and the UK). From this point of view, the ECtHR case law is worth noting, particularly with regard to two French cases that themselves reflect the lack of uniformity among European States on the subject:

[w]hen the French courts sanctioned the apology of a person when this person was the author of crimes, the European Court of Human Rights considered that France had violated Article 10 (ECHR, September 23, 1998, *Lehideux & Isorni v France* – about an attempted rehabilitation of the image of Maréchal Pétain). The ECtHR declared instead the absence of violation of Article 10, in a case of sanction for ... apology of terrorism (ECtHR, October 2, 2008, *Leroy v France*).

Similar considerations apply to the performance of acts of **offence against national symbols** such as the national anthem or the flag.

For example, in Austria, Bulgaria, Croatia, the Czech Republic, France, Germany, Italy, Latvia, Poland, Portugal, and Slovenia, but not in Cyprus, Denmark, Finland, Ireland and the UK. The act of burning the flag of, for example, another State or a symbol of an entity

or group other than the national State of reference appears to escape specific criminalisation (ie unless it is part of another hate crime), with exceptions such as Bulgaria (which from 2016 includes the EU flag and anthem protection), Croatia, Germany (from 2020, also covering the desecration of the EU's symbols), Italy, Poland, Slovenia and Sweden.

This can be linked to the aforementioned Hungarian reflection on the limits to hate speech towards Hungarians themselves, as well as the legitimacy in Ireland of the limits to freedom of expression where it is 'used to undermine ... the authority of the State'.

Again, similar conclusions can be reached regarding the **exaltation of totalitarian, anti-democratic regimes** (cf the Italian report, but see also Portugal, where '[t]he Constitution ... prohibits crimes of opinion, even when the opinions are linked with unconstitutional ideologies (such as racist or fascist)') and the use or display of a totalitarian symbol (in Hungary, with a criminal provision 'upheld by the Constitutional Court in its decision 14/2000'; however, cf the outcome of the ECtHR case *Vajnai v Hungary* (8 July 2008) on the display of vestimentary symbols recalling totalitarian regimes). Related to this, the United Kingdom report mentions that:

[t]he Terrorism Act 2006 criminalises 'encouragement of terrorism' which includes making statements that glorify terrorist acts, punishable by up to seven years imprisonment. It is an offence even if the person or group making the statement doesn't intend to encourage terrorism. Speech which either intentionally or unintentionally constitutes a cause of harassment, alarm or distress under the Public Order Act is also restricted.

In summary, there is certainly a lack of consensus on the legitimacy of conduct such as that described, and instead there seems to be an agreement to the contrary, ie on their incompatibility with national constitutional systems (this is also confirmed by the ECtHR cases *Refah Partisi (the Welfare Party) and Others v Turkey* (13 February 2003), *Orban and Others v France* (15 January 2009) and *Hizb Ut-Tahrir and Others v Germany* (12 June 2012); however, cf also the case, mentioned just above, *Vajnai v Hungary* (8 July 2008)).

Similarly, the criminalisation of the **denial of the Holocaust or other historical facts of particular importance** appears to be generally shared.

Holocaust denial is subject to specific provisions in Austria, Croatia, the Czech Republic, France, Italy (as 'aggravating circumstance of a hate speech conduct'), Latvia, Poland, and Slovenia; it is not provided for as a self-standing offence (although it may be covered by other hate speech provisions) in Bulgaria, Cyprus, Denmark, Finland, Hungary, Ireland, Portugal, Sweden, and the UK.

The German case is particular, also for self-evident historical reasons, as highlighted in the report:

Apology of a crime is not, as such, punishable under German Law, which is in line with the requirement in Article 5.2 of the Basic Law that limitations to freedom of expression may not target specific opinions. Due to the particularities of German history, one important exception exists, however, with respect to Holocaust denial and, more generally, offences related to Germany's National Socialist past, which are punishable as incitement of masses under Article 130 of the Criminal Code. In that context, interferences in freedom of expression may be based on provisions that do not meet the threshold of a general law under Article 5(2) of the Basic Law. The Federal Constitutional Court (FCC, BVerfG) has explicitly underlined the exceptional nature of this approach and has stressed that it is not transposable to situations others than those related to Germany's Nationalist Socialist past. It also stressed that the Basic Law does not prevent the dissemination of Nationalist Socialist ideas as such. The European Court of Human Rights has confirmed that references to the Holocaust must be seen in the specific context of the German past.

As for particularly important historical 'truths', the countries that are distinctive in this regard are France, with its 'memorial laws', which officially recognises the Armenian genocide (Law of 29 January 2001) or slavery as a crime against humanity (Law of 21 May 2001), and Poland, which also includes public denial of communist crimes and those committed during the Soviet domination of Poland.

The Spanish case is peculiar in this regard: the Constitutional Tribunal (TC) clarified that hate speech is not protected by Article 20 of the Spanish Constitution. However, the TC also declared that Holocaust *denial* does not amount to hate speech, therefore this form of expression does not seem to constitute a limit to freedom of expression (note, also, that under Spanish law, Holocaust *justification* is still a crime).

The ECtHR considers the criminal punishment of such forms of expression compatible with the Convention (cf the cases *Garaudy v France* (7 July 2003), *Witzsch v Germany* (no 2) (13 December 2005), *M'Bala M'Bala v France* (20 October 2015), *Williamson v Germany* (8 January 2019), *Pastörs v Germany* (3 January 2019)). In the case of *Perinçek v Switzerland* (15 October 2015), however, the Grand Chamber of the ECtHR famously found a violation of freedom of expression in the criminal sanctions imposed on a political activist for denying the Armenian genocide. Previously, in the already-mentioned case of *Lehideux and Isorni v France* (23 September 1998), the Grand Chamber had found the conviction of the authors of an article in favour of Maréchal Philippe Pétain a violation of Article 10 ECHR, although finding that this case did not fall under the instances of denial of historical facts.

5. Freedom of Expression and Minority Rights

- In most legal systems, it is not possible to state in a general way that freedom of expression prevails over or is subordinate to minority rights; it is instead necessary to make a **case-by-case** analysis conducted under the criterion of proportionality mentioned above.
- The analysis of national reports and the **statistical comparison** show that **freedom of expression usually does not prevail over minority rights**.

