



# Comparative report

## Media freedom and independence in 14 European countries: A comparative perspective

July 2012

## **Project profile**

Mediadem is a European research project which seeks to understand and explain the factors that promote or conversely prevent the development of policies supporting free and independent media. The project combines a country-based study in Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK with a comparative analysis across media sectors and various types of media services. It investigates the configuration of media policies in the aforementioned countries and examines the opportunities and challenges generated by new media services for media freedom and independence. Moreover, external pressures on the design and implementation of state media policies, stemming from the European Union and the Council of Europe, are thoroughly discussed and analysed.

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## **Introductory note**

Lately, technological innovation and economic imperatives have regenerated a lot of discussion about media policy and regulation and their appropriate scope. However, the degree to which contemporary European media are free and independent, and the policy processes, tools and instruments that can best support free and independent media performance have received far less attention in scholarly literature and policy discourse. This collection of reports engages in comparative analysis across the Mediadem countries and across different types of media services with a view to evaluating and analysing media policy patterns and their contribution (or not) to the promotion of media freedom and independence. The countries covered are Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK. The analysis builds on Mediadem's empirical country case findings as well as the broader scholarly literature, and focuses on the most pertinent questions and key issue areas for media freedom and independence emerging from the project's empirical research.

The first report by Evangelia Psychogiopoulou, Dia Anagnostou, Rachael Craufurd Smith and Yolande Stolte examines in a comparative fashion the freedom and independence of public service broadcasters in the fourteen Mediadem countries. This chapter starts by analysing the international case law, recommendations and declarations containing guidance to individual states concerning the regulation and independent operation of public service broadcasters. It then examines how well these international standards find reflection in practice in the Mediadem countries, focusing on three main areas: the management and supervision, financing and remit of the various public service broadcasters. The final part discusses whether the models of media systems established by D.C. Hallin and P. Mancini continue to illuminate the operation of public service broadcasters in Europe.

The second report by Daniel Smilov and Ioana Avădani explores the complex relationship between politics and the media in the context of five Eastern European countries: Bulgaria, Croatia, Estonia, Romania and Slovakia. The analysis has two main parts: the first part focuses on the different patterns of governmental interference with the media; the second part focuses on the private sector and the independence of private media in the region. The analysis here includes, among others, an examination of regulatory practices, ownership rules, and anti-monopoly bodies and whether they allow for direct or indirect political interference.

The third report by Andrej Školkay and Juan Luis Manfredi Sánchez engages in a comparative examination of the current trends and policy approaches pertaining to new media services in the Mediadem countries, and the guarantees in place to ensure media freedom and independence in the digital environment. It identifies the policy practices and the regulatory, co-regulatory and self-regulatory instruments (or the lack thereof) with regard to new media services and the principal 'constraints' that the various new media services face in relation to their independence. It then discusses the impact of new media services on traditional media and on journalists' freedom and independence at a professional level, as well as the contribution of new media services to democratic processes and freedom of expression.

The fourth report by Halliki Harro-Loit, Epp Lauk, Heikki Kuutti and Urmas Loit focuses on professional autonomy in journalism as a factor for safeguarding freedom of expression. This chapter starts with an introduction to the concept of journalistic autonomy as a central value of professional behaviour and a precondition

for free and independent journalism. It then examines how journalistic professional autonomy is safeguarded across the fourteen Mediadem countries and the factors that support or constrain this autonomy. The final part offers some remarks about the policy instruments that could support journalistic autonomy in European democracies.

The fifth report by Bart Van Besien, Pierre-François Docquir, Sebastian Müller and Christoph Gusy examines the role of the European courts in shaping media policies in the Mediadem countries. It focuses on the case law of the European Court of Human Rights and the jurisprudence of the Court of Justice of the European Union on media freedom. Domestic case law and legislative processes are also considered to the extent they interact with European rulings. The analysis provides a comparative overview of litigation practices in the various countries, leading cases and recurring topics. It also discusses the status of European court decisions in the national legal systems, the execution of European judgments and the values served by the European courts.

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## **1. A comparative analysis of the freedom and independence of public service broadcasters in fourteen European countries**

*Evangelia Psychogiopoulou, Dia Anagnostou, Rachael Craufurd Smith and Yolande Stolte*

### **1. Introduction**

The state has been centrally involved in the regulation of the broadcasting sector from the origins of radio broadcasting in the 1920s. State regulation was in part a response to the technical characteristics of the medium, which depended on the radiomagnetic spectrum for transmission. Licences were thus granted to transmit services over specific frequencies in order to minimise interference. But rather than sell licences to specific corporations and allow these to be traded like other forms of private property, states granted limited licences and used the award of these licences to control the content of what was broadcast. In many countries the state or the government started their own broadcasting organisations, increasingly aware of the potential political and social influence of this new medium. Short has noted that ‘of the 30 European national broadcasting systems in existence in 1938, 13 were state-owned and operated, 9 were government monopolies operated by autonomous public bodies or partially government controlled corporations, 4 were actually operated by government but only 3 were privately owned or run’ (Short, 1983: 30). The pattern was replicated with the new medium of television and even after the Second World War, when the printed press was increasingly asserting its independence from political parties, government and the state, the broadcast media remained subject to extensive structural and content controls.

Within Europe there has also been a strong and enduring tradition of public service broadcasting (PSB). PSB should be distinguished from state or public ownership of broadcasting organisations: though many public service broadcasters (PSBs) are state owned this is not a defining characteristic and a number of well established PSBs take the form of private corporations, subject to state regulation. Rather, PSB involves the provision of broadcast radio or television services in the public interest. There is no single accepted definition of PSB (see Harrison and Woods, 2007: 32) though a number of specific purposes and distinct characteristics have been identified as essential components of PSB in international documents and academic commentaries.

These *purposes* include support for citizenship and the democratic process; stimulating and facilitating the exchange of knowledge and learning; reflecting and engaging with the diversity of cultures and identities at the local, national and international levels; and support for innovation, original audiovisual creation, and training (see, e.g. Born and Prosser, 2001; Donders and Pauwels, 2012; CoE, 1996: Explanatory Memorandum, para. 2; CoE, 2007a: I.3.2; CoE, 2007b: I and II; CoE, 2009: para. 5; CoE, 2011: paras. 81-82; CoE, 2012a: paras. 3-4; European Commission, 2009a: paras. 9-16). Citizenship can be strengthened through the creation of a critical social sphere that provides a platform for informed democratic debate and the participation of all members of society (Born and Prosser, 2001: 671-675; Habermas, 1989; Harrison and Woods, 2007: 29-33; CoE, 2007b: II d). By stimulating and facilitating the exchange of knowledge and learning, individuals are given the resources to make informed decisions about how to lead their lives and to

play a meaningful role in shaping the society around them (CoE, 2007b: II c). Through reflecting national identities and cultural and social diversity, PSBs can strengthen social cohesion and enhance tolerance and understanding of others (CoE, 2007b: II b and e). PSBs have also played an important role in training the next generation of responsible journalists and supporting production and technological innovation (CoE, 2007b: II e).

*Key characteristics* considered indicative of PSB include editorial independence from political and commercial pressures; universal access, both in terms of geographic reach and affordability; and the provision of diverse, high quality programming (Born and Prosser, 2001: 675-681; Harrison and Woods, 2007: 33-39; Katsirea, 2008: 327-331; Mendell, 2011: 16; Donders and Pauwels, 2012: 84; CoE, 2006: Appendix, para. 9; CoE 2007b: II a and c; CoE, 2012a: paras. 3-5). These characteristics play an important role in enabling PSBs to perform the various functions identified above. Editorial independence reduces the risk of bias and undue media power and enhances public trust. Universal access enables PSBs to provide a common point of reference for the whole population, regardless of wealth or location. The provision of different genres and a diversity of viewpoints facilitate understanding and informed decision-making, while ‘quality’, though problematic to define, includes in this context programmes that are variously challenging, stimulating, innovative, trustworthy or reflect high production values (Born and Prosser, 2001: 678-681; Harrison and Woods, 2007: 37-39, CoE 2009: para. 15).

State support for PSB takes one of three main forms. Within Europe the most common approach has been to establish PSB *institutions* with a specific public service remit (Goldberg, Sutter and Walden, 2009: 28). Public service institutions can internalise the public service ethos across all their activities and the existence of distinct institutions makes it easier for individuals to know where to locate public service content. Such institutions can either themselves produce public service content or commission it from third parties. Commissioning from third parties can encourage the ‘trickle down’ of public service standards to other parts of the media community (Bennett and Kerr, 2012).

A second ‘distributed’ approach (CoE, 2012b: para. 10) involves the establishment of a central body, sometimes referred to as a ‘public service publisher’, that provides funding to third parties for the creation and distribution of public service content. Funding is awarded on the basis of competitive tender, open to all media organisations or specific categories only, for instance, commercial operators (Peacock, 1986; Peacock, 2004; Ofcom, 2009; Donders, 2012: 26). This, too, may encourage wider adoption of public service values and result in greater diversity of approach, but it also renders the provision of public service content more diffuse.

Finally, the state may require, through *regulation*, that all or certain types of media organisation conform to certain public service standards, such as impartial news coverage, or provide a certain percentage of public service content (Barnett, 2012).

Different models of political control and independence can also be identified across Europe. Hallin and Mancini identify four models with different degrees of independence from political influence: the ‘government model’, in which PSBs are controlled by the government or political majority; the ‘parliamentary or proportional representation’ model, where control over PSB is divided among the political parties based on proportional representation; the ‘civic’ or ‘corporatist model’ in which

control over PSB is distributed amongst not only political parties but also other ‘socially relevant groups’; and the ‘professional model’, in which PSBs are largely insulated from political control and run by professionals (Hallin and Mancini, 2004: 30-33). The fourteen countries studied by the Mediadem project include exemplars of all three models but they also include a number of Central and Eastern European countries that, with the transition from Communist to Democratic government, have had to re-conceptualise in a rapidly changing economic and political environment the relationship between the media and the state.

Underlying political, cultural and economic factors thus shape the remit of PSBs. Where there is support, for example, for classical liberal theory, state intervention in support of PSB is more likely to be seen as an unwarranted restriction on the freedom of speech of media owners and an appropriation of their property interests (Hallin and Mancini, 2004; Kelley and Donway, 1990). Concerns over ‘government failure’ to properly assess the public interest and the enhanced risk of political manipulation where the state provides financial or other means of support for PSBs, also encourage a reactive conception of PSB that prioritises the role of the market. On this view, PSBs are legitimate only where they serve to correct for failures of the commercial sector to provide all services deemed socially and democratically desirable (Donders, 2012: 25; Freedman, 2008: 8-10).

The alternative approach is to see state intervention as guaranteeing a full range of services of this type will be provided (Garnham, 1990: 120; Pratten, 1997; Donders, 2012: 31). PSB is thus not a response to ‘narrow market failure’ but reflects a ‘collective decision’ that society makes ‘to keep some important aspects of our lives in the public realm’ (Fairbairn, 2004: 58).

Preference for one or other of these two conceptions of PSB has important ramifications for the remit of, and range of activities pursued by, PSBs. Under a market-failure approach, the remit will be narrowly drawn to preclude provision of *programming* of a type offered by the commercial sector, such as popular sport or entertainment programmes. The focus will thus be on information, education, high cost drama, cultural (particularly minority), and children’s programming (Armstrong and Weeds, 2007: 83, 119; Donders, 2012: 29-31). When PSBs are viewed as assets in their own right, however, PSBs will be expected to provide a wide range of high quality programming, regardless of the availability of similar genres in the commercial market (Bardoel and d’Haenens, 2008: 344; Donders, 2012; Jakubowicz, 2007).

The ‘guarantee’ view is similarly more open to PSBs providing content across all *platforms*. Many PSBs have extended their activities beyond the provision of ‘traditional’ broadcast radio and television services to provide online content such as text and video websites, interactive fora, and on-demand catch-up services, so that it is now often more appropriate to use the term ‘public service media’ (PSM) rather than PSBs. One of the key rationales for state intervention in the broadcasting sector was that the airwaves are a limited public resource, necessitating regulation to ensure their use in the public interest. This argument does not apply in the online environment and, with commercial newspapers and PSBs increasingly competing for audiences for their websites, those who take a ‘market failure’ approach argue that PSBs should be limited to reconfiguring their existing broadcast services for online delivery, rather than be allowed to develop new services. But to remain valuable components of the public sphere, PSBs need to be able to exploit new communication

technologies and develop new services, in line with their public service remit (Bardoel and d’Haenens, 2008: 342; CoE, 1996: VII).

In this paper we consider the state of PSB in the fourteen countries studied in the Mediadem project. Our approach is a comparative one, drawing on the country studies prepared for the Mediadem project, academic commentaries, and official reports and documents. We start by analysing the international case law, recommendations and declarations that contain extensive guidance concerning the regulation of PSBs/PSM (part 2). In particular, we note the importance that these documents ascribe to the independence of PSBs/PSM from both political and commercial pressures (CoE, 2007: II.c). The Council of Europe has here played a particularly central role, though guidance has also been developed by UNESCO and the European Union (‘EU’) has established important criteria for the operation of PSBs to ensure conformity with EU law. We then turn to consider how well these international standards find reflection in practice, focusing on three main areas: the management and supervision, financing and remit of the various PSBs (part 3). In the final part of this paper (part 4), we return to the models established by Hallin and Mancini to consider how well they continue to illuminate the operation of PSBs in Europe (part 4).

