



**EPC** | European Publishers Council

## Response from the European Publishers Council to the Independent Report from the HLG on Media Freedom and Pluralism

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*The European Publishers Council (EPC) brings together Chairmen and CEOs of Europe's leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting communicating with Europe's legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the EU.*

***Our liberty depends on the freedom of the press,  
and that cannot be limited without being lost.***

***Thomas Jefferson***

www.epceurope.eu

### 01. Executive Summary

In January 2013, a High Level Group (HLG) on Media Freedom and Pluralism, set up by Commissioner Kroes in October 2011, delivered a report "A Free and Pluralistic Media to Sustain European Democracy" with 30 recommendations relating to the following areas: (1) political interference; (2) private and commercial interference; (3) media ownership concentration; (4) existing and potential legal threats to journalists' rights; (5) the role and independence of regulatory authorities; and (6) existing or potential measures favouring quality journalism, ethics and accountability.

Whilst members of the European Publishers Council (EPC) welcome the group's commitment to upholding press freedom by tackling state interference and considering

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financial support for quality journalism, we regret that this led them to some recommendations which, if enacted, could impose Europe wide rules on an independent, free press.

Despite this report, there is no mention of recent government interference or harmful changes to media laws that end up restricting media freedom, independence and indeed media access to the national market, an issue where EPC Members have strong concerns.

The European Publishers Council (EPC) fundamentally and wholly opposes the idea that the European Commission should regulate “independent” national media councils just as similarly any notion of applying indicators, as per the Monitoring tool, to measure pluralism seems to be a step too far in terms of EU interference.

A free and independent press has always been the keystone of an open society. Journalism is the exercise of a fundamental human right - freedom of expression. This reflects the special role of a free press in the functioning of a democracy. The press is there to scrutinise those in positions of power. It could not fulfill that role if those it was scrutinising had authority, however apparently limited, over it. The impact on a free society would be incalculable.

On balance, we feel the High Level group has missed a golden opportunity to address the real challenges media companies face today and to support an independent press that promotes democracy and cultural diversity throughout the world.

The free and independent press faces deeply challenging times in spite of soaring audiences online, where profits are elusive. We welcome the recognition that competition rules need to adapt to the new media eco-system because it is a fact of digital life these days that most content made available online by publishers, whether free at the point of consumer access or behind a pay-wall is re-used widely – mainly by commercial organisations, but without authorisation by the rights holders, and without any remuneration.

But we don't need new media regulation: what we need are the right market conditions for the long term viability of quality journalism and professional media and this reality is largely ignored in this report.

Independent press councils and self-regulatory bodies or press ombudsmen exist already in most EU countries and operate according to national cultural, historic and social mores. Journalists follow codes of ethics and high professional standards are already adapted to the digital environment so Recommendation 4 that specifies how self-regulation should

operate, prescribing specific elements, effectively seeking to license journalists by granting and removing “journalistic status”, is complete anathema to the spirit and practice of self-regulation and belies any real understanding of how self-regulation and press freedom work hand in hand. *“All EU countries should have independent media councils with a politically and culturally balanced and socially diverse membership. Nominations to them should be transparent, with built-in checks and balances. Such bodies would have competences to investigate complaints, much like a media ombudsman, but would also check that media organisations have published a code of conduct and have revealed ownership details, declarations of conflicts of interest, etc. Media councils should have real enforcement powers, such as the imposition of fines, orders for printed or broadcast apologies, or removal of journalistic status. The national media councils should follow a set of European-wide standards and be monitored by the Commission to ensure that they comply with European values.”*

We would also challenge the idea that the EU has legal competence under the treaties to harmonise substantive media laws such as defamation. Any notion of harmonised rules of the game, monitored by the EU, is anathema to press freedom – the very thing the group was tasked to protect.

Taking into account the content of the report, the European Publishers Council (EPC) would also like to refer the European Commission to the “European Charter on Freedom of the Press”<sup>1</sup>. This was adopted and signed by 46 editors-in-chief and leading journalists from 19 countries in Hamburg 25 May 2009. Since then many more have signed and will continue to do so. In ten articles, the charter formulates principles for the freedom of the press; free from government interference. The goal was to establish the charter’s validity across Europe and to make its adoption a condition in EU accession negotiations with candidate Member States. The charter was presented both to the European Commission in Brussels and to the Council of Europe in Strasbourg. In addition to national protections for the freedom of the press, journalists all over Europe will be able to cite the charter in cases of conflict with the state or with state-controlled institutions, and to call on their international colleagues for help and support.