As regards the intersection between the protection of freedom of expression and of **minority rights**, in most legal systems it is not possible to state in a general way that freedom of expression prevails over or is subordinate to minority rights; it is instead necessary to make a case-by-case analysis conducted under the criterion of proportionality.

A small number of countries do not follow this nuanced approach. In these countries either freedom of expression generally prevails, or minority rights generally prevail. Considering this alternative, the first solution is adopted in Denmark, with the recent repeal of the provisions criminalising blasphemy (and thus allowing for forms of expression directed against religious minorities), in Ireland, where there is a lack of organic legislation on hate speech, in Poland, where there is similarly a 'lack of political will to combat hate speech', and Sweden, where minority rights do not enjoy constitutional protection.

It should be noted, however, that religious freedom can sometimes be invoked to restrict minority rights, as in the Croatian case. On the other hand, in France '[f]ree speech does not prevail in the case of aggressive expression against ethnic groups or minorities', and the UK report also states generally that: '[f]ree speech does not prevail over minority rights'.

6. Speech with a Religious Dimension

In general terms, the common European tradition is that **freedom of religion is exempted from ordinary rules on freedom of expression**. According to national legislation and jurisprudence, speech with a religious dimension falls into the following subcategories:

- (a) **blasphemy and manifestations of contempt** for a religion or religious belief present a mixed picture, even if the choice not to criminalise such forms of expression prevails (in terms of number of countries; instead, in terms of population, the presence of sanctions for blasphemy would seem to prevail), unless they amount to hate speech, or are anyway subject to other constitutionally permissible restrictions;
- (b) **conscientious objection**, which is typically linked to religious reasons, is protected in most European jurisdictions;
- (c) **individual display of religious symbols** in the public sphere and workplaces presents a mixed picture: in some jurisdictions, the freedom to wear religious symbols in public or in the workplace is generally recognised, even if certain restrictions to this freedom are considered constitutionally permissible; in others, the issue has not been dealt with in a comprehensive manner, possibly with the introduction of some rules prohibiting the wearing of clothing that covers the face; others, however, have openly affirmed the principle of the secular State and therefore the legitimacy of the ban on wearing such symbols, imposed by internal practices or by the legislature

The handling of **speech with a religious dimension** is quite complex. The common European tradition is arguably that freedom of religion is exempted from ordinary rules on freedom of expression, because intimate beliefs can be valued and protected even at a greater level than the freedom to express oneself, to the point that a limitation can be lawfully imposed on 'anti-religious speech', even with criminal penalties. Also, in many cases, the guarantees that religious speech enjoys are forms of protection of the majority, not the minority (as exemplified by the leading case in this area, *Otto-Preminger-Institut v Austria*, 20 September 1994), therefore from this perspective, this area is very different from that considered in the previous paragraph. However, it is necessary to consider here the

most important cases of 'religious expression', because they are an integral part of the broader jurisprudence on 'freedom of expression' (it should be noted that freedom of religion nowadays does not only include religious beliefs, but also certain philosophical beliefs; however, this report focuses on the more 'traditional' notion of religious speech and freedom of religion).

To begin with, when it comes to **blasphemy** and manifestations of contempt for a religion or religious belief, there is a mixed picture, even if the choice not to criminalise such forms of expression prevails in terms of the number of countries surveyed (unless they amount to hate speech, or are anyway subject to other constitutionally permissible restrictions, as described above). Instead, in terms of population, the presence of sanctions for blasphemy would seem to prevail.

As for **conscientious objection**, which is typically linked to religious reasons, it is protected in most European jurisdictions, with respect to a variety of issues, as in Denmark, Finland, France, Germany, Ireland, Italy, Poland, Portugal, Spain Slovenia and the UK, but not in others, such as Austria, Bulgaria and Cyprus. In the Czech Republic, the issue of secular conscientious objection was also addressed, with particular reference to compulsory vaccination, and in this case, it was recognised to a certain extent.

A consensus appears to be lacking with regard to the **individual display of religious symbols** in the public sphere and workplaces. In some jurisdictions, the freedom to wear religious symbols in public or in the workplace is generally recognised, even if certain restrictions to this freedom are considered constitutionally permissible (as is the case in Belgium, Croatia, Cyprus, Denmark, Germany and the UK). In others, the issue has not been dealt with in a comprehensive manner (Finland, Ireland, Portugal, and Sweden), possibly with the introduction of some rules prohibiting the wearing of clothing that covers the face (Bulgaria). Others, however, have openly affirmed the principle of the secular State and therefore the legitimacy of the ban on wearing such symbols, imposed by internal practices, eg in a school (the Czech Republic), or by the legislature, as in France, where the issue has been the subject of extensive debate and various judgments, which have also led the Court of Strasbourg to express itself on more than one occasion,

always considering the action of the French institutions legitimate, by deeming it to fall within the margin of appreciation reserved for them.

Following the French report:

[r]eligious symbols are only allowed in specific public places like schools, courtrooms ... if they do not appear as “ostentatory” or if they do not infringe public order and security (hiding faces in the *Burka* case). Legislation of March 15, 2004 explicitly prohibits pupils to wear obvious religious signs or clothing. The Council of State has considered that such provisions were compatible with Article 9 ECHR and the Strasbourg Court affirmed this. In a decision of December 4, 2008, the Court declared the French legislation based on the constitutional principle of secularism, compatible with Article 9 ECHR. A decree of November 25, 1999 had also prohibited the wearing of any religious scarf or attire on identity cards and passports. Finally, the law of October 11, 2010 generally prohibits the concealment of the face in all public spaces. Although it does not explicitly target a particular religion, its enforcement has been contested by individuals wearing an integral veil – burka – for religious purposes. The ECtHR again confirmed compatibility with Article 9, adding that the State has a large margin of appreciation regarding the determination of collective conditions of living (ECHR, “*SAS v France*” 1 July 2014)).

It should also be considered that in a 2013 case concerning the UK, the ECHR ruled that ‘a Christian employee of British Airways ... should be able to wear a crucifix on a necklace, and that the airline should not ban such symbols as part of its company dress policy if they do not impact on the employees’ work’ (*Eweida and Others v UK*, 15 January 2013).