## **2. International and European guidelines on public service media**

### **2.1 Legal framework**

The decision whether or not to pursue public service objectives in the communications field and, if so, the scale of intervention is largely a political matter for each state. The 2005 UNESCO Convention on the protection and promotion of the diversity of cultural expressions confirms the rights of state parties to ‘formulate and implement their cultural policies’ (UNESCO, 2005: art. 5.1) and to adopt ‘measures aimed at enhancing diversity of the media, including through public service broadcasting’ (art. 6.2(h)). On the other hand, public service broadcasting regulations have been held by the European Court of Human Rights to curtail freedom of expression, guaranteed by article 10 of the European Convention on Human Rights (‘ECHR’) (Application no. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, *Informationsverein Lentia and Others v. Austria* 1993). Such measures can, however, be justified on media plurality grounds provided they are proportionate and no more restrictive than necessary (*ibid*). Although the state is under no obligation to introduce a system of public service media (Application no. 13936/02, *Manole v. Moldova* 2009: para. 100), access to free and independent media from diverse sources is considered an essential prerequisite for realisation of the right to freedom of expression and information in article 10 ECHR and PSM can play an important role in guaranteeing such a plural media environment (*ibid*; CoE, 1982; CoE, 1996: Explanatory Memorandum, paras. 1-4).

The EU is also committed to respecting ‘the freedom and pluralism of the media’ alongside the right to freedom of expression by article 11 of the Charter of Fundamental Rights of the EU. Article 22 of the Charter and article 167 of the Treaty on the Functioning of the European Union (‘TFEU’) further confirm the importance ascribed by the EU to cultural diversity. On the other hand, competition law and internal market rules enable the EU to review the operation of PSBs to prevent any unduly restrictive or discriminatory effects on trade (see, e.g. case C-250/06, *United*

*Pan-Europe Communications SA and others v. Belgium* (2007). As discussed further below, state funding for PSB is potentially a form of state aid within the terms of article 107 TFEU (European Commission, 2001 and 2009a), though derogations are provided for in article 107(2) and (3) TFEU, notably for cultural purposes, and article 106(2) TFEU, for services of general economic interest, provided trade is not distorted contrary to the interests of the Union. In part because of the qualifications to these derogations, the member states felt it necessary to adopt the 1997 Amsterdam Protocol, which confirms not only the democratic, social and cultural role of public service broadcasting but also the continuing competence of member states to determine the remit of public service broadcasters under their jurisdiction (Amsterdam Protocol, 1997). The European Commission has stated that it will question this remit only where it considers the state to have made a ‘manifest error’ of judgement (European Commission, 2009a: para. 48) and has acted primarily to impose procedural as opposed to substantive constraints on member state freedom in this context.

## **2.2 Endorsement of the ‘broad view’ of PSM**

International organisations increasingly emphasise the political and social importance not only of PSBs but also PSM. UNESCO defines PSM as those media that fulfil the same public purposes as public service broadcasters, but use digital media and platforms, including the Internet, instead of broadcast television or radio.<sup>1</sup> The Council of Europe considers use of the term to be a welcome indication of the transition of PSBs to organisations providing a more diverse range of content and services (CoE, 2012b: n.1). The Council of Europe has endorsed the broad view of PSM in relation to both programming and platforms. In relation to programming, the Parliamentary Assembly has reiterated that member states should ‘guarantee at least one comprehensive wide-ranging service comprising information, education, culture and entertainment...while acknowledging that public service broadcasters must also be permitted to provide, where appropriate, additional programme services such as thematic services’ (CoE, 2009b: para. 7). The Assembly also concluded that public service broadcasters should be able to diversify their services ‘through thematic channels, on-demand media, recorded media and Internet-based media services in order to offer a comprehensive and competitive range of media services’ (CoE 2009b: para. 9). The Committee of Ministers has called for PSM to respond positively to audience expectations of enhanced choice and levels of control stemming from digital developments (CoE, 2012b: para. 6).

The EU has similarly accepted, after some initial uncertainty, a broad view of PSM (Donders, 2012). Both the Court of First Instance and European Commission have expressly confirmed that an obligation to provide a wide range of programming and a balanced and varied broadcasting offer will generally be legitimate (European Commission, 2009a: para. 47; case T-442/03, *SIC v. Commission* (2008), paras. 201 and 204; cases T-309/04, T-317/04, T-329/04 and T-336/04, *TV2/Denmark v Commission* (2008), paras. 194-201). The Commission has confirmed that PSM may provide services that are not ‘programmes’ in the traditional sense, provided they address the same democratic, social and cultural needs of society (European Commission, 2001: para. 34) and that ‘the public service remit may also reflect the

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<sup>1</sup> UNESCO, ‘Public service media’, [http://www.unesco.org.uk/public\\_service\\_media](http://www.unesco.org.uk/public_service_media), date accessed 6 July 2012.

development and diversification of activities in the digital age and include audiovisual services on all distribution platforms’ (European Commission, 2009a: para. 47 and see also para. 81). The European Parliament has similarly endorsed the ability of PSM to take advantage of new distribution platforms (European Parliament, 2010: para. 14).

Different structures of PSB/PSM require different safeguards for independence. We discuss below the safeguards that can support independence proposed by international bodies, which are applicable to the majority of PSBs/PSM.

### **2.3 Independence and governance**

The Council of Europe considers that the ‘first priority’ for PSBs/PSM must be to ensure that their ‘culture, policies, processes and programming reflect and ensure’ editorial independence and operational autonomy (CoE, 2012b: paras. 2 and 21; and see also CoE, 2006). Editorial independence is defined as ‘the right of public service broadcasting organisations to determine the content of their programmes freely and without interference from any external authority, within the limits prescribed by law or other rules in order to safeguard legitimate rights and interests’ (CoE, 1996: Explanatory Memorandum, paras. 9 and 20; see also CoE, 2011: para. 81; CoE, 2012b: para. 2). Institutional autonomy involves the right of PSBs/PSM to organise and administer their activities freely, again within the limits prescribed by law and appropriate supervisory constraints (CoE, 1996: Explanatory Memorandum, para. 11). Below we consider what independence entails in relation to the remit, institutional structure and funding of PSBs/PSM respectively.

#### **2.3.1 Remit**

In order to protect PSBs from legal challenge, both at domestic and European levels, and any consequent extraneous pressures, it is necessary to establish a clear remit for PSBs and to specify who is to set this remit and how it can be reviewed (see e.g. CoE, 2009: paras. 16 and 17; CoE, 2012b: 15 and 25; European Commission, 2009a: 45). The process by which the public service mandate and funding is defined and renewed should be transparent, providing adequate scope for consultation with relevant interest groups, notably citizens and Parliament (Levy, 2012). This can enable PSBs/PSM to draw on public support, strengthening their position when subject to political pressure. To negotiate effectively in any settlement procedure with the state or government, PSBs/PSM require sufficient resources and expertise to develop a convincing and well substantiated case for the specified funds (*ibid*).

The Council of Europe has called for the principles of editorial independence and institutional autonomy to be explicitly embodied in the legal framework governing PSM, which can take the form of legislative texts, charters, agreements, licences, or company statutes (CoE, 1996: Explanatory Memorandum, para. 9). These provisions should clarify that independence extends to: the definition of programme schedules; conception and production of programmes; editing and presentation of news and current affairs programmes; organisation of activities; and recruitment of staff (CoE, 2006: Appendix I). PSBs/PSM should thus be required to offer scope for the expression of the widest spectrum of views and opinions, governed by the principles of balance and impartiality (CoE, 1996: Explanatory Memorandum, para. 68). All political parties should have sufficient airtime to present their views and

PSBs/PSM should not be required to transmit official public messages, declarations or communications save in ‘exceptional circumstances’. Where such messages are relayed their source should be clearly identified (CoE, 1996: Explanatory Memorandum VI).

Although the 1997 Amsterdam Protocol confirms, as noted in section 2.1 above, the competence of member states under EU law to determine the remit of their PSBs, EU law does impose certain constraints on public service activity. Commercial operators have not only lobbied their own governments to constrain PSBs but have also complained, as noted above, to the EU on the basis that public funding constitutes state aid contrary to article 107 TFEU (Craufurd Smith, 2008: 44-49; Donders and Pauwels, 2011; Donders, 2012). Such aid is said to lead, among other things, to the development of public services that result in the foreclosure of new commercial services. In response to these complaints, the European Commission has pressed for all new public services to be assessed in terms of their potential commercial impact and public benefit using a form of ‘public-value’ test (European Commission, 2009a; Donders and Pauwels, 2011; Donders, 2012).

Though these requirements encourage a clearer articulation of public service goals and qualities, creating greater certainty for industry, an overly precise public service remit may stifle innovation. Moreover, the operation of public value tests (‘PVTs’) entails further bureaucracy and costs and may do little to stimulate broader debate about the proper scope of public provision within the public at large (Donders and Pauwels, 2012: 91-92; European Parliament, 2010: para. 16). Without care, they could thus encourage PSM to become unduly cautious when proposing new services and a reactive ‘market failure’ mentality that constrains PSBs/PSM to services the commercial sector is unable, or unwilling, to provide. The Parliamentary Assembly of the Council of Europe has expressed concern at the potential of EU law to constrain ‘member states’ powers to adapt the public service broadcasting remit to their own national needs’ (Council of Europe, 2009: para. 10).

### **2.3.2 Structure, supervision and regulatory framework**

As noted above, public services in the media field can be realised in different ways but where they take the form of a specific entity, such as a limited company, this should be organised so as to limit the possibility of outside influence on the services provided. The 1996 Council of Europe Recommendation on the guarantee of the independence of public service broadcasting suggests a two-tier structure, consisting of a board of management and a supervisory body (CoE, 1996: Appendix II and III). The board of management should be solely responsible for the day-to-day operation of the organisation and, editorially, for programme schedules and output. The independent supervisory body, to which the board should be solely answerable, save where appropriate to the courts, should have no prior control over programming or involvement in the day-to-day management of the organisation (*ibid*; CoE, 2000: para. 19; IFJ, 1999: 2; Mendell, 2011: 15).

The legal framework governing the status of both the board of management and the supervisory body should be structured in a way that avoids any risk of political or other interference (CoE, 2000). The responsibilities of the various parties should be clearly set out in advance and the supervisory body should itself be independent from the state in its decision-making capacity (CoE, 2000: 26; CoE,

2012b: 25). The Council of Europe does not exclude the possibility of representatives appointed by the government or parliament sitting on the board of management but such individuals should not be in a position to exert a dominant influence over the board and must be able to exercise their functions independently (CoE, 1996: Explanatory Memorandum, para. 2 4). The Council of Europe also states that the supervisory body should ‘represent collectively the interests of society in general’, opening the way to a pluralist representation of different factions within parliament or social and religious groups, excluding the dominance of any one political group (CoE, 1996: Appendix III.2; Application no. 13936/02, *Manole v. Moldova* (2009), paras. 109-110). To avoid both perceived and actual conflicts of interest, members of both bodies should not have interests in related fields, such as share holdings or directorates, in media outlets (CoE, 1996: Appendix II.2 and III.2; CoE, 2000: para. 4).

Although state involvement in appointments to the highest supervisory or decision-making levels may be acceptable, the Council of Europe concludes that this ‘should not normally extend to appointments at executive or editorial management level’ (CoE, 2012: para. 27). And, as noted above, in relation to government or parliamentary appointments to the board of management or the supervisory body, no one interest group should be allowed to dominate. The risk of outside influence will be reduced by recourse to an open public tender; with appointments made in a transparent manner on the basis of specified, relevant, criteria published in advance. Rules regarding the payment of members of the supervisory body should be defined clearly in the governing documents (CoE, 1996: Appendix III.2).

The recruitment, promotion and transfer of staff ‘should not depend on origin, sex, opinions or political, philosophical or religious beliefs or trade union membership’ (CoE, 1996: Appendix IV), though international organisations have indicated the desirability of staff being generally representative of the diversity of political trends or society’s constituent groups (IFJ, 1999: 2, CoE, 2011: para. 83; CoE, 2012: para. 34). Staff should not be subject to instruction from individuals outwith the PSM though they should be free to join a trade union, subject to any necessary limitations designed to ensure the continuation of an essential service, for example, during times of national emergency or war (CoE, 1996: Explanatory Memorandum Guidelines 15-16). The Council of Europe suggests that PSM lay down internal rules specifying when it would be appropriate for employees to discharge functions outside the organisation (CoE, 1996: Explanatory memorandum Guideline 16). To avoid the risk of actual or perceived bias it is advisable that editors and journalists working for PSM do not hold office in a political party or at the least declare any affiliations (IFJ, 1999: 4).

Similarly important are the terms of appointment and scope for dismissal. Top management positions should be allocated for a fixed term regardless of the term of office of the elected government and there should be no scope for dismissal on the basis of editorial differences (CoE, 2012: para. 27; IFJ, 1999: 3). Subject to any independent liability before the courts, members of the board of management should only be accountable for the exercise of their functions to the supervisory body of the PSM (CoE, 1996: Explanatory Memorandum II.3). Similarly, members of supervisory bodies should be immune from dismissal or suspension during their term of office by any authority other than the authority which appointed them, outside exceptional circumstances, such as becoming incapable of carrying out their functions.

Journalists also require protection from dismissal or negative career repercussions where they have published material considered politically controversial or have undertaken investigations that could harm particular political interests (CoE, 2006: Appendix para. 29; Application no. 13936/02, *Manole v. Moldova* (2009): paras. 103-106). In particular, PSM should actively, and thus explicitly, ‘promote a culture of responsible, tough journalism that seeks the truth’, reinforced by the existence of publicly available codes of journalistic conduct (CoE, 2012: paras. 47-48).

