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FREEDOM OF EXPRESSION AS A EUROPEAN VALUE

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Abstract

Freedom of expression is a long-established right, present since the origins of modern constitutionalism. Although the EU is a relative newcomer to the freedom of expression field, it has been very active recently, adopting a significant amount of secondary legislation relevant to free expression, much of which relates to digital platforms, social media and emerging technologies. While some parts of the world (namely, Russia and China) may approach freedom of expression very differently from Europe, it is in the contrast to the US where current battles rage sharply. Although there has, for some time, been a noticeable difference in approach to freedom of expression on both sides of the Atlantic, the problem of harmful, or even illegal, communications such as hate speech or disinformation has been hugely amplified by the exponential increase in the digital media. This contribution explores this divergence in more detail, as it has manifested itself in both in the digital and non-digital sphere, but with a particular focus on the EU Digital Services Act, with the aim of defending the European approach and articulating any values it may represent.

1. Introduction

'In Britain, and across Europe, free speech, I fear, is in retreat.' These were the words of US Vice President JD Vance, in a speech he gave in Munich in February 2025. So there could be no doubt as to his argument, he also cited instances of where he considered free speech under threat in Europe – for example: 'I look to Sweden, where, two weeks ago, the government convicted a Christian activist for participating in Quran burnings that resulted in his friend's murder.'[1] Vance's speech was not well-received by all in the

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1. JD Vance, Remarks by the Vice President at the Munich Security Conference (*The American Presidency Project*, 14 February 2025) <www.presidency.ucsb.edu/documents/remarks-the-vice-president-the-munich-security-conference-0> (all websites last visited 20 November 2025). Admittedly, one might question the present coherence of US free speech values given President Trump's announcement in late August 2025 of an executive order making burning the US flag a crime subject to a custodial sentence and attempts by the US administration to curb 'hate speech' following the Charlie Kirk murder in September 2025.

room at the time, but his views found favour elsewhere. For instance, a well-publicized article appeared in *The Economist* in May 2025 entitled 'Europe's Free Speech Problem: JD Vance was right', which opined that 'Europe really does have a problem with free speech', continuing that Europe '[…] should start by returning to the old liberal ideas that noisy disagreement is better than enforced silence and that people should tolerate one another's views'.[2]

Much of this attack has focused on the EU's Digital Services Act (DSA), which will be discussed in due course and has been the subject of a targeted offensive from a US administration, determined that US tech companies should not face fines if they allow illegal and hateful discourse on their platforms accessible in the EU. But this assault, although presented as an American critique of Europe's failure to uphold free speech, has also been supported by economic artillery, with the threat of high tariffs should the EU continue to enforce the DSA.

On the one hand, for those on the US administration's side, 'the EU is at it again', guilty in its actions of causing 'the Brussels effect, whereby platforms shape their globally-applicable content moderation practices to conform to EU regulations'.[3] On the other side, the EU's defence was perhaps most acutely expressed by Thierry Breton, former Internal Market Commissioner in the 2019-2024 Commission responsible for steering through the DSA. In a recent *Guardian* article, Breton observed: 'How long are we, citizens of the EU, going to tolerate these threats?' He continued that:

> 'An ever-widening gulf of misunderstanding is opening up between Europe and the United States on digital regulation. A gulf that the major tech platforms – American, in this case – are exploiting to the hilt. And that is deeply regrettable. Because regulating the information space is not optional: it is a sine qua non for turning the narrow mercantile logic of a few into a genuine contribution towards human progress and the common good.'[4]

Breton's reference to 'an ever-widening gulf' is apposite. Indeed, there has been a noticeable difference in approach to freedom of expression on both

2. 'Europe's Free Speech Problem' *The Economist* (London, 15 May 2025) <www.economist.com/leaders/2025/05/15/europes-free-speech-problem?utm_campaign=shared_article>.

3. Dawn Carla Nunziato, 'The Digital Services Act and the Brussels Effect on Platform Content Moderation' (2023) 23 Chicago J Int L 115.