It therefore seems justified that in the *Achbita* case (C-157/15), concerning the right to wear the Islamic veil at work, the CJEU also left a certain margin of appreciation to the State in this area. While acknowledging the common constitutional tradition of protecting the freedom of conscience and religion, it also found that there was no tradition sufficiently shared either prohibiting or allowing the exposure of such symbols in public.

A similar question, but with different answers, is that regarding the legitimacy of the **use of religious symbols in public spaces**, which is allowed in Croatia, Italy and Poland. Elsewhere, as in Latvia, the subject has not been particularly discussed, since there are neither rules nor practices that provide for such an exposition, while, in other legal systems, the principle of the secular State is affirmed, as in Slovenia, where the fact ‘that religious symbols cannot be seen anywhere in public institutions can also be considered as a constitutional “tradition”’. In this case too, therefore, the margin of appreciation which the Strasbourg Court granted to the Member States in this area seems justified, since it did not consider this display in public schools to be contrary to the Convention (*Lautsi and Others v Italy*, Grand Chamber, 18 March 2011). This is generally connected with the instances of religious expression that is endorsed by the State itself, sometimes even at a constitutional level (Croatia and Ireland), which is in contrast with the models of secularism, such as the well-known French one.

7. Special Categories of Expression

National legislation and jurisprudence point to several other self-standing categories:

- (a) **Commercial speech** is not a 'special' category itself, but falls within the scope of Article 11 of the Charter of Fundamental Rights of the European Union.
- (b) **Political speech**, with some relevant exceptions (based on long-standing national traditions), emerges as **widely protected** by national constitutions within European legal systems, since it is regarded as **fundamental in the context of a democratic process**.
- (c) **Anonymous speech** is protected in a few European legal systems, at least in circumstances where the anonymous form is the only alternative to self-censorship.
- (d) **Lawyers' speech** in trials enjoys particular protection when subjected to the proportionality test.
- (e) **Freedom of association tends to be completely autonomous** from freedom of expression, unlike in the US.

With regard to special categories of expression, in Europe there is a tradition that **commercial speech** is not a special category in itself. Admittedly, commercial speech per se does not lie outside the area of protection of Article 11 of the Charter of Fundamental Rights of the European Union (*RTL Television case*, C-245/01, para 68; *Karner*, C-71/02, para 51; and *Damgaard*, C-421/07, para 23, concerning dissemination of information on medicinal products; see also ECtHR, 13 July 2012, *Mouvement raëlien suisse v Switzerland* [GC], no 16354/06, para 61). However, unlike in the American First Amendment jurisprudence, it is simply dealt with under the ordinary rules on freedom of expression, at least at a 'declamatory' level.

The exceptions are Austria, where 'commercial speech is an autonomous category', and Slovenia, where 'this is an autonomous category as evidenced by the decisions U-I-141/97, Up-515/14 and Up-349/14-39 of the Constitutional Court', although the latter then attributes commercial speech 'a lower level of protection'.

In general, there are restrictions on the dissemination of false and misleading information by companies, especially in advertising, as well as on other forms of expression related to the category of unfair commercial practices, in order to protect consumers, alongside cases of restrictions on the advertising of discounts, which were considered illegitimate.

As explained in the EU report:

a large amount of discretion, entailing only limited judicial review, is recognised in the field of the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising (2 April 2009, *Damgaard*, C-421/07, para 27; General Court, 16 March 2016, *Dextro Energy v Commission*, T-100/15, para 81). The Court has also acknowledged that freedom of expression plays a role in trademark law and that it must be taken into account when applying relevant provisions of EU law in order to reject an application for registration of a word sign as an EU trademark (27 February 2020, *Constantin Film Produktion v EUIPO*, C-240/18 P, para 56).

There is, on the contrary, a particularly widespread favourable treatment of **political speech**, seen as functional to the development of democratic systems. In particular, in the UK, a tradition dating back to Article IX of the Bill of Rights 1688 ('the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament') resulted in a very strong protection for political speech (as well as for speech uttered by expert witnesses summoned by one of the Houses of Parliament). A partial exception was Hungary, which provided for a controversial 'constitutional limitation on political advertisements', later amended following criticism from the Venice Commission; Irish legislation still contains such a ban. In spite of its overall strong protection for political speech, the UK also provides for an absolute ban on political advertising outside the electoral period as part of a special tradition eventually deemed to be compatible with the ECHR in the landmark case *Animal Defenders International v UK* (22 April 2013), precisely to respect the UK peculiarity;

restrictions in electoral material are also mentioned in the Bulgarian report.

Moreover, some European legal systems guarantee protection even for **anonymous speech**, at least in circumstances where the anonymous form is the only alternative to self-censorship, for fear of retaliation and negative consequences of various kinds (this is an argument taken very seriously in the US Supreme Court's case law in point: see for instance, among many, *NAACP v Alabama*, 357 US 449 (1958) and *McIntyre v Ohio Elections Commission*, 514 US 334 (1995)). This is the case for Denmark, Germany, Slovenia, and to a certain extent France and Sweden. On the contrary, however, other countries, such as the Czech Republic, Ireland, Italy and Latvia, do not protect anonymous speech.

Also, in some jurisdictions, special protection is given to lawyers or even private parties in the course of **legal proceedings** (as in Danish case law and UK law respectively), in others for **artistic freedom/speech** (as in the Italian, Spanish and Slovenian constitutions) and **satirical speech** (as in the Italian, Slovenian and to a certain extent German case law), in others for **scientific research** (as in France), in yet others for **whistleblowing** (as in the UK). In Ireland, 'the courts have inferred a right to silence from the guarantee of the freedom of expression, with any abridgment of this right having to pass the proportionality test' (**privilege against self-incrimination**, also relevant for the UK).

Finally, in addition to the differences already mentioned between the jurisdictions in European and American (eg on standards of scrutiny, commercial speech, treatment of anonymous speech, but also on hate speech and flag burning), there appears to be a further one in another, less easily anticipated area, namely the European tradition of separating quite clearly freedom of expression and **freedom of association**. While in the US Constitution, freedom of association is an integral part of the First Amendment jurisprudence, a separation seems to prevail in Europe: of course, there are also deep links between these two freedoms in Europe, but there is constant emphasis on the autonomous nature of the two.