## 02. Our comments on the specific recommendations

Notwithstanding our strong, fundamental concerns about the report and its conclusions, we recognise the European Commission’s good intention to set up the HLG in order to make recommendations that would protect press freedom, especially from interference

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<sup>1</sup> [www.pressfreedom.eu/](http://www.pressfreedom.eu/)

from the State, which we understand is still the case in some member states. Some of the more positive recommendations include 9, 10, 11, 12, 13, 14, 18, 19, 21, 22, 23, and 27.

The HLG Report itself went some way to understand the role of the media and some of the challenges they face today. However, we feel that some of the recommendations do not address the problems it identified, but rather strayed into areas that are potentially dangerous for a free press or into areas in which the EU has no competence.

With regard to Competition Policy we would highlight the following:

We welcome the recognition in **recommendation 8**<sup>2</sup> that competition rules need to adapt to the new media eco-system because it is a fact of digital life these days that most content made available online by publishers, whether free at the point of consumer access or behind a pay-wall is re-used widely – mainly by commercial organisations, but without authorisation by the rights holders, and without any remuneration.

As the technologies and markets converge, not only does pluralism expand to the benefit of citizens, but publishers face new forms of competition from players not traditionally associated with the publishing market. These new competitors include state-funded broadcasters, search engines, telecommunications companies as well as the many internet service providers, which offer a wide range of news, information and entertainment services. Any new measures which increase the regulatory burden on the press will not bring the benefits the authors perceived.

With regard to **recommendation 7**<sup>3</sup>, most EU member states already impose some form of special regulations on the ownership of media industries to safeguard pluralism – over and above competition law, specifically in order to promote diversity of opinion as well as ownership in democratic societies. In addition, the European Commission has competition powers to examine mergers and acquisitions of media companies to prevent abusive concentration within clearly defined relevant markets. Media concentration through merger or acquisition, leading to cross-media ownership, is not, of course, always abusive – or anti-competitive, a fact recognised by competition authorities throughout the world. In

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<sup>2</sup> Recommendation 8: “European and national competition authorities should take into account the specific value of media pluralism in the enforcement of competition rules. They should also take into account the increasing merging of different channels of communication and media access in the definition of the relevant markets. In addition, the High Level Group calls upon the European and national competition authorities to monitor with particular attention, under competition policy, new developments in the online access to information. The dominant position held by some network access providers or internet information providers should not be allowed to restrict media freedom and pluralism. An open and non-discriminatory access to information by all citizens must be protected in the online sphere, if necessary by making use of competition law and/or enforcing a principle of network and net neutrality”.

<sup>3</sup> Recommendation 7: “National competition authorities need to make (or commission) pro-active regular assessments of individual countries’ media environments and markets, highlighting potential threats to pluralism. At the EU level, there should be pro-active market assessment under competition policy in the form of a sectoral inquiry”.

this regard, we don't need new media regulation, however; what we need are the right conditions for the long term viability of quality journalism and professional media.

### 03. Recommendations that are potentially harmful

We regret to see that the report fails to take account of even one of the most basic aspects of professional publishing: the role, the responsibilities and the liability that the publisher carries in the course of his/her activities, along with the role of the editor to keep an editorial line and the integrity of the published content.

The role, successes and the value of self-regulation are also diluted in the report, even though independent press councils and self-regulatory bodies or press ombudsmen exist already in most EU countries which operate according to national cultural, historic and social mores. Journalists follow codes of ethics and high professional standards which already adapted to the digital environment.

It is unfortunate that the report underestimates the role of the private media vis-à-vis the public service broadcasters. It is concerning to read that private media is portrayed as solely concerned with making profit, and pays scant regard to its contribution to Europe's democracies, plurality, diverseness and culture. On the other hand, public service broadcasters are portrayed as a benign force for good and the impacts of state/public intervention is ignored. In particular, the report has not adequately taken into account the impact distorting effect of state aid to publicly funded broadcasters on private media and the negative impact this has on plurality.