4. Thierry Breton, 'The EU surrendered to Trump over trade tariffs now it's in danger of capitulating again' *The Guardian* (London, 28 August2025) <www.theguardian.com/commentisfree/2025/aug/28/eu-donald-trump-tariffs-us-europe-tech>.

sides of the Atlantic, in Europe and America, that predated the salience of the digital sphere. Although this 'gulf' was not evident in all areas of expression, in such areas as hate speech,[5] discriminatory speech and incitement, the US and Europe have been at odds for some time, before the advent of the digital world. While some parts of the world (namely, Russia and China) may approach freedom of expression very differently from Europe, it is in the contrast to the US where current battles rage sharply. The rest of this contribution explores this divergence in more detail, as it has manifested itself in both in the digital and non-digital sphere, with the aim of defending the European approach and articulating any values it may represent.

2. Background

First, some basics. To be sure, freedom of expression is a long-established right, present since the origins of modern constitutionalism, which is to say at least from the 18th century, in both Europe and America. It includes the right to hold and express opinions as well as to receive and impart information and ideas. It is now articulated in all general international human rights instruments, as well as modern national Constitutions, and accepted as a fundamental component in democracy,

One foundational source for valuing freedom of speech can be traced to the 17th century. John Milton, in his famous essay entitled 'Areopagitica', celebrated the virtues of free speech and tolerance. He continued, however, by writing that speech disrespectful to the Church ('tolerated popery, and open superstition') could be punished by 'fire and the executioner'.[6] These latter words from Milton, extreme as they are and often omitted, remind us that freedom of expression has never been absolute – not even in the US, where the First Amendment has often been given a fairly absolutist interpretation.

Freedom of expression is also, in common with most rights, complex, and has evolved over time. These days, severe threats to expression are as

5. The term 'hate speech' is frequently used in the US and more and more in the EU, although it has no uniform legal definition. The EU Framework Decision 2008/913/JHA (on Combating Certain Forms and Expressions of Racism and Xenophobia by Criminal Law), defined illegal hate speech as 'all conduct publicly inciting violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin' and it is generally used in that sense in this contribution.

6. John Milton, *Areopagitica: A speech of Mr. John Milton for the Liberty of Unlicenc'd Printing* (1644).

likely to emanate from powerful private actors as from the State, which was the prime threat in earlier times. But today, the dominance of a few online platforms and intermediaries (very often American, such as X, Meta and Google) that frequently host harmful or even illegal content and often make untransparent use of algorithms to highlight or hide certain information has required some rethinking of how freedom of expression may be best upheld. And, although some States have jealously guarded their sovereignty and jurisdiction by attempts to seal off their internet (for instance China and Iran), the immediacy of online publication has globalized freedom of expression, problematizing the coexistence of distinct approaches and regulatory models. Hence the rupture between the US and Europe.

Yet the EU is a relative newcomer to the freedom of expression field, at least in its capacity to regulate for the EU bloc. Given the EU's early focus on trade and the establishment of a common market, human rights – not least freedom of expression – did not appear a major concern, and were by and large left to the EU's Member States to deal with.[7] However, as the EU evolved, freedom of expression – particularly in the digital media – has become a significant subject for EU regulation and is now protected, or affected, by a number of instruments.

Freedom of expression is specifically protected within the EU by Article 11 of the EU Charter of Fundamental Rights, which states the following:

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
> 2. The freedom and pluralism of the media shall be respected.'

Article 11(1) of the Charter corresponds to Article 10 of the European Convention on Human Rights (ECHR), which explicitly concerns freedom of expression. Therefore, according to Article 52(3) of the Charter, its meaning and scope should be given the same interpretation as Article 10 ECHR, and indeed the European Court of Human Rights (ECtHR) has had a significant role in shaping EU law on freedom of expression. However, the EU itself has also been very active recently, adopting a significant amount of secondary legislation relevant to the field of free expression, much of which relates to digital platforms, social media and emerging technologies.

7. To be sure, the vexed issue of EU competences ensured that EU regulation outside the internal market was vigorously contested. See Bruno de Witte's contribution (especially on European media freedom) in this issue.

The most prominent recent example of these is the 2022 Digital Services Act, which regulates online intermediaries and platforms (such as social networks and content-sharing platforms) with the principal aim of preventing illegal and harmful online activities, and we will duly return to this measure.