### **2.3.3 Funding**

In order to protect PSBs/PSM from external pressures the Council of Europe has emphasised the importance of access to adequate long-term funding determined at the national level, in line with the principle of subsidiarity, as well as independence in the management of financial resources. (CoE, 2006: Appendix I; CoE, 2009: paras. 10, 12, 16.1 and 17.1). Both the Council of Europe and European Union have accepted that funding can be obtained from both state and commercial sources, which may include: flat rate licence fees or other state grants and subsidies; general or hypothecated taxation; subscription fees and payments for specialised pay-per-view or on-demand services; advertising and sponsorship revenues; and the exploitation of related products such as videos or books and audiovisual rights (CoE, 2009: para. 15; European Commission, 2009a: para. 59).

The ability to provide or withhold finance can be used both by corporations and the state to influence PSB/PSM content. In relation to both commercial and public funding, a clear statement in the founding documents of the obligation of independence, supported by transparent accounting and effective monitoring processes, as discussed above, should be put in place. In the commercial context, formal separation of editorial and revenue raising activities; limits on commercial funding for news and documentary programmes; and restrictions on the overall proportion of finance obtained from commercial sources can all help to reduce the risk of inappropriate influence (see CoE, 1996: Explanatory Memorandum para. 63).

The EU Audiovisual Media Services Directive goes some way towards meeting these concerns by prohibiting the sponsorship of, and deployment of product placement in, audiovisual news programmes, and limiting advertising and requiring a clear separation between advertising and editorial content in broadcast television (but not audiovisual media) services (European Union, 2010: arts. 10.4, 11.2-3, 19, 23). Certain European measures may thus establish basic public interest protections more generally across the audiovisual sector.

In terms of revenue type, reliance on subscription, as opposed to advertising, product placement or sponsorship income, will also reduce the scope for commercial influence. Though neither the Council of Europe nor the EU exclude reliance on subscription income, subscription for core services could exacerbate the pressures on PSBs/PSM to provide popular programming, increase costs for those who continue to subscribe and thus reduce ‘accessibility and affordability for the public at large’ (Council of Europe, 2009: para. 14, see also Fairbairn, 2004). Careful attention thus needs to be paid to the services offered and level of fees charged.

In relation to public finance, access to secure funding, awarded on a multi-annual basis can help to reduce political pressure, whether direct or indirect (CoE,

2009: para. 13), as can the use of a separate body, independent of government or parliament, to fix or recommend the level of public finance needed by PSM to fulfil their designated missions. Government or parliamentary competence to redirect funds formally allocated to PSM to other uses once awarded is highly problematic (Collins, 2011a: 1214). The process by which public funding is renewed should, as noted above, be transparent, affording scope for meaningful consultation with all relevant interest groups (Levy, 2012).

In the EU context, commercial operators have complained that certain PSBs have not only been overcompensated, resulting in them bidding-up the prices paid for popular sport and entertainment programmes or reducing their charges for advertising time, but that they have also cross-subsidised commercial activities with public money. In response, the EU has required PSBs to prepare separate accounts for their commercial and public service activities (European Community, 2006). EU law also requires any aid to be proportionate and thus restricts the capacity of PSBs to build-up and carry over financial reserves from year to year. Use of taxation, imposed on internet service, telecommunication and pay-tv companies to fund PSBs/PSM has also come under scrutiny on the basis that this could disadvantage certain operators and conflict with EU rules on electronic networks and services (European Commission, 2009b).

### **3. PSBs in the Mediadem countries: A comparative overview**

#### **3.1 Management and supervision**

The management and supervision structures of PSBs - covering both the structures for decision-making and the structures available for the supervision of the implementation of the decisions taken - can play a significant role in securing or conversely undermining the organisational and editorial autonomy of PSBs. A central feature reflective of the independence of PSBs is indeed their ability to operate at arm's length from the government and power elites, while being subject to effective supervision by organs and bodies that similarly benefit from mechanisms that shield them from political or other undue interference.

##### **3.1.1 Management bodies**

The executive bodies of the PSBs under study consist of corporate bodies (management or administrative boards), persons acting in an individual capacity (i.e. director general, president, etc.) or both. The executive is responsible for the operational management of the public service operators, which typically involves developing and implementing a programme and budgetary strategy, taking organisational and personnel decisions, and engaging in programme scheduling. Although the competences assigned to the management bodies of the PSBs in the 14 Mediadem countries display considerable similarities, different management models are followed, accounting for which are mainly differences in political culture, socio-cultural traditions and national styles of government. Management models can be centralised, decentralised or mixed, depending on the arrangements made for the nomination/appointment of the members of the PSBs' management organs.

The criterion of nomination and appointment procedures is particularly useful for the categorisation of the management models in use. This is because appointment

procedures can create a sense of loyalty, generating a favourable environment for the nominator/appointer to provide instructions to management. The issue is certainly complex and encompasses several aspects that should be taken into account when examining the independence of PSBs' management: the length of managers' tenure and the possibilities afforded for renewal, incompatibilities with other posts, requirements for expertise and specific qualifications, protection against dismissal and mechanisms preventing conflicts of interest. Although attention should be afforded to all these elements when probing into the ability of PSBs to engage in autonomous management, the particular nomination and appointment arrangements made are of crucial importance because they determine whether procedures can become politicised or not.

### *The centralised model*

Belgium, Greece, Italy, Romania, Spain, Slovakia and partly Croatia and Denmark follow a centralised model concerning the appointment of the individuals forming part of the executive bodies of (all or some of) their PSBs. Under the centralised model, appointment essentially involves the executive and/or the legislative branch, though opportunities for the PSBs' employees to elect their management representatives may also exist.

A pure centralised model can be found in Denmark, concerning the nationwide PSB TV2/Denmark, and Greece. TV2/Denmark - a public limited company - is managed by a board of directors, which consists of six members (including the chairman and the vice-chairman), appointed by the general assembly of the PSB, that is, the Ministry of Culture - the operator's shareholder. In Greece, the president of the PSB ERT, responsible for directing the activities of the ERT management board, and the ERT managing director, entrusted with day-to-day management, are appointed by a joint decision of the Ministry of Finance and the Ministry of State, following the publication of a public tender. Besides the president and the managing director, the management board of ERT, which is assigned with general management duties (e.g. formulating basic programme guidelines, engaging in economic and budgetary planning, etc.), in addition to some supervisory functions (i.e. ensuring respect of programme guidelines), consists of four additional members. These are also appointed by the two ministries. In both countries, representatives of the PSB employees are placed on the boards: one member in the case of ERT and three members in the case of TV2/Denmark.<sup>2</sup>

In Belgium, Spain, Slovakia, and to some extent in Croatia, appointment procedures are under the responsibility of the parliament. Whether influence is distributed among the represented political parties thus depends on the actual composition of the parliamentary assembly and often, on the type of majority decision required for decision-making. In Belgium, the boards of directors of RTBF.be and VRT, the PSBs in the French community and the Flemish community respectively, consist of 13 members and from 12 to 15 members each. Members are selected by the respective community parliaments in proportion to the strength of the political parties therein. They are appointed by the French community parliament in the case of

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<sup>2</sup> Danish company law specifies that in any public limited company with at least 35 employees, the employees can elect their representatives to the board. The number of representatives must be half the number of the board's ordinary members.

RTBF.be<sup>3</sup> and by the Flemish community government in the case of VRT. In Croatia, management tasks for the PSB HRT are carried out by the management board and the programme council, which also has some programme supervisory duties. Whereas a decentralised procedure is followed for the appointment of the members of the management board (on which see below), the programme council consists of 11 members, elected by the parliament on the basis of a public call for nominations. The call is issued by the parliamentary committee on information, computerisation and media, which is responsible for compiling the list of candidates, submitted to parliament for voting, after consultation with the deputy clubs.

The Spanish PSB RTVE is managed by a management board, which until recently consisted of 12 members. Eight of these members were appointed by the Congress (two of which had to be trade union representatives) and four by the Senate by a two-thirds majority decision. Changes to the legal framework agreed in April 2012 have reduced the number of board members as part of the government's austerity measures. Henceforth, the management board will consist of nine members designated by parliament (five members will be selected by the Congress and four by the Senate) but no employee representatives will be able to sit at the board. Moreover, if the two-thirds majority required for appointment is not achieved, the vote will be repeated after 24 hours and an absolute majority will suffice. Similar arrangements have been made for the election by the congress of the RTVE president, who also acts as RTVE's managing director. Notably, a simple majority parliamentary decision is similarly required for the appointment of the director general of the Slovakian PSB RTVS, which is responsible for the operator's management.

Appointment procedures for the members of the management bodies of the Danish DR, the Italian RAI and the Romanian TVR require the involvement of both the executive and the legislative power. This arguably decreases the potential for one-sided influence, provided that more members are elected by the legislative branch and that influence is dispersed among the political elites. DR's board of directors comprises three members nominated by the Ministry of Culture, six members nominated by the political parties in parliament and two members representing the employees of the organisation.<sup>4</sup> In Italy, the PSB RAI is managed by a nine-member administrative board. Seven members are appointed by the Parliamentary Committee for General Guidance and Monitoring of Radio and Broadcasting Services (PCGG), while two members are appointed by RAI's shareholder, the Ministry of Economy and Finance (MEF). The president chairing the board is selected among the board's members by the MEF and requires the approval of the PCGG. However, the MEF is solely responsible for nominating RAI's general director. The board of directors of the Romanian PBS TVR, finally, consists of 13 members, including the president who also acts as director general. Eight members are nominated by the deputy groups in parliament, two members by the PSB's employees and three members by the government, the President of the Republic, and the group of national minorities in parliament, respectively. Nominations are considered by the media committees in the

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<sup>3</sup> It is however the French community government that appoints the operator's managing director, responsible for day-to-day management.

<sup>4</sup> Note that the chairman of the board is appointed from the three members selected by the ministry and the vice-chairman is appointed from the six members selected by the parliament. The director general, responsible for day-to-day management, is appointed by the board.

two Romanian parliamentary chambers, which jointly compose the list of candidates to be submitted for simple majority voting in plenary.<sup>5</sup>

### *The decentralised model*

Bulgaria, Estonia, Finland, Germany, and partly Croatia, Denmark and the UK follow a decentralised model for the appointment of the members of the management bodies of (some of) their PSBs. Under the decentralised model, insulation from political influence is sought by assigning responsibility for appointment to external bodies which are not linked to government or parliament (i.e. independent regulators, regional councils, etc.) or to internal bodies, which on most occasions act as the PSBs' primary supervisory organs.

In Bulgaria, for instance, the management boards of the public service operators BNR and BNT consist of members appointed by the independent media regulator, the Council for Electronic Media (CEM), upon nomination by the PSBs' director general, who is also elected by CEM. In Denmark, the members of the board of directors of the regional TV2 stations are appointed by the board councils. These consist of representatives of each region's cultural and social life, and vary substantially in terms of size and composition from region to region.

In Estonia, Finland and Germany, appointment procedures are under the exclusive responsibility of the PSBs' internal organs. In Estonia, it is the broadcasting council, the supervisory organ of the public service operator ERR, which appoints the ERR chairman and the other members of the ERR management board. In Finland, responsibility for the election of the director general of the Finnish PSB YLE rests with YLE's internal supervisory body, the administrative council.<sup>6</sup> As to the directors general of the German PSBs, these are appointed by the PSBs' internal supervisory organs, the broadcasting councils, partly in consent with the administrative councils. Similar arrangements can be found in Croatia as regards the management board of HRT. The board consists of a president and two members, which are appointed by the HRT supervisory board and the HRT programme council, following a public tender. The BBC executive board, for its part, has a chairman (the director general of the BBC), executive and non-executive members. The director general is appointed by the BBC Trust, the sovereign supervisory organ within the BBC, while all other members are appointed by the executive board, on the basis of a proposal by the BBC nomination committee. Non-executive members need to be approved by the Trust.

### *The mixed model*

A mixed model lying between the centralised and the decentralised model can be found in Turkey and in the UK as regards Channel 4, which is required to fulfil a public service remit. The Turkish PSB TRT is managed by an administrative board, which consists of the director general appointed by the cabinet, two members appointed by the cabinet and four members appointed by the cabinet on the basis of eight candidates nominated by RTÜK, the Turkish independent regulator. In the UK,

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<sup>5</sup> The president of the board is nominated by the board members and appointed by the plenary as well.

<sup>6</sup> The director general then appoints the heads of YLE's programme channels and other YLE services. YLE's board of directors, which encompasses, among others, the director general and the directors of YLE's programme operations, engages in general programme and budget planning.

Channel 4 is managed by a board with executive and non-executive members, appointed by the independent regulator Ofcom. Members, the chairman excluded, are appointed after consultation with the chairman and require the approval of the Secretary of State.<sup>7</sup>

### 3.1.2 Supervisory bodies

The supervisory bodies of the PSBs in the 14 Mediadem countries vary in nature, being internal, external or both. Internal bodies are either solely assigned with supervisory responsibilities or enjoy mixed competences, engaging partly in management and partly in supervision.<sup>8</sup> This can prove problematic and undermine autonomous management, if the exercise of supervisory functions allows for encroachment on management.<sup>9</sup> As noted above, the CoE requires a clear separation of supervisory and management activities, with the supervisory body having no involvement in day to day management (see section 2.3.2). External supervision commonly rests with independent regulatory authorities and sometimes with parliamentary committees and governmental bodies. Interestingly, most public service operators are also subject to control of compliance with media ethics by external and internal self-regulatory bodies (i.e. press councils, ethics committees, media ethics ombudsmen, etc.). Since relevant bodies are primarily concerned with increasing PSBs' accountability to the general public and civil society, they are not covered in the analysis below. The analysis rather focuses on the links allowed or not allowed between PSBs' supervisory bodies, the state and political elites.