There are indeed certain recommendations that are rather alarming including Recommendation 4 which as we state above belies any real understanding of the nature of self-regulation and its role in supporting freedom of expression and press freedom.

Recommendations in the area of media pluralism such as **recommendation 1<sup>4</sup>** are arguably beyond the competences of the EU. For many EPC members this was seen as the beginnings of the EU trying to justify a greater role in the area of media plurality and content.

Phrases like "*more extensive competence*" for issues of media freedom, besides the creation of legal uncertainty to media organisations, create also an imbalance of rights prescribed in the Charter of Fundamental Rights.

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<sup>4</sup> Recommendation 1: "*The EU should be considered competent to act to protect media freedom and pluralism at State level in order to guarantee the substance of the rights granted by the Treaties to EU citizens, in particular the rights of free movement and to representative democracy. The link between media freedom and pluralism and EU democracy, in particular, justifies a more extensive competence of the EU with respect to these fundamental rights than to others enshrined in the Charter of Fundamental Rights.*"

We believe that this recommendation goes also against the HLG statement that “acknowledges [...] the main responsibility for maintaining media freedom and pluralism lies with the member states”. National markets, cultures and habits are so diverse across Europe, shaped by different historical experiences than lead to “customise” approaches.

The issue of EU’s competence on this matter should finally be resolved in an official way as it emerges often, usually triggered by different political motives.

We struggle to understand the motivation behind the **3<sup>rd</sup> recommendation** as such “independent monitoring centres” exists already under the umbrella of the Council of Europe<sup>5</sup>, OESCE<sup>6</sup> and the United Nations<sup>7</sup>. Instead of creating new bodies, we should focus on strengthening and implementing the work of the existing international bodies.

We support the idea of the Media Councils which exist in the various member states, under voluntary self-regulatory systems. The European Publishers Council fundamentally oppose however the idea that the European Commission should regulate “independent” national media councils<sup>8</sup> and question the role that has been attributed by the HLG to the Commission especially any function that could prescribe the way that those national councils should be operating. This will go firmly against the principles of self-regulation.

Instead, the European Commission should give more incentives to the sector to work under an effective self-regulatory system, which meets the needs and the particularities of the respective member state. The Alliance of Independent Press Councils of Europe (AIPCE)<sup>9</sup> a loose network of independent content regulators for both press and broadcast media, provides already an excellent forum for Media and Press Council representatives to discuss topical issues, to exchange ideas and to offer and receive advice and best practices.

The **recommendation 4<sup>10</sup>** goes even further wishing the Councils to have the ability to “impose fines, order apologies and remove journalistic status” following complaints by

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<sup>5</sup> Media - Freedom of expression and information - Article 10 of the European Convention of Human Rights - <http://www.coe.int/t/dghl/standardsetting/media/>

<sup>6</sup> OECD Representative on Freedom of the Media: <http://www.osce.org/fom>

<sup>7</sup> <http://www.un.org/en/events/pressfreedomday/> ;

The EPC is proud to celebrate the 20th anniversary of the United Nations “World Press Freedom Day” on Friday, 3 May, and applauds the UN for its attempt to: celebrate the fundamental principles of press freedom; assess the state of press freedom throughout the world; defend the media from attacks on their independence; pay tribute to journalists who have lost their lives in the line of duty; [http://epceurope.eu/wp-content/uploads/2013/05/PR-WorldPressFreedomDay\\_6May2013.pdf](http://epceurope.eu/wp-content/uploads/2013/05/PR-WorldPressFreedomDay_6May2013.pdf)

<sup>8</sup> [http://epceurope.eu/wp-content/uploads/2013/02/PR-HLG-resorts-to-regulation-to-protect-press-freedom-in-europe\\_22Jan2013.pdf](http://epceurope.eu/wp-content/uploads/2013/02/PR-HLG-resorts-to-regulation-to-protect-press-freedom-in-europe_22Jan2013.pdf)

<sup>9</sup> <http://www.aipce.net/>

<sup>10</sup> Recommendation 4: “All EU countries should have independent media councils with a politically and culturally balanced and socially diverse membership. Nominations to them should be transparent, with built-in checks and balances. Such bodies would have competences to investigate complaints, much like a media ombudsman, but would also check that media organisations have published a code of conduct and have revealed ownership details, declarations of conflicts of interest, etc. Media councils should have real enforcement powers, such as the imposition of fines, orders for printed or broadcast apologies, or removal of

citizens. The above points are highly problematic for publishers, let alone the fact that there is no single “journalistic status” in the European Union, which could be removed. We trust that those points, not carefully examined and phrased, will meet the strong opposition of all media and journalist’s organisations.