3. Interpretations of expression

But to start with the offline. For some time, it seems, Europe has been on a different trajectory from the US. Although they share a common belief in the importance of freedom of expression (as the 1986 Strasbourg *Lingens v Austria* case,[8] with its strong affirmation of the press and political speech, affirms), differences in how this right is interpreted and enforced have been observable for some time. These differences have been most notable in areas where racist, discriminatory and hate speech are at issue, with distinctly European responses deriving from the view that the problems caused by some types of speech are not addressed most effectively by strict adherence to unfettered free expression.

Attempts to censor certain types of racist or discriminatory speech raise the vexing question of whether governments should outlaw the expression of views that society generally abhors – a dilemma for liberal societies since at least the time of John Stuart Mill and his formulation of the so-called 'harm principle'.[9] A prime example of a liberal approach was taken by legal philosopher Ronald Dworkin, who in an article entitled 'Should Wrong Opinions Be Banned?' criticized the legal prohibition in Germany of Holocaust denial and certain types of racist invective, concluding: 'We must not endorse the principle that opinion may be banned when those in power are persuaded that it is false and that some group would be deeply and understandably wounded by its publication.'[10]

Dworkin's view was based on a liberal justification of freedom of speech; namely that free speech promotes key values such as individual autonomy and democracy (in that people should be able to decide for themselves which political and societal views should prevail), and for that reason, however apparently abhorrent, most speech must not be banned. This view is prevalent in the approach taken by the US Supreme Court in its First Amendment jurisprudence, but is also found in the ECtHR. But

8. *Lingens v Austria* (1986) 8 EHRR 407.
9. John Stuart Mill, *On Liberty* (The Walter Scott Publishing Co Ltd 1859).
10. Ronald Dworkin, 'Should wrong opinions be banned?' *The Independent* (London, 28 May1995) <www.independent.co.uk/voices/should-wrong-opinions-be-banned-1621519.html >.

European authorities have nonetheless felt able to prohibit certain types of expression and take a more interventionist approach.

Dworkin's article was written 30 years ago and he was criticizing German case law that was over 30 years old.[11] They are cited here to highlight that the US and Europe have taken different approaches in certain areas of speech for some time now, predating the digital age, and that a different European approach based on certain values might be said to have emerged. Dworkin was particularly critical of some German law relating to Holocaust denial. For example, in 1994, the German Constitutional Court held that it was not contrary to Article 5(1) of the Basic Law for the Federal Republic of Germany, which provides for freedom of expression, to ban an assembly in Munich at which the 'revisionist historian' David Irving would be questioning the extent of the Jewish Holocaust during the Third Reich.[12] The court held that the ban on the assembly and the consequent restriction of Irving's free speech were compatible with the German Constitution and authorized under the German Criminal Code. This German case may be contrasted with the well-known American case of *Collin v Smith,* in which a US court held that the First Amendment protected from prior restraint the planned march of a group of neo-Nazis through Skokie, Illinois, a suburb of Chicago where a large number of Holocaust survivors lived, chosen by the neo-Nazis for precisely that reason. The court held that the march was protected speech and it invalidated Skokie's anti-defamation law by which it sought to prevent the march.[13] The Seventh Circuit held that the protection of the sort of expression engaged in by the neo-Nazis in Skokie was the necessary price of liberty in America.

The US First Amendment provides that 'Congress shall make no law […] abridging the freedom of speech' and in its First Amendment jurisprudence, the US Supreme Court has construed that provision very broadly, often using the metaphor of 'the marketplace of ideas',[14] indicating that all types of expression, even if abusive and hateful, should be able to battle their way in a theoretical marketplace of free expression. In contrast, European jurists have

11. This was subsequently found to raise no issues for freedom of expression in the ECHR.

12. Judgment of the Bundesverfassungsgericht (The Federal Constitutional Court of Germany), 23 April 1994, reported in NJW 1994, 1779.

13. 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 US 916 (1978).

14. The well-known market metaphor was first articulated in *Abrams v. United States*, 250 US 616 (1919), where Justice Oliver Wendell Holmes wrote: 'But when men have realized that time has upset many fighting faiths, they may come to believe […] that the best test of truth is the power of the thought to get itself accepted in the competition of the market [...]'. Although a dissent then, the marketplace metaphor was adopted by the majority in subsequent cases.

shown themselves more willing to countenance restrictions on freedom of expression. Several European countries have implemented statutes prohibiting incitement to race and religious hatred that probably would not withstand constitutional scrutiny in American courts.