8. Freedom of Information and of the Press, Media Pluralism and the Impact of New Technologies

A special category, which is expressly covered by the protection of freedom of expression, at least according to Article 11.2 of the Charter, is **freedom of the press and freedom of information**.

Freedom of the press and freedom of information are multifaceted phenomena that can, in turn, be further divided into sub-categories:

(a) The right to **receive and have access to information** is generally and widely recognised as fundamental. However, this right may well be balanced with an individual's **right to privacy** (in this regard, public relevance of the information may be taken into account when balancing the two rights). A **ban on censorship of media publications** is present in several constitutions, being explicitly linked – in some legal systems – to the **crucial role of free media in the context of democratic societies**.

(b) **Pluralism of information and unconcentrated ownership of the media** emerge as a common feature, specially recognised in the case law of the CJEU: the purpose is to avoid unwanted ownership concentration (within a certain media market) or excessive 'barriers to entry' for new and independent operators, and to ensure that those media outlets that are financed by public funds provide effective, diverse and plural information.

(c) **The relationship between freedom of expression and new technologies** shows, until now, two different and opposite trends. The first one tends to extend provisions on freedom of the press to new media, irrespective of the source (or the medium); the second relies on a more restrictive approach. In this area, a common problem (not yet solved) can be identified with regard to freedom of expression, namely the pervasive and intrusive powers that new technologies grant to public authorities, which generate a new risk of interference not entirely grasped by the traditional concept of free speech rights.

(d) No common constitutional tradition can yet be identified with regard to the legal treatment of so-called **fake news**.

In general, one thing that is certainly common is the **constitutional ban on prior authorisation (censorship) of written publications**. It is linked to the crucial role in a democratic society of **freedom of the press**. As the EU report clarifies:

[c]oncerning the freedom of the media, it is settled case law that the purpose of the freedom of the press, in a democratic society governed by the rule of law, justifies it in informing the public, without restrictions other than those that are strictly necessary (1 December 2011, *Painer*, C-145/10, para. 113, and 29 July 2019, *Spiegel Online*, C-516/17, para. 72). Whereas, as stated above, the right to privacy may justify restrictions to the freedom of the media, the freedom of the press may, in turn, command a large interpretation of 'media privilege' under EU law, according to which Member States provide for exemptions and derogations from data protection requirements for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression (16 December 2008, *Satakunnan Markkinapörssi et Satamedia*, C-73/07, para. 56, and 14 February 2019, *Buivids*, C-345/17, para. 51. See Article 9 of Directive 95/46/EC and Article 85 of the General Data Protection Regulation). In the light of the freedom of the press, the exercise of the right to freedom of expression of users of a work protected by copyright may be favoured over the interest of the author in being able to prevent the reproduction of extracts from his work which has already been lawfully made available to the public (1 December 2011, *Painer*, C-145/10, paras. 134 and 135, and 29 July 2019, *Funke Medien NRW*, C-469/17, para. 60).

As for the ECtHR, the EU report goes on:

More generally, the ECtHR has developed sophisticated case law in this field, emphasising the vital role of the press as a ‘public watchdog’ (for instance, 7 February 2012, *Axel Springer v Germany* [GC], no 39954/08, para. 79) and emphasising that, where freedom of the press is at stake, national authorities have only a limited margin of appreciation to decide whether restrictions can be justified under Article 10.2 of the ECHR (10 December 2007, *Stoll v Switzerland* [GC], no 69698/01, para. 105). As far as audiovisual media are concerned, media pluralism may justify severe restrictions to the ownership rights of cable network operators, which are required, under EU law, to provide access to their cable networks to all television programmes allowed to be broadcast terrestrially (22 December 2008, *Kabel Deutschland Vertrieb und Service, C-336/07*, paras. 28 et seq.). The same reasoning applies with respect to national rules that aim to prevent that financial resources available to the national broadcasting organizations to enable them to ensure pluralism in the audio-visual sector be diverted from that purpose and used for purely commercial ends (3 February 1993, *Veronica Omroep Organisatie, C-148/91*, para. 11). However, a national rule requiring foreign broadcasters to use certain national companies to produce their programmes cannot be justified on grounds of media pluralism (25 July 1991, *Commission v Netherlands, C-353/89*, para. 31).

Freedom of expression includes the *right to receive and have access to information* (this is also reflected in several national constitutions: eg Bulgaria, Croatia, the Czech Republic, France, Italy, and Latvia). Concerning the press and the right to impart information, an important distinction that emerges in some jurisdictions is that between **statements of fact and statements of opinion (or value judgements)**, which triggers different standards of review by the courts (see for example the reports on the Czech Republic, Ireland and Slovenia). This distinction between two categories of speech is present also in the case law of the ECtHR: see *ES v Austria* (25 October 2018) and *Morice v France* (23 April 2015).

An important issue is the well-known English and Welsh **regime on defamation and libel**, which traditionally places the burden of proof of the truth of an assertion on those who made it: this regime was typical of the UK, but recently this difference from the rest of Europe (and the US) has been partly mitigated by the Defamation Act 2013.

Of particular importance is also the question of **pluralism of information and ownership of the media**. As underlined in the EU report:

[w]ith respect to freedom and pluralism of the media, the ECtHR held that it is ‘... incumbent to [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them ... Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society ...’ (ECtHR, 8 July 1986, *Lingens v Austria*, no 9815/82, paras. 41 and 42). Therefore, it is up to Member States to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinions and comments, reflecting, inter alia, the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comments. The choice of the means by which to achieve these aims vary according to local conditions and, therefore, falls within the Member States’ margin of appreciation (ECtHR, 17 September 2009, *Manole And Others v Moldova*, no 13936/02, para 100).