#### *The internal model*

A characteristic example of internal supervision can be found in Germany. The supervisory organs of the German PSBs are the broadcasting councils<sup>10</sup> and the administrative councils.<sup>11</sup> The broadcasting councils consist of representatives through delegation by various societal groups, including trade unions, industry groups, churches, sports, science and cultural associations, universities, etc. Their size and composition varies considerably, and it is regulated by the relevant state broadcasting act, which may also specify that representatives of political parties and the state government can be admitted to the councils. The broadcasting councils appoint the director general of the PSBs, advise on programme design, monitor compliance with programme standards and approve the PSBs' budget and annual accounts. The administrative councils usually oversee financial management and participate in the nomination of individuals in senior editor positions, as well as in

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<sup>7</sup> UK commercial broadcasters that are required to fulfil particular public service requirements have a conventional executive structure.

<sup>8</sup> See for instance the ERT management board and the HRT programme council mentioned above.

<sup>9</sup> This of course does not mean that there should be no interaction between PSBs' management and internal supervisory bodies. Besides assessing compliance with legal requirements and public service duties, supervisory bodies should be allowed to offer guidance and steer the performance of PSBs, at the same time refraining from any type of a priori programme control.

<sup>10</sup> In the case of ZDF the television council.

<sup>11</sup> ARD being an association of public service operators follows the following monitoring format: the broadcasting and administrative councils of each regional broadcasting corporation monitor the activities of their respective corporations; where ARD matters are concerned, the Conference of Supervisory Body Chairpersons coordinates the supervision of the individual corporations.

major fiscal transactions. However, they also participate in management planning. All or most of their members are elected by the broadcasting councils and therefore tend to represent a variety of social groups.

In Denmark, the PSB DR is supervised by its board of directors,<sup>12</sup> whereas in Estonia, the PSB ERR is overseen by the public broadcasting council. The council, an internal body to the PSB, presently consists of eight members including politicians and media experts. On the basis of a proposal by the parliamentary cultural affairs committee, the parliament appoints one member per each fraction of parliament (presently four), and four members among recognised specialists. Among others, the council approves the PSBs' budget and oversees that the guidelines and ethical principles for broadcasting are adhered to. The council is required to report annually to the parliamentary cultural affairs committee.

### *The external model*

In some Mediadem countries, the activities of PSBs (or part thereof) are monitored by independent regulators, sometimes with concurrent parliamentary or governmental supervision. Although there is a series of criteria that should be taken into account when evaluating the ability of independent regulators to discharge their duties in an autonomous manner (Indireg, 2011), appointment procedures merit particular attention as they are an obvious way to seek influence over the regulator. The potential for one-sided influence declines for instance when there are more players involved in the process. The nature of the players participating in the appointment procedure has also an evident role to play.

In Denmark, the independent regulator, the Radio and Television Council, acts as a supervisory body for TV2. The members of the council are appointed by the Ministry of Culture and include a representative of listeners' and viewers' associations. In Bulgaria, Greece and Turkey, oversight over the activities of PSBs is also exercised by independent regulators: CEM, the National Council for Radio and Television (NCRT) and RTÜK. In the UK, supervision of the broadcasters assigned with public service obligations other than the BBC is carried out by Ofcom. Appointment procedures vary. CEM consists of two members appointed by the Bulgarian President and three members appointed by majority decision in parliament. NCRT has seven members, selected by a 4/5 majority decision of the Conference of Presidents of the Hellenic Parliament, a cross-party parliamentary college. RTÜK enjoys nine members which are elected by the Turkish parliament upon nomination by the political parties with proportional representation. Ofcom's ten members, in turn, are appointed by the Secretary of State.

In Belgium, the Flemish media regulator, VRM, oversees compliance with media regulation in the Flemish community in general, and monitors whether the Flemish PSB VRT complies with its management contract in particular. VRM drafts an annual report in this regard, which is delivered to the Flemish government. The extent to which public service goals (as identified in the management contract) have been achieved is ultimately assessed by the Flemish government on the basis of

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<sup>12</sup> Note that the Danish independent media regulator, the Radio and Television Council, comments on the fulfilment of DR's public service obligations on the basis of an annual report submitted to it by DR's board of directors, and is also involved in the assessment of new DR services (see section 3.3.2). However, it has no general supervisory powers over DR.

VRM's report. In the French community, the College of Licensing and Control within the High Council for the Audiovisual Sector (HCAS) is responsible for monitoring compliance with broadcasting legislation, including with regard to RTBF.be's respect of its management contract obligations. Whereas the VRM members are appointed by the Flemish community government, HCAS consists of ten members, seven of which, including the president and three vice-presidents, are appointed by the French community government. The rest are appointed by the French community parliament.<sup>13</sup> Interestingly, both the Flemish community government and the French community government appoint 'community representatives' (one for VRT; two for RTBF.be), who are present at the meetings of the PSBs' boards of directors (and the meetings of the general assembly in the case of VRT), in order to ensure respect of the legislative framework and the management contracts. The representatives can appeal against PSBs' decisions before their respective governments.

In Italy and Romania, supervisory duties over the PSBs are assigned to independent regulators but go hand in hand with the exercise of parliamentary control, and in the case of Italy, with control by the executive as well. The Romanian independent regulator, the Broadcasting Council, supervises compliance of all broadcasting operators, including the PSB TVR, with broadcasting legislation. It consists of two members appointed by the President, three members appointed by the government and six members appointed from the two chambers of the parliament (three members from the Senate and three members from the Chamber of Deputies). Supervision with regard to the discharge of the public service remit and budgetary discipline is exercised through parliament on a basis of an annual report prepared by the PSB and submitted to the parliament's media committees. If the report is not approved, the parliament may dismiss the board, which has frequently been the case after the emergence of a new political majority in parliament (Ghinea and Avădani, 2011: 21). In Italy, the PSB RAI is supervised by the independent regulator AGCOM. The president of AGCOM is nominated by the President of the Republic upon the head of government's proposal while the other four AGCOM members are selected half from the Chamber of Deputies and half from the Senate. The PCGG monitors compliance with public service broadcasting principles, such as pluralism, fairness, completeness and impartiality of information. RAI also reports each semester to the Department of Communications within the Ministry of Economic Development on the fulfilment of all quantitative programme content requirements specified in its management contract. It also submits an annual report on all programme activities to the same department.

In Spain, in the absence of an independent regulator for the media sector, RTVE is supervised through parliamentary control and with regard to its finances by the Court of Auditors and the competent ministries. Several supervisory functions will be transferred to the Audiovisual Media State Council (CEMA) - once established - the independent media regulator mandated by the 2010 General Law on Audiovisual Communication. CEMA, when created, will consist of one president and six

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<sup>13</sup> The members of the Bureau of the HCAS (the president and three vice presidents) are distributed among the political parties present in the French community parliament and are automatically members of the college. The remaining six members of the college are appointed by the French community government (three members) and the French community parliament (three members). The distribution of positions among the political parties takes into account all six members. Consequently, the distinction between the government-appointed members and the parliament-appointed members has no significant impact. In the college, there is also one community representative with observer status.

members, appointed by the government, on the basis of a proposal by the Chamber of Deputies of the Spanish Parliament, with a 3/5 majority decision.

### *The mixed model*

A mixed model consisting in the exercise of supervisory functions by bodies both internal and external to the PSBs can be found in Croatia, Finland, Slovakia and the UK. In Croatia, the supervisory council, an internal body to the PSB HRT, is charged with monitoring duties concerning overall management, financial discipline, and compliance to legal requirements. It consists of a chairman and three members elected by parliament following a public call published by the parliamentary committee for information, computerisation and media. One additional member is selected by the HRT employees' council. HRT is also supervised by the Croatian independent media regulator, the Agency for Electronic Media and its Council. The council is responsible for supervising compliance with programme duties as these are determined in the public service contract concluded between HRT and the government (still pending). It also grants permission for new HRT channels and services. It consists of seven members appointed by parliament, following a proposal by the government on the basis of a public call for nominations.

In Finland, the administrative council of the PSB YLE consists of 21 members elected by parliament. It is responsible for supervising the implementation of YLE's tasks, and it is also charged with deciding on economic and operational guidelines. It is required to report to parliament about the fulfilment of public service tasks every two years. Also, YLE's board of directors is required to report annually to the independent regulator FICORA as regards compliance with regulation. It is the government through the Council of State which appoints the director general of FICORA, the authority's highest decision-making organ.

In Slovakia, the council board of RTVS is responsible for strategic management and monitoring the PSB RTVS. Its members are elected by the parliament after publication of an open call for nominations. The Council for Broadcasting and Retransmission, the Slovakian independent regulator in charge of the electronic media sector in general, is also involved in PSB supervision. It consists of nine members nominated by political parties in parliament and civil organisations, and appointed by parliament.

A mixed supervisory model can also be found in the UK. Responsible for the supervision of the BBC are the BBC Trust and Ofcom. The Trust sets the overall strategic direction of the BBC, approves its budget, holds the BBC executive board to account, has the power to investigate concerns about the BBC's management and operations and hears appeals regarding editorial complaints referred to the executive board, including on impartiality and accuracy issues. The Trust is also under a duty, in accordance with the BBC Charter, to secure the independence of the BBC and determine whether proposed new services can be justified under the public value test (see section 3.3.2). The chair and the other eleven members of the Trust, drawn from various professional backgrounds, are appointed by the Crown, on the advice of ministers, after an open call for applicants. One ordinary member is also designated as the trust member for each of the constituent parts of the UK: Northern Ireland, Scotland, Wales and England. Being required to observe certain programme standards objectives set by Ofcom under section 319 of the 2003 Communications Act and to

comply with Ofcom's Fairness Code under section 107 of the Broadcasting Act 1996, the BBC is also supervised by Ofcom. In addition, Ofcom is required to assess the market impact of any new service envisaged by the BBC (see section 3.3.2). Notably, some supervisory duties are shared between the two bodies. For example, both Ofcom and the Trust are required to monitor compliance with programme and production quotas.

### 3.2 Financial arrangements

Most of the countries under study have introduced a model of *mixed funding* for their PSBs that rests on a combination of public resources with commercial revenue. While commercial revenue may derive from several sources (i.e. advertising, sponsorship, programme sales, merchandising, holdings, the provision of production services to third parties, etc.), it is through public funding that the public service activities of PSBs are principally financed.<sup>14</sup> The most common instrument in this regard is the *broadcasting licence fee*. However, public revenue may also originate directly in the state budget, emanate from taxation or derive from specific public funds in the form of subsidies, grants or concession fees paid by commercial operators. PSBs can further benefit from benefits in kind such as the use of frequencies and facilities on preferential terms or free of charge, and various ad hoc measures (i.e. capital increases, restructuring aid, etc).

In some of the countries under study with more than one PSB, diverse funding arrangements have been made per operator. In Denmark, for instance, DR and the regional TV2 stations are funded by licence fee revenue, and to some extent by commercial revenue (i.e. from the sale of programmes, multimedia, etc.), while the nationwide TV2 programme is funded by advertising and subscription fees. In the UK, the most significant source of funding for the BBC is public funding through the BBC licence fee. This has been complemented in the past by government grants for the World Service, advertising revenue accumulated from the online provision of public service audiovisual services viewed from outside the UK, and revenue from the BBC's commercial services, managed by BBC Worldwide. Channel 4 is mainly funded through commercial sources.<sup>15</sup>

#### 3.2.1 The licence fee system and taxation-based funding arrangements

In the countries that have opted for the licence fee method, the obligation to pay the fee and the level of its amount are commonly laid down in law or other statutory provisions, usually in the form of multi-annual public service contracts signed with the government.<sup>16</sup> The collection of the fees is undertaken by the PSBs themselves, collecting bodies that have been created by the PSBs for that purpose, public entities (tax authorities, independent media regulators, etc.) or utility companies. Funds are either transferred directly to the PSBs or to specific funds.

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<sup>14</sup> Whether a programme service is of a public service nature or not depends on whether it comes within the public service remit as legally defined and specified in the country concerned. This entails that PSBs may use commercial revenue to discharge their public service duties but may not use public funding for services that do not come under the public service mandate.

<sup>15</sup> Channel 5 and ITV, which have certain public service programming commitments, are funded from commercial revenue.

<sup>16</sup> This is the case in Belgium, Croatia, Denmark, Slovakia and the UK.

The licence fee system, which applies in all Mediadem countries with the exception of Bulgaria, Estonia and Spain, has historically been associated with the possession of a radio and later a television set, with most countries distinguishing between a radio and a television fee. Anyone who purchased a television or radio set had to announce this to the competent body - the PSB or the entity responsible for fee collection. In some countries the system was reversed once it became common place to possess audiovisual equipment: those without a broadcast receiving device had to properly notify the collecting body. Other countries, however, did not attach payment of the licence fee to possession of a specific device. In Greece, for example, a lump sum for public service broadcasting is paid through electricity bills by all holders of an electricity account. The same applies in Slovakia, though from 2013 onwards, public service broadcasting might be funded solely from the state budget (Školka, Hong and Kutaš, 2011: 35-36). In Turkey, in addition to a tax imposed on the initial purchase of equipment allowing for broadcast reception, public service broadcasting benefits from a device-neutral 2% tax imposed on electricity bills.

Technological evolution, enabling broadcast reception by means other than radio or television, has brought significant changes to the licence fee system, triggering the application of platform-neutral fees in some of the countries reviewed. Since 2007, for instance, the collection of fees for the Danish PSB DR has been tied to ownership of any device enabling the reception of sound and image broadcasts, including mobile phones, computers and other analogous apparatus. Similar payment obligations exist in Romania, Finland and Germany, though in the latter two countries, the licence fee system will be soon subject to change (Müller, 2012; Kuutti, Lauk, Lindgren, 2011: 24). Germany has opted for the application of a compulsory licence fee, starting in 2013, imposed on households and legal persons, regardless of the possession of a receiving device. In Finland, the licence fee for the PSB YLE will be replaced in 2013 by a public service broadcasting tax, calculated on the basis of the income of natural and legal persons.