The ECtHR has developed a considerable amount of case law on freedom of expression, which the CJEU has applied and followed more recently. This illustrates that freedom of expression is not an unlimited right in Europe. Limitations on it must comply with Article 52(1) of the Charter, which means that they may not go beyond Article 10(2) of the ECHR, so they must be justified and proportionate.

ECtHR case law has revealed a sliding scale for reviewing the proportionality of interferences with expression. The intensity of the scrutiny may depend on the nature of the expression at issue. Although the ECtHR has interpreted 'expression' broadly to cover expression in its many forms, it has nonetheless applied a stricter scrutiny of restrictions on expression where the speech is political in nature or serves a matter of public interest.[15] However, expression that promotes or justifies violence, hatred, or xenophobia is less likely to gain protection.[16] Actions brought in Strasbourg by David Irving's supporters against his German conviction were held not to be expression for the purposes of the ECHR, but an abuse of rights.[17] More recently, the CJEU upheld measures taken against a right-wing, populist MEP, who had been disciplined for offensive racist and sexist statements.[18]

Characteristic of all of the Article 10 case law is the willingness of the Court to balance the exercise of the right to freedom of expression with its limitation by legitimate aims under Article 10(2). Article 10(2) also stresses that the exercise of expression brings with it 'duties and responsibilities'. So let us be clear – in contrast to the First Amendment, Article of the 10 ECHR is not expressed as an absolute: there are eleven different permissible limitations on freedom of expression under Article 10(2).[19] The issue must also be addressed of whether the restriction is 'necessary in a democratic society' as required by Article 10(2); a phrase that the European court has not interpreted

15. *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 39.
16. Eg *Steel and Morris v United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) para 88.
17. *Nationaldemokratische Partei Deutschlands v Germany*, App No 25992/94 (1995).
18. Case T-352/17, *Janusz Korwin-Mikke v European Parliament*, EU:T:2018:319, para 71.
19. Art 10(2) ECHR provides the following: 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, 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.'

to mean useful or desirable, but to correspond to a 'pressing social need'. In this way, every European court applying the provisions of the ECHR is required to consider the purpose of restrictions on a Convention right and the proportionality of such restrictions to their purpose. Simply stated, the restrictions should be no more intrusive than necessary to accomplish their purpose. Dieter Grimm, German Constitutional Court Judge Rapporteur in the 1994 Irving Holocaust Denial case, wrote: '[…] it is the German responsibility for the Holocaust that explains the decision. It has become part of the identity of post-war Germany that atrocities like these should never happen again under the responsibility of the German state.'[20] Notably, however, the proportionality test may result in a difference in approach between European States. Holocaust or genocide denial is not prohibited in all ECHR States. However, the fact that legislation prohibits speech on the grounds of its content is not, in itself, a reason to hold that legislation in contravention of the Convention.

4. Digital measures

The problem of harmful or even illegal communications such as hate speech or disinformation has been hugely amplified by the exponential increase in the digital media. The European Commission has stated that 'very large platforms have become de facto public spaces, playing a systemic role for millions of citizens and businesses',[21] while the US Supreme Court has described social media platforms as 'the modern public square', providing many people's 'principal sources for knowing current events'.[22] Harmful content spreads extremely quickly in the digital space and content providers may be anonymous, overseas or otherwise hard to trace and render accountable. Also, in contrast to the traditional news media, which may be subject to certain standards, fewer constraints apply to cyber communications. To counter the damage of harmful or illegal content online, it becomes essential to engage with internet platforms themselves. This has required the EU to think about taking a new regulatory approach to digital expression. And although both the EU and US have characterized media platforms as public spaces, it is the EU's specific approach to digital regulation that has created the recent friction with the current regime in the US.

20. Dieter Grimm, 'The Holocaust Denial Decision of the Federal Constitutional Court of Germany' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2010) 557, 560.

21. European Commission, 'Impact Assessment Report Accompanying the document Proposal for a Regulation Of The European Parliament And Of The Council on contestable and fair markets in the digital sector (Digital Markets Act)' COM (2020) 842 final, 43.

22. *Packingham v North Carolina,* 137 S. Ct., 1737 (2017).