Also the CJEU ruled on the issue, in a case concerning Italy, stating that European legislation:

preclud[es], in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting

radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.⁷

A crucial matter, which has become even more relevant with the advent of new technologies (on which see below), is the relationship between freedom of the press and the **right to privacy**. This is a hotly debated topic, at the centre of some important cases of the CJEU, that would seem to indicate a prevalence, on certain conditions, of the right to data protection over freedom of information: see, among the most recent cases, the *Tele2 Sverige* case (C-203/15 and C-698/15) in addition to the *Google v Spain* and *CNIL* cases mentioned below; it seems warranted to derive a similar conclusion from the ECtHR case, *Bărbulescu v Romania* (5 September 2017). As the EU report explains:

[m]ore generally, in the field of data protection, restrictions to freedom of expression may be justified with regard to other fundamental rights, in particular Article 7 (Respect for private and family life) and Article 8 (Protection of personal data) of the Charter, for example concerning the disclosure of fiscal data for journalistic purposes (16 December 2008, *Satakunnan Markkinapörssi et Satamedia*, C-73/07, paras. 52 et seq.), data retention (21 December 2016, *Tele2 Sverige et Watson e.a.*, C-203/15 et C-698/15), and the online publication of video recordings (14 February 2019, *Buivids*, C-345/17). Relying on relevant ECtHR case law, the Court recalled that, in order to balance the right to privacy and the right to freedom of expression, a number of relevant criteria must be taken into account, [which include,] *inter alia*, contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the manner and circumstances in which the information was obtained and its veracity (14 February 2019, *Buivids*, C-345/17, para. 66).

Finally, in recent times, the **Internet and new technologies** have had a great impact on the evolution of the treatment of freedom of expression, with particular reference to the media (old and new): the fight against so-called fake news and the effort to restore

order in social networks, through which attempts to influence the outcome of electoral consultations are known to have occurred, has mainly preoccupied European Union institutions. However, such effort might be in tension with long-established principles for which freedom of expression, as mentioned in the introduction, implies lack of governmental interference, while these efforts imply potentially invasive legislative interventions. It is not the task of governments to conclusively affirm the existence of historical or scientific truths (from this point of view, the theme already posed, in another form, with reference to the criminalisation of the negation of the Holocaust, on which see above, is here proposed again). The project team was very well aware of how relevant and topical this subject is: any treatment of the law of freedom of expression in Europe nowadays necessarily faces the difficult challenges arising as regards freedom of expression in the digital sphere and the resulting heated policy debate amongst academics, courts, operators, and the general public. Therefore, this report could not ignore this topic, but the project team deemed it unviable to go further than what follows in the next few pages, because, by definition, it is difficult to identify the existence of traditions (ie the specific focus of the present report) in a new area such as this one, considering the fact that one component of a tradition is almost inevitably the passing of a certain amount of time for it to be established.

As explained in the EU report:

[a]s matter of fact, on several occasions, the Court ruled on aspects of freedom of expression and the Internet. It is commonly accepted that ideas, opinions and information may be expressed, received and imparted via the Internet and any means of electronic communication (24 November 2011, *Scarlet Extended*, C-70/10, para. 50, 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, para. 28, and of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, para. 101). Interpreting substantial EU law on copyright and related rights, the Court emphasised that the Internet is in fact of particular importance to freedom of expression and of information and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and

⁷ *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni, Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008], ECR I-00349.

information in that network characterised by the availability of immense amounts of information (8 September 2016, *GS Media*, C-160/15, para 45, and 29 July 2019, *Spiegel Online*, C-516/17, para. 81). In contrast, the publication on a website without the authorisation of the copyright holder of a work which was previously communicated on another website with the consent of that copyright holder does not contribute, to the same extent, to that objective (7 August 2018, *Renckhoff*, C-161/17, para. 40).

In a first group of legal systems, the provisions on freedom of the press have been expressly extended to new media by case law (Austria, the Czech Republic, Denmark, France, Italy, Latvia, and Slovenia).

Other countries have not yet followed a similar path (Croatia, Cyprus, and Ireland). In Belgium, the Court of Cassation (in contrast to lower courts and parts of doctrine) has indeed made such an extension, but only with reference to written texts, and therefore not to radio, TV, photos and videos. In Greece, Article 15.1 of the Constitution: 'explicitly prescribes the non-application of the protective provisions for the press to films, sound recordings, radio, television or any other similar medium for the transmission of speech or images'.

One issue that has also been emerging in academic and policy debates is that of the **responsibility and role of online platforms**: the national reports paint a picture of an evolving subject, in which, focusing on intermediaries, legislatures are laboriously trying to find a balance between the protection of freedom of expression, which in itself is favoured by new media, and repression of unwelcome forms of expression that find many more opportunities for dissemination in new media.

Linked to this is another issue that is lively debated, but is too recent to be addressed from the angle of the existence of a common constitutional tradition, and perhaps even national traditions: the **power of online platforms to exclude certain forms of discourse**. A comprehensive treatment of this problem is beyond the scope of this work, but it may be useful to recall the landmark ruling by the ECtHR *Delfi AS v Estonia* (16 June 2015), where the Strasbourg Court held that a media company publishing a news website could be lawfully requested to implement a system to review comments posted on it that amount to hate speech (on which see above), even before possible requests to remove them by offended readers. In a similar vein, the CJEU recently

ruled that even politicians are entitled to require the removal by social media outlets hate speech addressed to them and posted on such platforms (*Eva Glawischnig-Piesczek v Facebook Ireland Limited*, Case C-18/18).

From a different perspective, new technologies have also given State authorities pervasive new **opportunities to control the lives of their citizens**. This gives rise to major disputes which have sought to define the boundaries of the use of these new technologies by public authorities, reaffirming the traditional rights of freedom of expression in the face of new forms of surveillance made possible by new technologies (this is particularly the case in Portugal and the UK; with regard to the latter, see the case of *Big Brother Watch and Others v the UK* (25 May 2021), see also *Centrum för Rättvisa v Sweden* (25 May 2021)).

Finally, the topic of **fake news** is particularly relevant in addressing the extent to which this report should be concerned with the emerging legal problems raised by new technologies. On the one hand, a tradition has by definition a temporal component, which implies the passing of a certain amount of time; therefore new issues might be completely outside of our scope. However, it shall be observed that, from a certain perspective, the reality of the press in Europe today is much more similar to that of the 18th century, where everybody could access a printing press and spread their ideas, than to that of the last century, which witnessed a concentration of great media conglomerates acting as necessary intermediaries. Thus, a tradition could be identified even with regard to apparently new phenomena such as social media.