With reference to **recommendation 5**<sup>11</sup>, EPC believes that the EU does not have legal competence under the treaties to harmonise substantive media laws such as defamation. Any notion of harmonised rules of the game, monitored by the EU, is anathema to press freedom – the very thing the group was tasked to protect.

Especially with regard to libel law, instead of harmonisation, this issue should be looked at in the framework of Brussels I and Rome II Regulations, which deal with International Private Law. They set rules to determine which Court should hear a case (Brussels I), and which country’s Law should be applied (Rome II) when there is a cross-border conflict. The international elements in matters of private law cover such matters as family law and law of contract, including in the case of Brussels I, cases brought against the media for defamation and violations of privacy. **At present, Rome II does not apply to the media, whereas Brussels I does in spite of a proposal from the European Parliament to solve this problem, adopted by a large majority<sup>12</sup> in 20 November 2012.**

However, because in all cross-border cases of defamation and privacy violations, the *jurisdiction* under Brussels I is the first matter to be settled, the absence of a rule to determine thereafter which country’s *law* should apply is an issue for media companies when defending cases of defamation and violations of privacy in countries outside the place of editorial control because under Brussels I, media companies find themselves defending cases according to foreign laws, often in multiple jurisdictions.<sup>13</sup>

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*journalistic status. The national media councils should follow a set of European-wide standards and be monitored by the Commission to ensure that they comply with European values”*

<sup>11</sup> Recommendation 5: “For improving the functioning of the Single Market, further harmonisation of EU legislation would be of great benefit. Currently, the existence of divergences between national rules can lead to distortions in the framework of cross-border media activities, especially in the online world. It would be particularly important to adopt minimum harmonisation rules covering cross-border media activities on areas such as libel laws or data protection”.

<sup>12</sup> The outcome was 567 votes for and 28 against.

<sup>13</sup> see Case ECJ C-68/93 *Shevill and Others* [1995] ECR I415, paragraph 19 where the claimants were established in England, France and Belgium and the alleged libel was published in a French newspaper with a small circulation in England. The ECJ held that, in the case of a libel in the press:

- the place where the damage occurs is the place where the publication is distributed, when the victim is known in that place (paragraph 29); and
- the place of the event giving rise to the damage takes place is the country where the newspaper was produced (paragraph 24)<sup>(11)</sup>.

The ECJ also held in *Shevill* that as regards the assessment by the English court applying Article 5(3) of Brussels I of whether “damage” actually occurred or not, the national court should apply national rules provided that the result did not impair the effectiveness of the general objectives of the Regulation.

Furthermore the ECJ held that where a libel causes damage in several different EU Member States, the victim may sue in any of the jurisdictions where the libel is published in respect of the damage suffered in that jurisdiction.

Media companies need the legal certainty that when they publish – whether in print or online, the editorial content complies with the law and any self-regulatory codes which apply where the final editorial decisions are taken. As more and more content is made available outside the country of first publication this legal certainty is ever more important in order to uphold the freedom of expression. We believe that the issue should be looked in the framework of those two EU Regulations.

## 04. Conclusions

We note that this is not a European Commission report but rather one which reflects the views of ‘independent experts’ appointed by the Commission but nevertheless we have fundamental concerns with many aspects of it. It contains many misunderstandings of European media or pays scant attention to huge swathes of the environment we operate in. Moreover, some of its findings are simply chilling and an anathema to democracy and the very “European values” it seeks to impose.

Only independently run self-regulation can guarantee the freedom and independence of the press; any other form of regulation, supervision, statutory control, or “monitoring” would undermine that independence.

We trust that any decision to pursue possible follow-up actions will be based on an in-depth, proper analysis of their added value to the status quo where Member States have competence to deal with matters of media pluralism, recalling the limitations under Article 51 (2) of the Charter of Fundamental Rights which does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

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*On behalf of the European Publishers Council*