When the internet was in its youth, 30 years ago, it was little regulated. Indeed, the aim was to encourage its growth by stepping back from any significant regulatory intervention. In particular, a decision was taken not to penalize intermediaries (more familiarly known now as platforms) for any material posted on them by third parties. This was the approach taken in both the EU's 2000 Directive on Electronic Commerce and Section 230 of the US' 1996 Communications Decency Act (CDA). This approach stopped making sense with the growth of extremely powerful platforms such as X, Meta and Google, which were able to dominate social media and disrupt democracy by obtaining users' attention (and their private data) with algorithms that polarized debate, often hosting harmful or illegal content. A fundamental change in the regulation of the internet seemed necessary to at least increase the responsibility of platforms.

4.1. *The right to be forgotten*

An earlier indication of a specifically European approach to online intermediaries took place with the *Google Spain* decision on internet privacy, in which the CJEU ruled that search engine operators must comply with requests to remove links to personal data that is 'irrelevant or excessive', even where the original publication was lawful. Famously, the Court found that Article 8 of the Charter could be interpreted to give rise to a 'right to be forgotten' that could be asserted against internet search engines. Yet the judgment did not consider any expressive rights in the search results, with the CJEU stating that a data subject's rights to data protection 'override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name'.[23] This is in contrast to, for example, the US, where search engines have often been treated as having speech rights in their results. The *Google* holding provoked some worries (generally overseas or from the US) regarding the EU's perceived insufficient protection of freedom of expression, although continues to be upheld and respected in the EU.

4.2. *Platform liability*

Even before the EU took action by secondary legislation, the ECtHR had also encountered the issue of online intermediary liability. In the 2013 *Delfi*

23. Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2014:317.

case,[24] the ECtHR upheld a finding that an Estonian news site was liable for defamation and hate speech caused by readers' comments on its website, and that there was no breach of Article 10 as the conviction was 'necessary in a democratic society'. This was an early indication of a platform's responsibility to prevent the spread of harmful content. Although in two Hungarian cases,[25] the ECtHR found that freedom of expression had been violated by findings of liability for user comments and automatic liability for hyperlinks to defamatory comments, the Court nonetheless confirmed its basic approach in *Delfi* that in principle, internet portals have responsibilities regarding third-party comments, even if there are exceptions. And in *Sanchez v France* in 2021,[26] the Strasbourg Court upheld the conviction of Sanchez, a politician standing for election to Parliament whose French conviction followed his failure to take prompt action to delete comments containing illegal hate speech (against Muslims in Nimes) posted by others on his Facebook account. The EU adopted this approach as well – in *Glawischnig-Piesczek v Facebook Ireland*,[27] which concerned defamatory comments posted on Facebook, the CJEU held that Facebook could be ordered to remove identical and equivalent content globally, provided that the measures were clear and specific.

The EU also busied itself with a number of soft law and legislative measures relating to harmful online content. In 2016, the European Commission agreed a Code of Conduct with major digital platforms for combatting illegal hate speech online.[28] This Code was agreed with Facebook, Microsoft, Twitter and YouTube, and, using the EU Framework Decision 2008/913/JHA (on Combating Certain Forms and Expressions of Racism and Xenophobia by Criminal Law), defined illegal hate speech as 'all conduct publicly inciting violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin'. As the US had not regulated online hate speech in this way, these platforms in fact adjusted their practices globally so as to conform with the stricter EU regime. In January 2025, the Commission revised and bolstered this Code into a Code of Conduct+, which it integrated into the regulatory framework of

24. *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), 586.

25. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App No 22947/13 (ECtHR, 2 February 2016); *Magyar Jeti Zrt v Hungary* App No 11257/16 (ECtHR, 3 March 2019).

26. *Sanchez v France* App No 45581/15 (ECtHR, 2 September 2021).

27. Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, EU:C:2019:821.

28. European Commission, 'Combatting hate speech and hate crime' <commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-hate-speech-and-hate-crime_en>.

the DSA.[29] Major social media platforms remained signed up to this voluntary code, although Mark Zuckerberg, the Meta and Facebook founder, declared in January 2025 that Meta would cease its fact-checking process and instead use a community notes model along the lines of X. In 2018, the Commission agreed another (reinforced 2022) Code of Conduct with digital platforms, this time for combatting disinformation.[30] Furthermore, under the Terrorist Content Regulation,[31] digital platforms must take action against terrorist content that is defined as, *inter alia*, material that incites, glorifies or advocates the commission of terrorist offences. The EU also adopted a Regulation on political advertising,[32] harmonizing rules for political advertising, thus aspiring to deal with challenging online manifestations of deception and manipulation; the aim was to enhance citizens' trust in elections and help fight against disinformation and foreign interference.