### **3.2.2 Commercial revenue and the effects of technological evolution**

In the majority of the countries under study, besides their public income sources, PSBs have been allowed to draw upon advertising and sponsorship revenue. Dependence on commercial funding, it has been argued, exposes PSBs to market pressures, and may result in advertisers and sponsors gaining undue influence over the PSBs' editorial policy. Also, the more dependent a PSB on commercial revenue is, the more inclined it might be to achieve high audience and viewership rates with regard to those segments of the population that are of principal interest to advertisers and sponsors. This could eventually lead to a prioritisation of services of wide popular appeal, blurring the distinction that is typically drawn (and expected) between the offer of PSBs and the offer of commercial operators.

With the argument that PSBs should not be dominated or unduly influenced by market forces, Estonia, Finland and Spain have opted for the exclusion of their PSBs from the advertising market. Whereas the Finnish YLE has been prevented from relying on advertising since its establishment,<sup>17</sup> changes in the legal framework governing the Estonian ERR and the Spanish RTVE have resulted in the operators' exit from the advertising market (Harro-Loit and Loit, 2011: 16; de la Sierra *et al.*,

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<sup>17</sup> YLE can neither produce and broadcast sponsored programmes.

2010: 400).<sup>18</sup> In the case of RTVE in particular, advertising has arguably been renounced in favour of a levy for public service broadcasting imposed on the communications industry. Hence, in addition to contributions from the national budget and earnings from own productions, sponsorship and spectrum tax, RTVE is funded via two taxes imposed on the revenues of private broadcasters and electronic communication service providers, respectively.<sup>19</sup>

In most Mediadem countries, technological developments enabling the expansion of PSBs on new platforms have triggered heated discussions on the funding of PSBs' new activities, an issue that is closely linked to the demarcation of the public service remit, discussed under section 3.3. For sure, the debate on whether PSBs should be allowed to compete with private operators for commercial revenue is not new. It has been a component of the European 'dual' broadcasting model since its inception and explains why in some European countries, PSBs have been excluded from the advertising market or were subject to stricter advertising regulation. Limited or no advertising for PSBs was seen as a means to foster the creation and progressive consolidation of financially viable private media markets while insulating the public service operators from advertising pressures.

The opportunities offered by technology for the extension of PSBs' activities, especially online, has revitalised debates on the ideal funding model for public service audiovisual services. In many Mediadem countries, commercial operators, including both press outlets and private broadcasters, have increasingly criticised PSBs for spreading out their activities on the internet via use of their 'guaranteed' public income. PSBs' free online services, in particular, are considered to place commercial media's advertising-funded or subscription-based online services at a serious disadvantage. Shrinking circulations for newspaper publishers and declining advertising resources for both press outlets and private broadcasters have exacerbated the situation, reinforcing arguments about preventing PSBs from competing with private media for advertising resources.

Allegations of unfair competition and PSBs' harm on commercial media services have elicited a move towards increased reliance on public funds in some of the countries reviewed. In Germany, for instance, online advertising was banned for PSBs by means of the 2008 Interstate Treaty on Broadcast and Telemedia, which was adopted following the complaint of the Association of Private Broadcasters and Telemedia Operators, filed with the European Commission, against the financing model of German PSBs (European Commission, 2005). The treaty identified 17 types of non permissible content for public service operators, including advertising portals and online advertising, among others. In Croatia, although advertising was not forbidden, under the pressure of commercial operators, the legislator limited the amount of advertising that the PSB HRT may carry and thus the ensuing advertising revenue (Švob-Đokić, Bilić and Peruško, 2011: 22)

The reduction or altogether elimination of advertising for public service operators could in principle shield them from advertising pressures and strengthen the distinctiveness of their services by protecting PSBs from the race for audience maximisation in an effort to appease advertisers. At the same time, the (total or

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<sup>18</sup> Notably, the Estonian PSB voluntarily gave up television advertising in 1998 in exchange for a monthly financial compensation paid by commercial television stations, a practice that eventually failed because the commercial operators defaulted on payment.

<sup>19</sup> Regional PSBs in Spain have not been required to abandon advertising.

partial) exit of PSBs from the advertising market might place the operators' financial independence under peril, especially under the harsh economic conditions that currently prevail in Europe. As the Mediadem case study reports aptly demonstrate, some of the PSBs whose funding originates in state contributions have recently experienced a drop in their finances. The licence-fee funded PSBs have similarly not escaped financial constraints through reductions in the amount of the licence fee or other income cuts. In an uncertain economic environment where particular sources of revenue might prove unstable or wither, a multiple-source funding scheme might be more appropriate to sustain public service media activities and ensure the financial autonomy of PSBs.

### **3.2.3 New trends**

While recent changes brought about in PSBs' funding models might indicate a trend towards less diversification of their resources, in some of the countries under study, another pattern seems to be emerging: supporting by means of public revenue public service audiovisual services, in addition to public service operators as such. The Danish Radio 24Syv is a case in point. This nationwide radio station is a privately run, yet licence-fee funded radio, which is under duty to fulfil certain public service requirements and which may not collect advertising or sponsorship revenue. Notably, public revenue generated by the collection of the licence fee in Denmark also feeds the Public Service Fund. This fund is administered by the Danish Film Institute and subsidises since 2008 drama and documentary programmes to be broadcast on commercial television and radio stations. The type of programmes supported forms part of the public service audiovisual services that the Danish PSBs are typically mandated to provide. Public support through the licence fee is thus directed to a particular kind of audiovisual content that is considered to be in the public interest and which is to be provided by commercial operators (Helles, Søndergaard and Toft, 2011: 43). A similar model exists in Croatia. The Fund for the Promotion of Diversity and Pluralism of Electronic Media benefits from licence fee revenue and encourages the production and broadcasting of public interest programmes by local and regional radio and television operators. The Croatian independent media regulator operates the fund and determines, on an annual basis, the audiovisual genres that are considered to be in the public interest (Švob-Đokić, Bilić and Peruško, 2011:30).

Such practices indicate a shift from public support solely offered to public service operators to public support offered to particular public service programmes, besides the PSBs. Relevant models can serve to promote pluralism but may also signal the exercise of a new type of control over audiovisual content by those responsible for determining the types of supported audiovisual services and relevant funds' allocation. The entrustment of implementation functions to independent media authorities, as the Croatian example shows, might be particularly helpful to pre-empt undue influence. Of course, it also raises the question of safeguarding in an adequate manner the independence of the 'independent' regulators both in law and in practice.

### **3.3 The public service remit**

Laws and regulations in all the countries under study lay down a set of more or less comprehensive provisions identifying the character, type and breadth of the public service programmes and services that PSBs are mandated to provide. Whereas in

some countries the legal framework targets public service operators in an exclusive manner (i.e. Finland, Estonia), in other countries certain public service requirements are imposed on commercial operators as well (the UK). Most common, however, is the imposition of public service obligations on distinct operators, which also justifies the grant of public resources for their discharge.

EU Member States are generally afforded a wide margin of discretion concerning the definition of the public service obligations, and thus the public service remit of their PSBs. Mandates, which usually take the form of qualitative terms but may also consist of quantitative requirements, vary considerably from country to country, precisely on account of the historical, socio-political and cultural realities prevailing in each state. Even so, the public service mission of the PSBs in the 14 Mediadem countries reveals that there is a core of common features which are prevalent and generally valid. The PSBs are generally required to provide citizens with a wide variety of programmes and services that disseminate information and news, provide education and entertainment, promote citizenship and civic engagement, and foster public debate on issues of public interest. They are also expected to support the national identity, culture and language, promote creativity and the arts, increase the population's knowledge and understanding of other cultures, and foster social cohesion, tolerance and mutual understanding. In doing the above, the PSBs must satisfy in a balanced manner the interests of different audiences and social groups, including children, youth and various cultural, linguistic or minority communities, guarantee pluralism in information, and promote plurality of views and opinions. Further, requirements for investment in content production and transmission quotas for particular types of programmes are commonly imposed as well as obligations for high professional standards, quality, impartiality, accuracy and fairness.

### **3.3.1 Determining the public service mission**

The public service mission of the PSBs in most Mediadem countries is laid down in laws (governing the activity of public service operators or broadcasting more generally). Public service contracts and charters concluded on a regular basis with the government are used in Belgium, Croatia,<sup>20</sup> Denmark, Italy, Slovakia and the UK. Depending on format, these agreements may define more or less detailed programme requirements and also identify the financial means to be allocated to specific services. Sometimes, as in the case of the Danish DR, the public service contracts build on broader media policy agreements reached by the political parties in parliament (Søndergaard and Helles, 2011: 19-20).

Those responsible for the negotiation of the laws and the public service agreements defining the public service mission of PSBs (usually the political party or parties in power) enjoy the ability to steer the activity of the PSBs and influence various elements of their programme. Contrary to ordinary laws, however, Mediadem's empirical evidence indicates that the negotiation of public service contracts at times results in excessively detailed public service content requirements and clear-cut financing obligations for specific services falling within the public service remit. Arguably, the more detailed the public service agreements are, the less is left to broadcasters to decide in an autonomous manner. This may thwart flexibility

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<sup>20</sup> An agreement between the Croatian PSB HRT and the government is still pending.

in the fulfilment of the public service remit, preventing PSBs from being responsive to citizens' evolving needs. At the same time, public service contracts may also act to the benefit of PSBs' independence if the imposition of detailed requirements reduces the number of channels available for those seeking to influence PSBs' content to operate. The involvement of independent media regulators in the negotiation of the contracts might serve to introduce helpful checks and balances into the process.<sup>21</sup>

Interestingly, there are countries where the public service remit and the existence and development of PSBs more broadly have been primarily shaped by the judiciary. Germany is a clear example in this respect, as it was the jurisprudence of the German Federal Constitutional Court which determined the public service *raison d'être* of PSBs (Müller and Gusy, 2011: 21-22). The court read in the German Constitution - the Basic Law - the state's obligation to create a legal framework for free and independent broadcasting to flourish. It also recognised the principle of state independence, namely that broadcasting should be free from undue state influence, in order to encourage a free process of forming public and individual opinion. This led to the establishment of public service broadcasting in Germany, and requirements, in accordance with the principle of state independence, for a broad and general public service remit, subject to specification by the PSBs.

### **3.3.2 The quest for a *precise* public service remit**

A broad definition of the public service remit that leaves the broadcaster free to establish its own range of programmes is closely linked to the principle of editorial independence. While in the pre-Internet era, there seemed to be general agreement that a broad public service remit was also a sufficiently *precise* remit, in the multi-platform, post-Internet media environment, such a consensus has faded. Partly accounting for this has been technology and the efforts deployed by public service organisations to expand their operations beyond their traditional radio and television services. By exploring new ways to reach users and by seeking to diversify their services, PSBs prompted renewed interest in their role in society. The *public value* frenzy that accompanied relevant debates resulted in the introduction of detailed regulations in some EU Member States with a view to evaluating the societal value and market impact of PSBs' new services. The formal introduction of these new *ex ante* assessments of PSBs' activities raises a number of serious concerns about PSBs' ability to develop and act independently in the future.

Since the early 2000s, private broadcasters, together with publishers and providers of electronic communications networks and services, have increasingly argued that PSBs should not be allowed to expand their activities on new platforms. In a media environment characterised by digitalisation, convergence and interactivity, private initiative, it was argued, could itself cater to distinct audience and viewership preferences. One of the fundamental purposes of public service broadcasting, namely to satisfy diverse tastes and interests, was thus fundamentally questioned. For commercial operators, PSBs should be contained to the fulfilment of their public service remit, so as to refrain from hampering the healthy development of the activities of private operators. The public service mission of PSBs should further be

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<sup>21</sup> See for instance the 2010 Croatian Radio and Television Act, which requires the five-year contract, concluded between the Croatian government and the Croatian PSB HRT, to be approved by the Croatian independent media regulator, which is also responsible for monitoring its application (Švob-Dokić, Bilić and Peruško, 2011: 22).

accurately defined, in order to ensure that PSBs address specific kinds of content (i.e. news, culture and education) when expanding to new platforms.

Convinced that the added value of PSBs' new services should be verified on a national basis, the European Commission first made mention of a so-called *public value test* in the context of a state aid investigation concerning the funding regime of the German PSBs (European Commission, 2007). The idea of an *ex ante* evaluation of PSBs' new media services was subsequently consolidated in the 2009 Broadcasting Communication that set out precise guidelines for the funding of PSBs (European Commission, 2009a). The model used for the drafting of the communication was the BBC public value test (Donders, 2011: 29), which was introduced in the UK in 2006, without EU intervention, following the publication of the BBC's 'Building Public Value' paper, part of the BBC's contribution to the debate over its Charter renewal (BBC, 2004).

### *Public value tests in the Mediadem countries*

A soft law instrument that is not legally binding on the EU Member States, the 2009 Broadcasting Communication has not exerted an overwhelming impact on the organisation of the EU Member States' PSB systems. Besides the much debated BBC public value test, public value tests have been instituted in a limited number of Mediadem countries, namely Denmark, Finland, Germany and partly Belgium, following specific European Commission-led investigations into the financing of their PSBs, with the exception of Finland. In Italy, monitoring practices for assessing the public value of RAI's services have been introduced,<sup>22</sup> while in Croatia, legislative changes in 2010 have denoted concern for the impact of HRT's activities on commercial operators (Švob-Đokić, Bilić and Peruško, 2011: 28-29), without establishing a public value test per se.