In a similar vein, with particular regard to fake news, it appears that the constitutional traditions are relevant in framing the policy debate: one can indeed ask whether or not the constitutional tradition of a country requires a prior judicial decision before removing fake news. If it does, only the approach followed so far by France would be compatible, whereas the different one taken by Germany, which entrusts Internet service providers with the task of removing fake news from the web, would appear much more problematic. In summary, at the moment, some special regimes that restrict freedom of expression in the case of fake news exist, but no common constitutional tradition can be identified yet.

One last point worthy of consideration is that part of the evolution with regard to the impact of new technologies on the law of freedom of expression in Europe was **influenced directly by European Union institutions**, for instance in the case of the right to be

forgotten, recognised by the CJEU in the well-known *Google v Spain* case (*Google v Spain SL, Google Inc v Spanish Data Protection Agency, Mario Costeja González*, C-131/12) and then better specified in *CNIL (GC, AF, BH, ED v Commission nationale de l'informatique et des libertés (CNIL)*, C-136/17), and subsequently by national laws and courts. In other words, here the movement seems to have been predominantly top-down, unlike in most other areas considered in this report, where a longer-lasting tradition can be identified.

9. Conclusions

Ultimately, a sufficiently consolidated national **tradition** of protection of freedom of expression can be found in most EU Member States.

The common constitutional tradition on freedom of expression has its bedrock in the **prohibition of prior authorisation of publications (censorship)**. In fact, some forms of censorship are allowed: in some instances, prior restraint is possible, such as with films in the UK; in some others, Internet platforms have a duty to prevent the publication of hate speech (see the *Delfi* case recalled above); finally, freedom of expression is not granted in some sectors of public life, which is the case particularly of civil servants in Germany (but not only there), whose duty of loyalty prevails over their freedom of expression. However, these appear exceptions that do not alter the traditional, fundamental presumption of unlawfulness of any form of government censorship (in the sense of requirement of prior authorisation of publications).

Another strong commonality is the fact that the protection of freedom of expression tends to be functional to the advancement of democracy. In other words, freedom of expression is not framed in Europe in the individualistic way so typical of the American First Amendment jurisprudence. Instead, it tends to be an instrument of democracy. This explains first of all why there are several forms of unprotected speech, which can typically be traced back to the following categories: defamation; incitement to, approval of or praise of an act of terrorism; threat to commit an act of terrorism; threat of death, bodily harm or extensive damage; defamation of a nation, race, ethnic or another group of people; incitement to hatred towards a group of people or suppression of their rights and freedoms; establishment, support and promotion of movements aimed at the

suppression of human rights and freedoms; denial, approval and justification of genocide; incitement to violence; hate speech and racism; Holocaust denial and reference to the Nazi ideology.

However, significant differences exist among the jurisdictions examined with regard to these forms of unprotected speech. In any case, such categories of speech that do not enjoy the protection of freedom of expression are to be considered limited and interpreted strictly, given that they allow automatic restrictions or limitations, prior to any proportionality test.

Aside from these forms of automatically unprotected speech, a balancing of freedom of expression with other fundamental rights needs to be conducted. The instrumental nature of freedom of expression in EU Member States also accounts for the way in which this operation is conducted, which indeed takes the form of a proportionality analysis. The practical outcome of its application can also vary in a considerable way from Member State to Member State, thus offering an even more multi-faceted picture of the law of freedom of expression across the examined jurisdictions (this is true beyond the particular cases of Poland and Hungary, which have been experiencing some unprecedented friction with EU institutions, according to their respective reports). This diversified picture emerges clearly with regard to speech with a religious dimension, to certain special categories of freedom of expression, and to the broad area of freedom of information and of the press, particularly as far as the impact of new technologies is concerned.

Annex 1

TABLE NO 1
ANSWERS TO QUESTIONNAIRE

	AT	BE	BG	HR	CY	CZ	DK	EE	FI	
										LEGEND
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	3	3	3	3	3	3	3	2	3	1 = MIN 3 = MAX
Does freedom of expression prevail over minority rights?	2	1	2	2	1	2	3	∅	∅	1 = ABSENCE OF PREVALENCE 3 = MAX PREVALENCE
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	3	3	3	3	3	2	3	2	3	1 = HATE SPEECH 'ALLOWED' 3 = HATE SPEECH 'EXCLUDED'
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	3	∅	3	1	3	3	1	∅	1	1 = NO SANCTIONS FOR BLASPHEMY 3 = SANCTIONS FOR BLASPHEMY
Is condoning/apology of a crime in itself a crime?	1	∅	1	3	2	3	2	∅	1	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME 3 = OTHERS
How is Holocaust denial handled?	3	∅	1	3	1	3	2	∅	1	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL 3 = OTHERS
Is commercial speech an autonomous category?	3	∅	1	3	2	2	1	∅	2	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY 3 = OTHERS
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	∅	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	∅	1	1	1	1	1	∅	1	1 = SEPARATE PRINCIPLES 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	3	∅	3	3	1	3	1	∅	1	1 = OTHERS 3 = SANCTIONS FOR BURNING FLAG
To what extent is anonymous speech protected?	3	∅	2	2	∅	3	1	∅	∅	1 = PROTECTED ANONYMITY 3 = OTHERS
Are there limitations on freedom of expression due to ethical grounds?	1	∅	1	∅	∅	∅	1	∅	∅	1 = ETHICAL LIMITATIONS 3 = OTHERS