5. The Digital Services Act

These initiatives culminated in the DSA. According to the EU (Recital 3 of the DSA):

> '[…] responsible and diligent behaviour by intermediary services was essential for a safe, predictable and trustworthy online environment and allowing Union citizens and others to exercise their fundamental rights, in particular freedom of expression, freedom to conduct a business, the right to non-discrimination and the attainment of a high level of consumer protection.'

But it should be stressed that the EU has not been alone in its attempt to manage online harms. For example, the UK is implementing a similar framework under the Online Safety Act, and non-European States such as Australia, Brazil and South Korea are in the process of adopting legislation along the lines of the DSA aimed at protecting citizens from illegal content uploaded on social media platforms.

29. European Commission, 'The Code of Conduct on countering illegal hate speech online +' (20 January 2025) <digital-strategy.ec.europa.eu/en/library/code-conduct-countering-illegal-hate-speech-online>.

30. European Commission, '2018 Code of Practice on Disinformation' (16 June 2022) <digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>.

31. Regulation (EC) 2021/784/EU of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79.

32. Regulation (EU) 2024/900/EU of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising [2024] OJ L2024/900.

The DSA is actually an EU regulation;[33] a legislative form minimizing the ability of EU Member States to modify its provisions. It applies only to intermediaries or platforms. It continues and enhances the EU Code of Conduct for Hate Speech, and was clearly influenced by ECtHR cases such as *Delfi* and *MTE v Hungary* in its sophisticated rules on intermediary liability, which seek to balance freedom of expression with repression of illegal hate speech. Although, on the one hand, it continues the protective state of affairs on intermediary liability introduced by the Directive on Electronic E-Commerce, it diversifies this by introducing new duties of transparency, due diligence and responsibility for intermediaries, with the added obligation of very large online platforms to actively manage systemic risk.

Although all providers of search and social media have due diligence obligations regarding illegal and harmful content, Very Large Online Platforms (VLOPS) – that is, those with over 45 million active users in the EU, such as Meta, Google and Elon Musk's X – have particular obligations, including to be transparent about their content moderation and use of algorithms. VLOPs must also proactively manage harmful online expression by undertaking regular risk assessments, which include the impact of their conduct on human rights, public opinion-forming, elections, 'negative effects on civic discourse and electoral processes, and public security' and 'effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being'[34]

It is these latter obligations on VLOPs that have provoked strong opposition from tech platforms in the US as well as the hostility of the Trump administration. In contrast to the DSA, in the US, Section 30 of the CDA shields platforms from liability for third-party content, even if notice of illegal content (such as the hosting of ISIS propaganda videos on YouTube) has been given to them.[35]

5.1. *Opposition to the DSA*

The DSA has been subject to criticism, some but not all emanating from the US (where most VLOPs are based). In particular, criticism has focused on a perceived lack of clarity in its referencing the 2008 EU Framework Decision

33. Regulation (EU) 2022/2065/EU of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

34. Art 34(1)(c) and (d), respectively.

35. But the US has been willing to place some restrictions on online expression when it claims national security is at issue. See Anastasia Iliopoulou-Penot's contribution in this issue.

for its definition of hate speech – which, it is alleged, can amount to censorship and the silencing of views. This is not a new claim, but was a well-known criticism of European laws (that is, UK or German incitement to racial or religious hatred) in the pre-digital era. Furthermore, because each EU Member State has its own laws and there is no uniform EU definition, a common contention is that 'illegal' expression may differ from country to country and thus expression may be prohibited under the DSA, which is in fact illegal in only one EU Member State. However, this critique might equally be made of the USA, where state laws may differ considerably. For instance, the 2021 Texas House Bill 20 criminalizes the censoring of expression based on content by large social media platforms (that is, with 100 million users per month), making it a crime 'to block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression'. So, for example, it would prohibit the removal of content denying the Holocaust, or content that is critical of immigration policy or Covid-19 vaccines. It is not only in the EU where there exists disparate laws as to the regulation of expression.