In Denmark, a public value test was first introduced in 2007 without a market impact assessment by means of a two-page appendix in the public service contract of the PSB DR (DR, 2007). DR had the right to decide whether a new public service broadcasting service, including on-demand services, qualified for the test. If a test was due, DR should carry out the test, and communicate the results to the Danish independent media regulator, the Radio and Television Council (RTC), which should publish a comment, on the basis of which DR should take a final decision. Following the adoption of the 2009 Broadcasting Communication, this 'internal' version of the public value test was replaced by an 'external' public value test, complemented by market impact assessment analysis (Helles, Søndergaard and Toft, 2011: 43). The 2010 media agreement, concluded between DR and the government for the period

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<sup>22</sup> The 2007-2009 service contract, signed between RAI and the Italian Ministry of Communications, mandated the development of a system for assessing the quality of the operator's programmes, which was maintained by the service contract for the period 2010-2012 (see article 3(1)(e), Service contract 2010-2012, [http://www.segretariatosociale.rai.it/regolamenti/contratto2010\\_2012.html](http://www.segretariatosociale.rai.it/regolamenti/contratto2010_2012.html), date accessed 6 July 2012). Two instruments were foreseen: a) a monitoring and analysis study on programme quality and public value that verifies users' perceptions of the public service offered by RAI; and b) a monitoring study into corporate reputation in terms of RAI's ability to compete, innovate and increase its public service value, exemplified by its presence on the international audiovisual market, the support offered to the independent television industry, technological capacity and compliance with corporate and professional ethics. The service contract requires periodic assessments of RAI's performance on the basis of these two instruments, and expressly stipulates that RAI is required to develop a multimedia offer on the Internet (see art. 11).

2011-2014, explains that DR is allowed to provide public service content on a technology-neutral basis by offering *editorially-founded* online activities that contribute to its public service purposes (Svendsen, 2011: 120). The RTC is responsible for conducting both a value and a market impact assessment before the launch of any new service or major service changes that are not explicitly covered by the public service contract.

The Finnish public value test was established by decision of YLE's supervisory body, the administrative council, in October 2010. According to the procedures introduced, a request for the conduct of the test may stem from YLE's board of directors, the administrative council or any other natural or legal person, established in Finland, with an interest on the issue. The decision as to whether a test is due is incumbent on a subcommittee appointed by YLE's administrative council, and must be properly justified. If a test is required, an external expert, selected in accordance with public procurement legislation, is assigned with the conduct of the test, which includes two strands: a market impact assessment and an evaluation of the public service value of the service concerned. Regarding the first strand, the expert is required to launch a consultation in line with the instructions received by the Finnish Competition Authority (FCA), analyse the market impact, and request a statement from the FCA on the analysis made. Concerning the second strand, the expert must make consultation arrangements in line with the specifications provided by the administrative council's subcommittee, and compile a summary of the statements received. On the basis of the results of the two components of the test, the administrative council then reaches a final decision, and publishes it together with its grounds. The recently adopted bill on the Finnish PSB (Law 29/2012, 20/6/2012) has incorporated the public value test in Finnish legislation. According to the new act, services and operations that have a considerable impact on the content services available and which are 'significant' in terms of nature, duration and cost must be subject to the test. For the performance of the test, observations must be specifically sought from the Consumer Ombudsman, FCA and main stakeholders, while other experts may also be heard.

The German public value test, also known as the 'three-step' test, was incorporated in the 12<sup>th</sup> Interstate Broadcasting Treaty, validating the compromise reached between the European Commission and the German Länder on the financing of German PSBs in 2006. German PSBs are allowed to offer online services (so-called 'telemedia' services), in so far as these are *journalistically and editorially motivated and arranged* (Moe, 2010). Moreover, through a 'negative' list, the Interstate Treaty has established specific categories of online content that may not form part of the public service, including *non-programme-related press-like services*, and distinct time periods for the retrieval of programme offers providing specific types of content (Müller and Gusy, 2011: 18).

The German three-step test marks a significant departure from the Danish and Finnish public value tests. Whereas the latter have subjected only *new* services to test, the German model required the *ex post* evaluation of all existing online services, besides the *ex ante* assessment of any new services envisaged by the PSBs. With regard to the *ex ante* assessment, in particular, according to the German system, the broadcasting councils of the German PSBs must check whether a new or a significantly modified 'telemedia' service satisfies the democratic, social and cultural needs of society; balance its impact on the market with its public value, taking due account of the quantity and quality of existing, freely available offers on the market

and the likely opinion-forming function of the service; and evaluate the ensuing financial cost (Katsireia, 2011). Although there is no requirement for the tested service to demonstrate *added* public value, various interpretation difficulties can be noted. It is unclear for instance what services fall within the notion of *journalistically and editorially motivated and arranged* services, and *non-programme-related press-like services*.

In the case of the BBC, the public value test, set out in the BBC's 2006 Agreement with the government, replaced the 'approval' powers previously enjoyed by the Department of Culture, Media and Sport, marking, from this perspective, a welcome reinforcement of the BBC's independence from government (Collins, 2011b). The test works as follows: the BBC management must apply to the BBC Trust for approval of any potentially significant change to the public services of the BBC. The Trust then determines whether a public value test is necessary, in which case two distinct tests are performed: the impact on competition of the proposed change is reviewed by Ofcom, while public value is assessed by the Trust. On the basis of the results obtained, the Trust examines whether public value outweighs any potential negative market impact, and launches a formal public consultation, before reaching a final decision (Craufurd Smith and Stolte, 2011: 21).

In Belgium, a public value test was instituted as a response to the concerns expressed by the European Commission in the context of its investigation into the funding model of the Flemish PSB VRT (European Commission, 2008). The 2009 Radio Broadcasting and Television Act clarified that VRT may offer programmes and services via new media applications, yet prescribed that any new service or activity that is not covered by the VRT management contract requires the explicit permission of the Flemish government (Van Besien, 2011: 26-27). To this end, the Flemish government must turn for advice to the Flemish Media Council, an independent advisory body, consisting of representatives of VRT and the Flemish media community (Van den Bulck, 2011: 157).

The public value tests discussed display significant divergence, particularly as regards the bodies assigned with the task of carrying them out. These include independent regulators, government, bodies forming part of the PSBs' own organisational structure, or bodies incorporating entities with a clear stake in the outcome of the evaluation procedure. On this basis, it may be queried whether each of these different systems provides sufficient safeguards to ensure an independent assessment. More importantly, the tests pose a clear challenge to the editorial autonomy of PSBs. For the most part, they act as instruments of censorship in the sense that new media services have to be put to test *before* they are actually launched. Further, new media services can be prohibited (outright, as the German 'negative' list demonstrates, or following the conduct of the test), not on account of public interest concerns that can legitimately restrict free speech (and which are commonly laid down in major human rights treaties, constitutional texts and parliamentary acts) but on the basis of competition constraints. The European Commission could have continued to steer the member states towards introducing and/or strengthening mechanisms to prevent the cross-subsidisation of PSBs' commercial services by public funds. Instead, and perhaps inadvertently, but clearly in the name of competition and economic concerns, it has contributed to the creation of new instruments of control over PSBs' content.

### *Judicial testing of the public service remit*

Besides the filing of complaints with the European Commission, pressures from commercial operators for a more detailed definition of the public service remit have also been exerted through recourse to courts. In Belgium, for instance, the Association of Belgian French-speaking newspapers, JFB, initiated proceedings against the French-speaking PSB RTBF.be, requesting the public service operator to be ordered to immediately cease all *online written press activities*.<sup>23</sup> The Belgian court took the position that RTBF.be's online services fell within the public service mandate either directly on the basis of the provisions contained in the 2007-2012 management contract that provided for RTBF.be's presence online, or indirectly, through the launch of services that transposed the public service remit online (Docquir, 2012).

The concept of *online written press activities* is similar to the concept of *non-programme-related press-like* services of the German three-step test, and as confusing as its counterpart. With its use, commercial operators seem to have argued that the Belgian PSB's online services should be limited to its existing, traditional broadcasting programmes. It could be claimed, nevertheless, that particular tasks falling within the public service remit might be better discharged through the provision of online services and that at any rate, the choice of the platform for the provision of a particular service coming within the public service remit is for the public service operator to make, as a safeguard of its organisational autonomy. A strict confinement of PSBs' online services to services that are closely associated to radio and television services might undermine the launch of services that address the same democratic, social and cultural needs of society, as radio and television public service broadcasting services do, though in an innovative way. It would also run counter to the endorsement by international organisations such as the Council of Europe of a technologically neutral view of PSM (see section 2.2 above)

#### **4. Factors influencing the political independence of public service broadcasting**

Given its historical origins and evolution as state broadcasting, the independence of public service broadcasting has a primarily political dimension that puts under scrutiny its relations with the government and dominant political forces. Borrowing from Hanretty, political independence refers to 'the degree to which PSB employees take day to-day decisions about their output or the output of their subordinates, without receiving and acting on the basis of instructions, threats or other inducement from politicians, or the anticipation thereof; or considering whether the interests of those politicians would be harmed by particular choices about output' (Hanretty, 2009: 76). In their seminal comparative study, Hallin and Mancini understand the configuration and functioning of media systems, including of PSBs, to be determined by contextual factors related to political parties, parliamentary systems, the role of the state and social interest representation (Hallin and Mancini, 2004). As noted in section 1, variation across states along these lines have, over time, shaped distinct degrees and patterns of political parallelism and journalistic professionalisation that render the media more or less impartial and independent from the political system. From this analytical frame, legal rules and institutional structures shaping public service broadcasting are likely to be largely epiphenomenal, a consequence, or a hostage of, the historically evolved political and social structures and relations, with limited

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<sup>23</sup> JFB also asked for the termination of online advertising.

ability to influence the extent to which public broadcasting operates as an autonomous institution that is true to its public service mission.

While the present analysis accepts that historically evolved political economy structures and relations profoundly influence the configuration of the media, it raises questions about the extent to which such structures and relations can lead us to draw distinctions and categorise national media systems along broad geographical lines and political system-wide features. Variation in the degree and nature of PSBs' dependence on political and state elites is more nuanced, contingent and shifting, and it is less determined by macro-structural features of the political economy system.

In this section, we explore the consequences of legal-institutional provisions (*de jure*) aiming to safeguard independence for the actual (*de facto*) independence of PSBs. *De jure* independence is expected to work by partially constraining attempts by political and government elites, who often have strong motives to interfere with news that affects their power and reputation, to seek to influence public broadcasting output (Hanretty, 2009: 79). From this perspective, we understand media independence as a contingent feature and outcome. It is not an absolute property that a PSB either has or has not as a direct and automatic effect of a particular set of regulatory, governance or financial arrangements. Instead, it is a relative one that can be claimed and achieved to a lesser or greater degree even by the same media system at different periods of time. As it is rightly stated more broadly, 'no mass media can, in the long run, attain complete independence from the paying public or from political authorities' (Lund, 2007). From this dynamic perspective, the independence of public service broadcasting is a contingent outcome of ongoing and often open-ended processes of supervisory control and negotiation among a variety of public and private actors, within the constraints and safeguards that existing governance and financial arrangements establish.

Over the past ten years, public service broadcasting in nearly all countries under study has undergone substantial restructuring in response to commercial and financial pressures, technological challenges, but also with the aim of bolstering the PSBs' independence vis-à-vis the government. Such reforms have also been strongly evidenced in the post-communist states of Central East and Southeast Europe (CESE), where a strong legacy of state broadcasting still weighs heavily upon public radio and television. The preceding sections have explored the configuration of the multiple legal, financial and institutional guarantees defining the governance of PSBs in each country. All 14 countries studied in Mediadem have in place legal, financial and institutional guarantees that at least in principle seek to ensure the independence of PSBs. Public service broadcasting can be said to be better placed and more successful in asserting and defending its independence from political and government interference in some countries than in others. What influences its ability to do so is the combination of legal and institutional characteristics aimed at keeping public broadcasting at arm's length from the state. The aggregate of legal and institutional safeguards is in some countries more extensive, consistent and mutually reinforcing than in others. In this section, we analyse these characteristics pertaining to the financing and governance of PSBs in the 14 countries on the basis of the qualitative material drawn from the country case studies, and discuss their impact on the political independence of public radio and television.

Being funded by public sources as opposed to gaining revenue from advertising does not necessarily restrict the autonomy of public service broadcasting.

Licence fees are considered the most effective in defending its autonomy and they are motivated by the desire to reduce reliance on direct state subsidies. In contrast to direct state subsidies that depend on the political will of decision-makers, usually on an annual basis, the licence fee method is generally considered to be a major safeguard for the editorial autonomy of the PSBs. The same could be fairly said regarding PSBs' funding drawing directly from taxation.<sup>24</sup> The laws and statutory provisions determining the level of funding through the licence fee or tax collection are commonly the product of negotiations either in parliament or between the PSBs and the government. On both occasions, parliamentary majorities and the political parties in power enjoy legal influence, which can be exploited to gain politically motivated editorial decisions by the funded body. Concurrently, inadequate levels of funding, undermining the operational capacity of PSBs and affecting their ability to discharge their remit in an adequate manner, can be established to penalise PSBs for their editorial policy. Safeguards in this respect may include procedural requirements for open and transparent decision-making concerning PSBs' funding, as well as the involvement of independent media authorities or other independent bodies<sup>25</sup> in the process.