TABLE NO 1
ANSWERS TO QUESTIONNAIRE

	FR	DE	EL	HU	IS	IT	LV	LT	LU	
										LEGEND
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	3	3	3	1	3	3	3	∅	∅	1 = MIN 3 = MAX
Does freedom of expression prevail over minority rights?	1	2	2	3	1	2	2	∅	∅	1 = ABSENCE OF PREVALENCE 3 = MAX PREVALENCE
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	3	3	3	2	2	3	2	∅	∅	1 = HATE SPEECH 'ALLOWED' 3 = HATE SPEECH 'EXCLUDED'
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	1	3	3	3	2	3	1	∅	∅	1 = NO SANCTIONS FOR BLASPHEMY 3 = SANCTIONS FOR BLASPHEMY
Is condoning/apology of a crime in itself a crime?	3	1	3	∅	1	3	3	∅	∅	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME 3 = OTHERS
How is Holocaust denial handled?	3	3	3	1	1	3	3	∅	∅	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL 3 = OTHERS
Is commercial speech an autonomous category?	1	1	∅	1	1	2	1	∅	∅	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY 3 = OTHERS
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	2	∅	∅	∅	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	1	2	1	1	1	1	∅	∅	1 = SEPARATE PRINCIPLES 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	3	3	∅	∅	1	3	1	∅	∅	1 = OTHERS 3 = SANCTIONS FOR BURNING FLAG
To what extent is anonymous speech protected?	2	2	3	∅	3	3	3	∅	∅	1 = PROTECTED ANONYMITY 3 = OTHERS
Are there limitations on freedom of expression due to ethical grounds?	3	∅	∅	∅	1	2	1	∅	∅	1 = ETHICAL LIMITATIONS 3 = OTHERS

TABLE NO 1
ANSWERS TO QUESTIONNAIRE

	MT	NL	PL	PT	RO	SK	SI	ES	SE	UK	
											LEGEND
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	∅	∅	2	3	∅	∅	3	3	3	3	1 = MIN 3 = MAX
Does freedom of expression prevail over minority rights?	∅	1	3	2	∅	∅	2	1	3	1	1 = ABSENCE OF PREVALENCE 3 = MAX PREVALENCE
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	∅	∅	1	3	∅	∅	3	3	3	3	1 = HATE SPEECH 'ALLOWED' 3 = HATE SPEECH 'EXCLUDED'
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	∅	∅	3	2	∅	∅	1	3	1	2	1 = NO SANCTIONS FOR BLASPHEMY 3 = SANCTIONS FOR BLASPHEMY
Is condoning/apology of a crime in itself a crime?	∅	∅	3	∅	∅	∅	3	3	1	1	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME 3 = OTHERS
How is Holocaust denial handled?	∅	∅	3	1	∅	∅	3	2	2	2	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL 3 = OTHERS
Is commercial speech an autonomous category?	∅	∅	1	1	∅	∅	3	1	2	1	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY 3 = OTHERS
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	∅	∅	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	∅	∅	1	1	∅	∅	1	1	1	1	1 = SEPARATE PRINCIPLES 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	∅	∅	3	3	∅	∅	3	3	3	1	1 = OTHERS 3 = SANCTIONS FOR BURNING FLAG
To what extent is anonymous speech protected?	∅	∅	3	∅	∅	∅	2	2	1	3	1 = PROTECTED ANONYMITY 3 = OTHERS
Are there limitations on freedom of expression due to ethical grounds?	∅	∅	∅	∅	∅	∅	∅	1	1	3	1 = ETHICAL LIMITATIONS 3 = OTHERS

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	9,006,398	11,589,623	6,943,565	4,102,921	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	3	3	3	3	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	2	1	2	2	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759) 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	3	3	3	3	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	3	∅	3	1	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	1	∅	1	3	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	3	∅	1	3	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	3	∅	1	3	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE; 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	∅	1	1	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	3	∅	3	3	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	3	∅	2	2	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations of freedom of expression due to ethical grounds?	1	∅	1	∅	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	1,207,359	10,708,981	5,792,202	1,326,617	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	3	3	3	2	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	1	2	3	∅	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759) 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	3	2	3	2	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	3	3	1	∅	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	2	3	2	∅	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	1	3	2	∅	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	2	2	1	∅	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE; 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	1	1	∅	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	1	3	1	∅	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	∅	3	1	∅	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations on freedom of expression due to ethical grounds?	∅	∅	1	∅	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	5,540,720	65,273,511	83,783,942	10,423,054	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	3	3	3	3	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	∅	1	2	2	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759) 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	3	3	3	3	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	1	1	3	3	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	1	3	1	3	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	1	3	3	3	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	2	1	1	∅	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	2	∅	1 = RELIGIOUS SYMBOLS NOT PERSVASIVE 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	1	1	2	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	1	3	3	∅	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	∅	2	2	3	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations on freedom of expression due to ethical grounds?	∅	3	∅	∅	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	9,657,985	4,937,786	60,461,826	1,884,049	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	1	3	3	3	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	3	1	2	2	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759) 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	2	2	3	2	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	3	2	3	1	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	∅	1	3	3	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	1	1	3	3	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	1	1	2	1	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERSVASIVE 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	1	1	1	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	∅	1	3	1	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	∅	3	3	3	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations on freedom of expression due to ethical grounds?	∅	1	2	1	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	2,718,327	626,813	441,650	17,134,872	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	∅	∅	∅	∅	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	∅	∅	∅	1	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759); 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	∅	∅	∅	∅	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	∅	∅	∅	∅	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	∅	∅	∅	∅	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	∅	∅	∅	∅	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	∅	∅	∅	∅	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	∅	∅	∅	∅	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	∅	∅	∅	∅	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	∅	∅	∅	∅	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations on freedom of expression due to ethical grounds?	∅	∅	∅	∅	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	37,842,866	10,193,917	19,225,418	5,459,893	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	2	3	∅	∅	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	3	2	∅	∅	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759) 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	1	3	∅	∅	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	3	2	∅	∅	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	3	∅	∅	∅	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	3	1	∅	∅	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	1	1	∅	∅	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERVASIVE 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	1	∅	∅	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	3	3	∅	∅	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	3	∅	∅	∅	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations on freedom of expression due to ethical grounds?	∅	∅	∅	∅	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

TABLE NO 2
COUNTRIES BY POPULATION
(3 August, 2020, based on Worldometer elaboration of the latest United Nations data)