Another complaint is that the ultimate sanction applicable under the DSA is a maximum fine of 6% of a platform's annual turnover; a huge amount, bringing the fear that companies will aim to comply with the DSA at the expense of other regimes. Yet, the annual turnover of VLOPs is itself gigantic in nature and sanctions must surely have some impact if they are to be effective.

5.2. *Enforcement of the DSA*

As Steve Peers commented, the DSA, 'in a remarkable coincidence, was published in the EU's Official Journal on the same day that Musk completed his takeover of Twitter'.[36] Since Musk acquired Twitter (now X), X removed itself from the EU Code of Practice on Disinformation and there have been deep cuts to its moderation teams. X now hosts not only harmful but also illegal conduct – deviating from Musk's earlier assurances of compliance with EU law. To be sure, the Commission has been busy. X was designated a VLOP in April 2023 and the Commission then began an investigation into whether X had violated the DSA by deceiving its users (including disseminating illegal content regarding the Hamas terrorist attacks against Israel). In July 2024, the Commission issued preliminary findings that X had violated the DSA. A further Commission investigation

36. Steve Peers, 'So long, no thanks to all the fash: review of Character Limit: How Elon Musk Destroyed Twitter, by Kate Conger and Ryan Mac' (*EU Law Analysis*, 27 September 2024) <eulawanalysis.blogspot.com/2024/09/so-long-no-thanks-to-all-fash-review-of.html>.

(provoked in part by a live-streamed discussion on X with German AFD leader Alice Weidel in January 2025) is concerned with whether X has done enough to combat disinformation and illegal hate speech. The Commission also opened formal proceedings under the DSA against TikTok (after the first round of the 2024 Romanian presidential election was invalidated due to reports allegedly showing Russian involvement on TikTok in favour of Călin Georgescu),[37] AliExpress and Meta in 2024.[38]

Yet elsewhere the worry might be that the DSA is underenforced. Telegram founder and Russian entrepreneur Paul Durov, although charged under French law with enabling access to the platform by paedophiles, cybercriminals and terrorists, was not liable under the DSA as Telegram, despite having roughly one billion users worldwide, was not designated as a VLOP in the EU, where it has under 45 million users.

Ultimately, the fear is that the DSA and tech regulation more generally might be brought under the umbrella of the EU's trade negotiations with the US and its enforcement discontinued to accommodate the US, which since the inauguration of President Trump has increased political pressure on the EU over the DSA, denouncing it as censorship and threatening to restrict US visas for EU officials who enforce EU DSA rules. In July, the US Congress joined in. The (Republican majority) House of Representatives Judiciary Committee published its July 2025 report entitled 'The Foreign Censorship Threat: How the European Union's Digital Services Act Compels Global Censorship and Infringes on American Free Speech', describing the DSA as an 'anti-speech, Big Brother law'. On 4 August, the US State Department joined the fray, requiring its European embassies to work on opposition to the DSA.

Amid all of this, Ursula von der Leyen, President of the Commission, has appeared less eager to enforce EU digital rules than in her first term. In particular, it has been suggested that, since the delivery of the 2024 competitiveness report by Mario Draghi, former head of the ECB, the EU has made a 'deregulatory turn' to galvanize economic growth. This possible drift, in turn, may have provoked Thierry Breton's column in *The Guardian,* where he bewails: 'How long are we, citizens of the EU, going to tolerate these threats? […] Surrender to those who now presume to dictate our fundamental democratic and moral principles, our rules for how we live together and even how we protect our own children online?'

37. European Commission, 'Commission opens formal proceedings against TikTok under the Digital Services Act' (Press release, Brussels, 19 February 2024) <ec.europa.eu/commission/presscorner/detail/en/ip_24_926>.

38. European Commission, 'Commission opens formal proceedings against Meta under the Digital Services Act related to the protection of minors on Facebook and Instagram' (Press release, Brussels, 16 May 2024) <ec.europa.eu/commission/presscorner/detail/en/ip_24_2664>.

However, it seems unlikely that the Commission will lessen its enforcement of the DSA, especially given that public support exists for increasing online social media security and safeguarding election integrity across the EU.