As we saw in the previous section, in most Mediadem countries, PSBs receive the lion's share of their revenue from some form of licence fee, media tax or direct public subsidies, while they rely minimally or not at all (i.e. Spain, Finland, Estonia) on advertising revenue.<sup>26</sup> The extent to which financing through a licence fee allows the PSB to secure a high degree of political independence is determined by a number of factors pertaining to the way in which licence fees are administered (O'Hagan and Jennings, 2003: 46). In particular, the licence fee can perpetuate political control in so far as its renewal is done in a short term frame and is based on decision of parliament and policy-makers. This is for instance the case in Slovakia, where its amount is not determined on the basis of economic indicators (i.e. inflation rate) but is decided by parliament (Open Society Institute, 2005). In Slovakia, the recent plan (2011-2012) to shift from licence fees to state budget subsidies as the main source of financing for the Slovak public television and radio has been marred in controversy that is closely linked to concerns about its ability to fend against political control. Government and political parties' interference with news and political discussion held by the public broadcaster has progressively declined but is far from eclipsed, despite reforms since 2003 aimed at bolstering the public mission and independence (Školkay, Hong and Kutaš, 2011). At the same time, the shift to state subsidies is postponed, not only due to concerns about strengthening the government's ability to exert control over the Slovak public broadcaster, but also due to the difficulty to cover the revenue to be lost by the abolition of the licence fee through the state budget, which is particularly severe under the current conditions of economic recession and crisis.

Politically discretionary changes in the licence fee can be contained by incorporating the licence fee in multi-annual public service contracts that link financing to performance and clear goals of the public service. Such a contract for

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<sup>24</sup> In fact, licence fee evasion in some countries has prompted governments to contemplate funding for public service broadcasting directly from taxation (i.e. Finland) (Kuutti, Lauk, Lindgren, 2011: 24).

<sup>25</sup> In Germany, for instance, the Commission for the Determination of the Financial Needs (*Kommission zur Ermittlung des Finanzbedarfs*) is an independent body that assesses the funding needs of the PSBs and makes recommendations on the level of the licence fee.

<sup>26</sup> There are some partial exceptions, such as Italy, where the public broadcaster RAI substantially relies on advertising revenues (40% in 2001-2007). See Padovani (2010: 186).

instance was adopted in Belgium in 1997, and while it has not ruled out government intervention, it has rendered it less frequent and less discretionary. Still, critiques argue that by removing the process of drawing up the public service contract out of parliamentary debate, they have rendered it less transparent (Coppens and Saeys, 2006: 271). Finally, the autonomy of public service broadcasting from governmental interference as a result of the power to set the licence fee can be supported through the involvement of independent regulatory and judicial actors able to oversee the operation of the public media and willing to restrain the executive from arbitrarily altering levels of public funding. For instance, when in 2004 a number of Länder governments in Germany for the first time refused the licence fee hike proposed by the independent Commission for the Determination of the Financial Needs of Broadcasters (KEF), the issue was taken to the German Federal Constitutional Court. The Court ruled in favour of the public broadcasters arguing that the ‘politically motivated handling of the licence fee issue by the Länder had been a violation of the principle of broadcasting freedom’ (Woldt, 2010: 178).

The ability of licence fees to secure a source of revenue that is not state-controlled is also closely linked to the size of the market, as well as to income levels of the average consumer. In a number of countries, attempts to raise the levels of PSBs’ financing through the licence fee have been resisted or have rendered difficult their collection, making licence fees especially unpopular and politically costly. If the licence fees are not adequate to raise sufficient revenue for the public broadcaster (Croatia<sup>27</sup>) or if they are not applied at all (Bulgaria) on the basis that they place an economic burden on the average consumer and are therefore unpopular, then the public broadcaster ends up having to make up the shortfall through direct state subsidies or not at all. In countries like Croatia and Bulgaria, ongoing substantial or exclusive reliance on direct state financing creates concerns about strengthening the already substantial political interference with public service broadcasting and its control by dominant political forces and the executive (Švob-Đokić, Bilić and Peruško, 2011: 29). In Bulgaria, despite the fact that the Radio and Television Act provided for the financing of Bulgarian Television through household fees from 2007, this was not implemented. The ongoing financial-political dependence on direct state budget subsidies affects the ability of the Bulgarian public broadcaster to openly criticise the government (Spasov, 2008).

Generally, as other studies also confirm (Benson and Powers, 2011), there has been a gradual shift towards further, and in some cases almost exclusive, reliance of PSBs on public funding in Europe. This has in large part been a result of intensifying commercial pressures seeking to prevent public broadcasters from acquiring a share of the advertising market, as well as from expanding their activities in the new online media. The shift to public financing may also be influenced by the desire to minimise commercial pressures and the effects that they are likely to have on the remit and programme content of PSBs. Commercial pressures against public service broadcasting have been particularly intense in post-communist countries of Central East and Southeast Europe (CESE) where public television revenues are heavily dependent on advertising. Zielonka and Mancini understand this to be connected to strong elements of ‘business parallelism’ in CESE alongside also a strong

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<sup>27</sup> The Croatian broadcaster HRT is financed through licence fees and advertising. However, the limitations that have been imposed upon its revenue from advertising increased pressures for filling the resulting revenue gap from direct state subsidies, if the licence fee is not increased. See Švob-Đokić, Bilić and Peruško (2011: 21-23).

phenomenon of ‘political parallelism’, whereby strong business interests are especially close to and capable of influencing political decision-making, including in the field of the media.<sup>28</sup> At the same time, by relying financially on advertising more than their counterparts in west and south European countries, public broadcasters in CESE are also prone to interference by their large advertisers (Imre, 2009: 49). Government and business interference with public service broadcasting in CESE are not necessarily antagonistic but actually reinforce one another, and pose a great challenge to the ability of PSBs to develop into a truly independent public media institution.

Besides funding schemes, the independence of public service broadcasting from political and state influences is closely dependant upon the internal and external structures that are set up to govern the public broadcasters. It is specifically determined by the extent to which these structures and appointment provisions allow for close relations between the public broadcasting and the reigning political elites. In most countries, governments tend to be well placed to influence such structures, with the competent ministry appointing some members in these structures. In the first place, the independence of public service broadcasting is more likely to be defended vis-à-vis potential political incursions into its activities in countries where the configuration of governance structures is explicitly intended to neutralise government and dominant political control. This is the case where PSBs’ governance structures closely reflect and seek to embed the existing balance of power among the main political parties, as well as to secure representation for the main social partners and interests. As we saw in the previous sections, this is the case in countries like Denmark (in relation to the regional TV2 stations), Finland and Germany,<sup>29</sup> where internal and external structures of PSB regulation and governance reflect in roughly proportionate ways the strength and power of parliamentary represented political parties and/or dominant social groups.

At the same time, the party-related affiliation of members in the management structures of PSBs arguably exposes the latter to politics and allows political parties to interfere with public media. In addition, the appointment of the management and supervisory bodies of PSBs in countries like Denmark (for DR and TV2/Denmark) and Finland is in the hands of the executive and/or the legislature,<sup>30</sup> still allowing considerable scope for the government to exert influence through its appointees. In these countries though, attempts by the government and political parties to appoint individuals on the basis of political favouritism and their ability to control is counter-balanced by the requirement for expertise and professionalism. Appointed members of the management bodies and the regulatory authorities like the Radio and Television Council in Denmark must principally demonstrate to be experts in a field relevant to the media, and partly to represent social and linguistic groups (as in Finland) (Benson and Powers, 2011: 26 and 28). In addition, relations and contacts between members of the management boards of PSBs and the government are generally issues about which Danish society and the political system is keenly aware and sensitive, and they are subject to public scrutiny (Helles, Søndergaard and Toft, 2011: 15).

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<sup>28</sup> Such close ties between business and the political system are also manifested in the fact that several media owners assume public functions. See Zielonka and Mancini (2011: 4).

<sup>29</sup> On Germany, see also Khabyuk (2010).

<sup>30</sup> In Denmark two members are also appointed by the DR broadcaster’s employees, and three members by TV2/Denmark broadcaster’s employees.

By contrast, the absence of a strong and principled requirement of media-related expertise and professionalism for government-appointed directors and members of management bodies and regulatory authorities allows for much greater politicisation of and government control over PSBs. For instance, it is clear that these kinds of appointments by the President of the Republic (upon proposals by the head of government) and the Minister of the Economy in Italy are politically tainted, despite the fact that they must be approved by parliamentary commissions. When Berlusconi became head of government in 2001, key appointments were assigned to people who were from his own entourage and clearly under his influence. Subsequently, the 2005 reform has arguably diluted, at least in part, dominant government control over the appointment process by also granting appointing power to a parliamentary committee. Further reform attempts in 2007 however, to have the public broadcaster RAI be governed by an independent foundation faltered, and did not even reach the phase of parliamentary discussions (Padovani, 2011). Evidently, the politically-driven nature of appointments to the PSB management and regulatory bodies is a corollary to the fact that the individuals selected for these positions need not have a strong record as professionals and experts in the media field.

Spain and Greece have also lacked a regulatory and governance frame that can act as a check on government interference, even though reforms over the past couple of years have sought to put into place such a frame. Up until 2006, the composition of management bodies of the Spanish public broadcaster were very much determined by and depended upon the government of the day. For instance, during the period 1996-1998, the Spanish public broadcaster changed Director Generals three times. Such a frequent turnover was clearly a result of political influence, which has arguably tended to undermine long-term strategic planning (Iosifidis, 2007). It was such political influence that reforms in 2006 and in 2012 have sought to weaken as Spain's Parliament approved a new regulatory frame that transformed the status of the RTVE into a state-owned corporation with 'special autonomy'. While the first reform in 2006 required a degree of cross-party consensus in the appointment of its Board of Directors (Leon, 2010), subsequently, the 2012 reform watered down this requirement by allowing for a simple parliamentary majority to reach a final decision should parties be unable to agree.

There is little evidence that the reformed governance structures of Spain's public broadcaster drastically cut its ties with the government. During this period from 2006 onwards, when these reforms were introduced, government attempts to interfere with and control public service broadcasting have continued. For instance, telling is the attempt in 2011 by the RTVE's Board of Directors to gain access to the editing of news content, which eventually was revoked following protest and criticisms (de la Sierra and Mantini, 2011: 20-21). Similarly, there have been little institutional safeguards to prevent governing elites from exerting a strong influence over the appointment of management bodies of the Greek PSB (Papathanassopoulos, 2010). The latest 2010 reform (Law 3878/2010) does not bring any fundamental change in this regard as it keeps the appointment of the president, the managing director and the board of ERT into ministerial hands with virtually no participation from opposition parties or social partners (Psychogiopoulou, Anagnostou and Kandyla, 2011).

While all three countries – Spain, Greece and Italy – have had a highly politicised PSB with strong ties to the government in power, there are some differences that set the Italian case apart as far as the independence of its PSB is

concerned. Perhaps due to the partly surviving legacy of *lottizzazione* (the allocation of public broadcasting control to different political parties), political control over Italy's PSB RAI has been more dispersed among the broader spectrum of governing elites rather than being directed by the government of the day. In addition, the involvement of parliamentary actors (the PCGG committee mentioned under section 3 above) in the appointment processes of RAI's management board has made a difference considering the fact that parliamentary committees often reflect the composition and politics of coalition governments. By contrast, equivalent reforms in Greece and Spain have not dispersed political control to a broader cross-section of governing and party elites in parliamentary structures that tend to reflect the majoritarian nature of government in these countries.<sup>31</sup>

The ability to defend the independence of PSBs can be augmented when the institutionalisation of political pluralism and social interest representation in media governance structures takes place in a decentralised state structure, as is the case in Germany. The members of broadcasting councils that internally oversee PSBs are typically representatives of political parties, unions, trade and industry groups, churches, universities and cultural institutions. Despite the fact that many members have had allegiances to particular parties, the federal nature of the broadcasting system renders it difficult for any one party to influence programming decisions. As Humphreys stated in the 1990s for the case of Germany, 'no single party ever enjoyed undue influence over the entire public-service broadcasting system' (Humphreys, 1996: 153). While other states, such as Spain are also decentralised to the point of being federal in all but name, the existence of public broadcasters at the regional level does not seem to neutralise or impair the central government's ability to interfere with public service broadcasting. In part, the differences between Germany and Spain may have to do with the fundamentally distinct institutional culture and political significance of federalist and regional structures in the two countries that has been identified by Borzel in the context of regions' interaction with the central state and the EU: while German federalism thoroughly operates along a cooperative frame of relations between regions and the central state, Spanish regionalism is defined by a competitive/confrontational strategy against central state intervention (Borzel, 2001). This cooperative kind of federalism appears to be replicated in the structure of public broadcasting in Germany.

The independence of public service broadcasting is most solid where the governance and monitoring structures of public broadcasters are entirely separate from any degree of direct political and government decision-making. In the UK the BBC operates under a Royal Charter intended to separate the organisation institutionally from Parliament and political influence. Though distancing the BBC from Parliament the present system affords the government considerable potential for influence, with power to determine the composition of the BBC's governing body (the BBC Trust), the size of the licence fee; and the nature of the Charter and Agreement with the Government, which sets out important operating terms. The Government's actual scope to influence the BBC is, however, significantly restrained by a number of explicit guarantees, conventions and cultural expectations. For example, ministerial influence over appointments to the BBC Trust is constrained by the involvement of an independent commissioner for public appointments and ministers generally respect the advice of regulatory bodies and cross party committees (Humphreys, 2009).

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<sup>31</sup> On this point, see Hallin and Papathanassopoulos (2002).

Moreover, one third of the BBC Trust members represent regional interests, while Trustee biographies and details of Trust activities are made available online, thereby ensuring a significant level of transparency (Benson and Powers, 2011: 56). It is the Trust and not the government that appoints the BBC Director General.

This is not to exclude government pressure on the BBC, particularly when covering controversial policies. During the 1980s under the Conservative government of Margaret Thatcher, for example, the BBC Director General came under fire and was forced to resign, in part for BBC coverage of the Falklands War that was deemed insufficiently supportive of the UK position. In 2004, the BBC's critical coverage of the UK government's claims about weapons of mass destruction in the lead-up to the Iraq War was contested by the Labour government of Tony Blair. In this context, both the Director General and Chairman of the Board of Governors (the BBC's then supervisory body) resigned after the Hutton inquiry found there had been lapses in journalistic standards and editorial oversight.<sup>32</sup> Widespread concern over government attempts to influence BBC editorial decisions led, however, to the importance of the BBC's independence being explicitly confirmed when the BBC Charter was renewed in 2006.