	2,078,964	46,756,500	10,099,265	57,886,011	LEGEND (total)
Is freedom of expression subject to a proportionality analysis? What are the constitutional standards of scrutiny for freedom of expression?	3	3	3	3	1 = MIN (9,657,985) 2 = (39,169,843) 3 = MAX (418,670,594)
Does freedom of expression prevail over minority rights?	2	1	3	1	1 = ABSENCE OF PREVALENCE (215,082,662) 2 = (282,382,759) 3 = MAX PREVALENCE (63,392,318)
Is hate speech excluded from the area of constitutionally protected speech, or is it included? If it is included, can it still be punishable if it constitutes a specific crime (defamation, incitement to race hatred, etc)?	3	3	3	3	1 = HATE SPEECH 'ALLOWED' (37,842,866) 2 = (28,515,418) 3 = HATE SPEECH 'EXCLUDED' (411,139,778)
Do crimes of opinion exist in your country? In particular, how about blasphemy, contempt of the authorities or of a religion?	1	3	1	2	1 = NO SANCTIONS FOR BLASPHEMY (94,771,632) 2 = (83,017,714) 3 = SANCTIONS FOR BLASPHEMY (276,792,476)
Is condoning /apology of a crime in itself a crime?	3	3	1	1	1 = LACK OF SANCTIONS FOR APOLOGY OF A CRIME (188,197,687) 2 = (6,999,561) 3 = OTHERS (239,532,672)
How is Holocaust denial handled?	3	2	2	2	1 = LACK OF SANCTIONS FOR HOLOCAUST DENIAL (38,481,332) 2 = (130,533,978) 3 = OTHERS (285,566,512)
Is commercial speech an autonomous category?	3	1	2	1	1 = COMMERCIAL SPEECH NOT AN AUTONOMOUS CATEGORY (340,952,334) 2 = (73,388,151) 3 = OTHERS (15,188,283)
How is the matter of the display of religious symbols handled? How are religious issues handled in certain sensitive environments such as schools, courtrooms, hospitals, etc? How is conscientious objection handled?	∅	∅	∅	∅	1 = RELIGIOUS SYMBOLS NOT PERSVASIVE 2 = (83,783,942) 3 = OTHERS
What is the interplay between freedom of expression and freedom of association? Are they constitutionally separate rights, or is the latter included in the scope of the former?	1	1	1	1	1 = SEPARATE PRINCIPLES (444,158,768) 2 = (10,423,054) 3 = OTHERS
Is burning the national flag allowed? What about foreign flags or a political party's flag?	3	3	3	1	1 = OTHERS (87,248,127) 3 = SANCTIONS FOR BURNING FLAG (347,272,656)
To what extent is anonymous speech protected?	2	2	1	3	1 = PROTECTED ANONYMITY (15,891,467) 2 = (208,939,403) 3 = OTHERS (203,150,971)
Are there limitations on freedom of expression due to ethical grounds?	∅	1	1	3	1 = ETHICAL LIMITATIONS (85,419,765) 2 = (60,461,826) 3 = OTHERS (133,159,522)

AUSTRIA = 9,006,398 inhabitants; BELGIUM = 11,589,623; BULGARIA = 6,943,565; CROATIA = 4,102,921; CYPRUS = 1,207,359; CZECH REPUBLIC = 10,708,981; DENMARK = 5,792,202; ESTONIA = 1,326,617; FINLAND = 5,540,720; FRANCE = 65,273,511; GERMANY = 83,783,942; GREECE = 10,423,054; HUNGARY = 9,657,985; IRELAND = 4,937,786; ITALY = 60,461,826; LATVIA = 1,884,049; LITHUANIA = 2,718,327; LUXEMBOURG = 626,813; MALTA = 441,650; NETHERLANDS = 17,134,872; POLAND = 37,842,866; PORTUGAL = 10,193,917; ROMANIA = 19,225,418; SLOVAKIA = 5,459,893; SLOVENIA = 2,078,964; SPAIN = 46,756,500; SWEDEN = 10,099,265; UNITED KINGDOM = 67,886,011.

Table 1 shows the answers to the Common Constitutional Traditions in Europe questionnaire on freedom of expression. Questions submitted to the national correspondents are presented horizontally and data concerning the Member States of the European Union and the UK vertically. For each country, '3' stands for an affirmative answer for each question, '1' for a negative answer and '2' means an intermediate level suggesting partial protection of the freedom of expression in the relevant domain, while 'Ø' indicates that no answer was provided. Similarly, in Table 2, a synoptic picture at European population level is indicated, where the different proportions of citizens who have (or not) a certain right guaranteed are shown.

In Europe in general, freedom of expression is guaranteed. However, this freedom is not absolute and is limited for reasons of public order and respect for the dignity of other citizens, as well as minorities or particular ethnic, cultural and linguistic groups, who may feel discriminated against or offended by the expression of third parties. For nine out of ten Europeans, freedom of expression is thus subject to a proportionality check, which aims at ensuring a balance between freedom of expression and either the protection of public order or human dignity.

An example of this balancing exercise relates to hate speech, which is prohibited in 90% of examined jurisdictions. Something similar happens when freedom of expression needs to be balanced with the protection of minorities: only in 14% of examined jurisdictions does the former prevail over the latter. Restrictions on freedom of expression due to more general ethical issues are in place in all examined EU Member States except France and the UK.

As far as the relation between freedom of religion and freedom of expression is concerned, the situation is more diverse. The prohibition against blasphemous acts, denial of the Holocaust and the display of religious symbols in workplaces or schools differs from country to country. For example in France, Denmark, Slovenia, Sweden and Finland, there are no sanctions for blasphemy. Claiming that the Holocaust never happened is not a crime in Bulgaria, Cyprus, Finland, Hungary, Ireland and Portugal. And finally, according to the country reports, only in Germany does a principle of proportionality seem to be applied with regard to religious symbols in schools or workplaces.

With regard to public order issues, the majority of countries do not provide for a sanction for those who engage in condoning/apology of crime, while only four countries out of the ones taken into consideration sanctioning the illegality of burning their national flag (Denmark, Finland, Ireland, Latvia and the UK).

Compared to other spheres adjacent to the traditional core of freedom of expression, such as freedom of association and the regulation of commercial speech, there is a prevailing consensus among European nations. Commercial speech – except in Slovenia, Croatia and Austria – is not an independent category with respect to freedom of expression; and freedom of expression is considered by all countries to be independent of freedom of association.

For other rights linked to new forms of mass communication and social networks, it should be noted that anonymity is only protected in Denmark and Sweden, while all other countries either do not mention this new right or do not explicitly protect it.

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