6. Whose values?

In sum, although it has been possible to identify elements of a European approach to regulating freedom of expression over the years, especially in areas such as hate speech, a more noticeable rift has recently appeared between the Europe and the US. This has become especially frenzied in the digital arena, particularly given the huge potential fines of very wealthy companies involved. The recent US House of Representatives Judiciary report, which argues that the DSA is a danger to free speech worldwide, also claimed that 'content targeted by the EU—core political speech, humour, parody, and satire—is protected under any reasonable free speech legal regime, including the First Amendment to the U.S. Constitution'. This is highly debatable and the US approach is far from a global standard. Dworkin conceded in the article referred to earlier that: 'The United States stands alone even among democracies, in the extraordinary degree to which its [Constitution] protects freedom of speech and of the press.' It is unlikely that many democratic regimes would unambiguously embrace the US approach based on the marketplace of ideas, especially given the prevalence of powerful social media platforms able to disseminate illegal content and hate speech to millions of people. As we have seen, many European countries have adopted a more vigilant approach, taking into account their own experiences of hate speech. So, Germany has adopted laws against Holocaust denial and glorification, and expanded its concept of militant democracy. In Denmark (as JD Vance mentioned in his Munich speech), it is a criminal offence to burn the Quran. Many States are in the course of adopting digital regulation that is closer to the DSA than the American approach.

6.1. *Expression, harm and democracy*

Whatever the virtues of freedom of expression, its exercise can sometimes threaten the wellbeing of others. Speech, like so many actions that humans perform, is not always politically constructive or only self-regarding. It affects others, and sometimes very painfully. Insults and abuse can cause direct harm in the form of psychological injury to the victim. Speech also

can harm directly by encouraging the victim or others to take immediate hostile action. But such invective can also cause indirect harm by helping to form an image in society that those attacked are less than human, thereby fostering a situation in which those attacked become less able to defend themselves against the abuse by the 'more speech' recommended by Justice Brandeis in the US *Whitney* case[39] or the 'noisy disagreement' referenced in *The Economist* opinion. Victims' rights to equality can be affected by hateful expression, as may their ability to respond and participate in public discussion, which is itself an aspect of free expression. In short, victims may be silenced. Freedom of expression is therefore better respected in a context where there is no systemic suppression of minorities and women by hate speech, and where extreme and fanatical views are not bolstered by far from transparent algorithms.

A common justification for freedom of expression is that it strengthens democracy. JD Vance made numerous references to this justification in his Munich speech: 'To believe in democracy is to understand that each of our citizens has wisdom and has a voice. And I really do believe that allowing our citizens to speak their mind will make them stronger still.' Several writers with European backgrounds, including Hans Kelsen, Jurgen Habermas and Emile Durkheim, have stressed the importance to democracy of an open communicative structure. However, their views do not always support a free for all that can include invective and abuse. For example, Habermas' arguments for free discussion require that there also be attempts to remove inequality and oppression in society. This can include curbs on the powerful by restricting media ownership and control and limits on political advertising and campaign financing. The considerable concentrations of even non-digital media in some EU Member States (for instance Hungary) illustrates the nature of this problem. This approach acknowledges that the 'marketplace of ideas' is by no means free, nor is it a level playing field.[40] The argument from democracy illustrates that it is particularly important to protect political speech (because of the role it plays in safeguarding democracy), while at the same time appreciating that restrictions on speech may sometimes be necessary to safeguard democracy.

7. Conclusion

Europe is more willing to regulate the marketplace of ideas, whether or not digital, than the US. Perhaps what is distinctive is the recognition that

39. *Whitney v California*, 274 US 357 (1927).
40. Eg Jürgen Habermas, *The Theory of Communicative Action. Volume 2* (Beacon Press 1987).

freedom of expression is not always best protected by a free for all, by unregulated free expression, although the means of regulation are nuanced, multifarious and complex. It is a difficult balancing act.

The EU's recent legislation regulating the digital sphere, and particularly the DSA, may not be perfect. But Article 1 of the DSA states that this legislation aims to protect fundamental rights. The EU has gone beyond being an organization concerned only with trade and commerce (if it ever was only that), and today also has a role in protecting democracy and fundamental rights. Whatever else, democracy and fundamental rights should not be subject to the whims of global politics and transatlantic relations, nor to the business urges of a few very powerful companies.