As we see in this UK example, a strong journalistic culture of professionalism, impartiality and editorial independence, backed by widespread public support, can function as a powerful counterbalance to occasional government attempts to exert influence. And such attempts clearly occur even in countries such as the UK where the main public broadcaster is institutionally autonomous and regulated at arm's length from the government. Hallin and Mancini (2004) highlight the existence and importance of a strong culture of journalistic professionalism and independence in democratic-corporatist countries like Finland, Denmark and Germany, as well as in a liberal system like the UK.

In the post-communist countries of CESE, the establishment of public service broadcasting in the aftermath of regime transition took place under two sets of conditions that have influenced its subsequent evolution and chances for political independence. In the first place, the establishment of PSBs took place simultaneously with the creation of a commercial media sector, which has rendered the nascent public broadcasters much more exposed and vulnerable to commercial pressures than their long-established counterparts in the countries in West, Central and South Europe. Secondly, the establishment of PSBs also took place against the background of intense politicisation of the state with political parties, business corporations, organised interest groups and other actors trying to control various state institutions and resources. In this context, particularly strong connections were forged between political parties and the media, which they sought to control for partisan political ends (Zielonka and Mancini, 2011: 2-3).

In reviewing the cases of Bulgaria, Croatia, Romania and Slovakia, we find that reforms since the 1990s have augmented the ability of public broadcasters to defend their independence from the government and dominant political elites only in limited ways. This is very much reflected in the regulatory and governance structures of public service broadcasting, which have not radically distanced the latter from politics. In Croatia a round of reforms in 2003 replaced the previous programme council of the public operator HRT that included the participation of a sizeable

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<sup>32</sup> In this instance the government employee, who had been named as the BBC's source, committed suicide. See Benson and Powers (2011: 58).

number of civil society organisations, with an 11-member council appointed by Parliament with the balance between government and opposition appointees to be 6 to 5, respectively (Working Group, 2008).

In Bulgaria, the intense politicisation shaping the policy and regulatory structures of public service broadcasting has been evidenced in the intense conflicts among political parties, as well as among the government and the opposition, with recurrent accusations that the government tries to control it. Political interference by the government was particularly direct and pronounced for most of the 1990s. Reforms in 1998 sought to ensure the political independence of BNT. Yet, the specialised agency (NCRT; in 2001 it was renamed CEM) established to oversee the PSB and to select its general directors is far from politically independent with its members being appointed by the President and the parliamentary majority (Smilova, Smilov and Ganev, 2011). In Romania, the appointment procedures of the members of the nominally independent regulator National Broadcasting Council (CNA) thoroughly lack transparency. Appointed by the President, the government and the two chambers of parliament, its members have a clear political affiliation and on no few occasions, they were former politicians. CNA is still considered to be somewhat more balanced in the light of some degree of cross-party bargaining in the latest composition of its members. By contrast, the board of the Romanian Public Television (TVR) is controlled in a direct and undisguised way by the government with its board usually being replaced after a parliamentary election (Ghinea and Avădani, 2011: 10-11). This replacement is made possible by the requirement that the Parliament has to approve the annual activity report of the TVR board, and by not granting its approval, it compels the resignation of the TVR board (Ghinea and Avădani, 2011: 21).

The governance arrangements of the Slovak public broadcaster and the processes of appointing their members have also been thoroughly politicised. This is also evidenced in the frequency with which the director of public television has been changed – thirteen times between 1989 and 2009. Throughout the 1990s, the domination of political parties' appointees in the supervisory councils means that government officials and parliamentary representatives were able to thoroughly influence public service broadcasting (Školkay, 2011: 114). Indeed, it is argued that a cardinal means whereby political elites have been able to intervene and influence the news on Slovak public service radio and television has been through the processes of whereby Parliament appoints board members with close ties to the dominant political parties. Close political control is also exercised by the fact that the Parliament must also approve the annual budgets of public radio and television and appoint their general managers. It is argued that the Slovak PSB is unlikely to be in a position to defend its independence and to fully shed the legacy of state-run broadcasting if the process of appointing members of the governing councils does not become more democratic and transparent, and does not bring in individuals from the civil society, as well as individuals with a high professional and managerial track record (Dragomir, 2003: 67).

Against the background of the profound politicisation of public service broadcasting and state intervention that lie at its origins, the quest for securing and bolstering the independence of public broadcasting has intensified over the past 15 years. It has done so in the context of growing pressure from commercial competitors but also as an inherent demand of democratic societies. As Hallin and Mancini have shown, public service broadcasting has been profoundly shaped by systemic

characteristics of the political system and its relations with social and economic groups, and the variable ways that these have historically evolved and crystallised across different national contexts (Hallin and Mancini, 2004). At the same time, this analysis argues that the adoption of legal provisions and institutional safeguards can make a difference and circumscribe the ever present attempts by political elites and governments to tamper with the production of news by public operators.

In particular, legal safeguards (*de jure*) of independence that limit the discretion of the executive and political party elites to install their preferred appointees in the management boards (i.e. by diversifying the actors who participate in this process; terms of office; or by approving medium and longer frame financing schemes and public service contracts) can enhance the independence of PSBs. In this regard, this analysis concurs with Hanretty's finding that '*de jure* independence explains a high degree of *de facto* independence [of PSBs] when the size of the market for news is taken into account' (Hanretty, 2009). While Hanretty's *de jure* independence concerning appointments mainly captures the extent to which the executive shares the power to appoint with the legislature and independent regulators, equally important is the requirement for cross-party consensus in parliament's involvement in this process, as well as the inclusion of explicit provisions that a) disallow the appointment of certain categories of individuals (i.e. former politicians) in the management of PSBs on grounds of conflict of interest, but also b) require a track record of professional expertise in the field of the media. If such norms of incompatibility are not explicitly inscribed in law, then civil society and media professionals, such as journalists, should monitor and raise potential conflicts of interest that may exist in PSBs' management appointments. Finally, an important safeguard for the autonomy of PSBs, which is not legal, is the presence of independent external agencies and institutions (including courts) that are ready to defend it.

## **5. Conclusion**

Though Hallin and Mancini envisaged greater homogenisation in media regulatory models in Europe, with gradual movement towards the professionalised 'Liberal' model as a result of increasing secularisation, technological developments and market forces, they also recognised that powerful counter-forces would continue to resist such developments (Hallin and Mancini, 2004: ch. 8). Our research suggests that, in the context of PSM, homogenisation is still a very distant prospect and that marked differences, rooted in political, cultural and economic circumstances, remain in evidence.

Our examination of PSM in the 14 countries covered by the Mediadem study, indicate that financial uncertainty and political interference remain the order of the day for many PSM. Though these pressures appear most acute in the post-communist countries of Bulgaria, Croatia, Romania and Slovakia, governing elites continue to seek to influence reporting by PSM in 'Mediterranean countries' such as Spain, Greece and Italy. The countries that afford most protection to their PSM are those that combine a 'pluralist' and representative approach to regulation, or, in the case of the BBC in the UK, a constitutionally 'independent' body, with a strong legal and professional tradition of journalistic freedom, secure funding, high levels of transparency, and widespread public understanding of the role of public service media in society. Both formal structures alongside cultural expectations and political

conventions appear to be needed for independence to be fully realised in practice. But even in those countries that offer most protection, PSBs continue to be challenged. In Germany, for instance, the ability of PSBs to develop new online services has been curtailed as a result of pressure from commercial competitors.

Independence and autonomy need to be respected across all PSM activities, otherwise protection offered in one area may be undermined by exposure to extraneous pressures in another (CoE, 1996: Explanatory Memorandum, para. 13). Not only, therefore, must attention be paid to the remit, institutional structure, regulatory oversight, and funding arrangements of PSM organisations but also to the quality, ethos and practices of management, journalists and staff working within them (CoE, 2012b: para. 18), issues that largely fall outwith the remit of this particular paper. In addition, PSM should be as transparent as possible in relation to their governance and activities with clear lines of accountability to enable their independence to be properly assessed.

International organisations such as the Council of Europe have, over time, established detailed standards and guidelines relating to the governance, practices and funding of PSM. All Mediadem countries are members of the CoE and should review their current procedures in the light of these guidelines, particularly as traditional PSBs seek to take advantage of new technological opportunities and respond to social and cultural change. Only where these standards are respected, not only formally but also in practice, will the freedom and independence of PSM be fully realised.

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## 2. Comparative report: Media and democracy in Eastern Europe

Daniel Smilov and Ioana Avădani

### 1. Introduction

Eastern Europe is characterised by very low levels of institutional trust in the representative structures of democracy. Although people believe that democracy is ‘the only game in town’, they are not satisfied with the performance of key democratic institutions.<sup>1</sup> Particularly affected are parliaments and the political parties. It is curious that the Czech Republic and Romania register levels of trust similar to these in Greece at the height of the financial and political crisis in the autumn of 2011.

**Table 1.** Trust in political parties/parliaments (Eurobarometer 76, December 2011)

Country	Trust	Distrust	DK
EU	14/27	81/66	5/7
Bulgaria	14/25	76/66	10/9
Estonia	20/40	75/57	5/3
Romania	8/9	86/83	6/8
Poland	18/25	78/68	6/7
Czech Republic	9/11	88/87	3/2
Slovakia	16/25	81/71	3/4
Hungary	15/28	80/66	5/6
Greece	5/12	94/86	1/2
Austria	30/46	64/47	6/7
Germany	15/42	78/51	7/7
UK	11/24	86/70	3/6

At the same time, Eastern Europeans are generally more trustful in regard to the European Union (EU). Currently, Bulgarians are champions by a wide margin: 59% of them trust the Union. The closest to this result is Estonia with 51%, while Romania, with which Bulgaria is generally considered to be in the same (somewhat

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<sup>1</sup> Very telling data on this are given by the Pew Global Attitudes Projects 2009, <http://www.pewglobal.org>. First, people generally believe that elections do give them some say in government business. Positive responses to this question are given by large majorities in most of the countries: 66% of Bulgarians, 61% of Czechs, 60% of Slovaks, 56% of in the UK, 55% in Germany, 45% of Poles and 38% of Hungarians. However, to the more probing question *do you believe that elected politicians care about the views of people like you* positive answers give only 14% of Bulgarians, 18% of the Czechs, 22% of Slovaks and Hungarians, 37% of Poles and Germans, and 39% of the British.

leaky) boat, is at 50%.<sup>2</sup> In contrast, for Western Europe the level of trust is way below the 50%. In the East, trust in the EU has dropped modestly since accession, but still it is consistently very high.

Against this background, trust in the media, and especially the TV, is strikingly high. While the average for the EU is 53%, in the new EU members it is around 70%, and it has not been affected negatively by the Eurozone financial turmoil.

**Table 2.** Trust in government/television

Country	Trust	Distrust	DK
<b>EU</b>	24/53	70/42	6/5
<b>Bulgaria</b>	38/73	53/24	9/3
<b>Estonia</b>	49/72	48/26	3/2
<b>Romania</b>	10/61	84/36	6/3
<b>Poland</b>	28/57	65/37	7/6
<b>Czech Republic</b>	15/71	83/27	2/2
<b>Slovakia</b>	21/69	76/29	3/2
<b>Hungary</b>	26/52	68/45	6/3
<b>Greece</b>	8/22	90/77	2/1
<b>Austria</b>	32/59	62/35	6/6
<b>Germany</b>	46/72	47/26	7/2
<b>UK</b>	21/53	74/43	5/4

The picture that emerges is somewhat paradoxical: trust has been focused not so much on domestic structures of representative democracy but on institutions of supranational character and media institutions. This development could have a variety of causes, but one particularly insightful and intriguing explanation is given by the philosopher John Keane in his conception of *monitory democracy*. According to it, contemporary democracy does not rely anymore only on the standard channels of representation of the people but features a wide array of institutions, which monitor the performance of political elites, and offer alternative ways of representation of interests (Keane, 2009). Because of the considerable levels of distrust in elected politicians, these are to be constantly monitored – preferably they should do their business live on TV. A normal day in Bulgaria, for instance, starts with two-hour long political shows on all major TV stations, in which the public enjoys the presentations, arguments, discussions, and PR strategies of ministers, opposition politicians, analysts, etc.

<sup>2</sup> European Commission, Eurobarometer 76, December 2011, [http://ec.europa.eu/public\\_opinion/archives/eb/eb76/eb76\\_first\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb76/eb76_first_en.pdf) (date accessed 16/07/2012).

Parallel to these live TV activities, the politicians are supposed to be regularly monitored by external, independent, expert bodies – the EU fits this profile rather well. Thus, paradoxically, the media and the EU may have certain similar functions in Eastern Europe: they both help, or are at least believed to help, domestic electorates to exercise some control over domestic elites, which for one reason or another are perceived to be untrustworthy and non-accountable through the standard democratic channels.

This hypothesis discloses some intimate links between the political processes and media politics in Eastern Europe. Most importantly, it suggests that people have started to perceive the media as relatively independent from the political sphere *per se*: if this was not the case, trust levels in both spheres would have been similar. In other words, in order to trust the media as a monitoring device, one has to be convinced that they are not fully controlled by the very targets of the monitoring. Thus, despite the consistently low scores of media freedom given to Eastern European countries by organisations such as Freedom House, one has to take seriously the trust of people in them: after all, trust is considered as one of the marks of consolidation of institutions. From this perspective, the media in Eastern Europe seem to be a success story.

Yet, triumphalism is obviously misplaced, mainly due to two reasons. First, the data may suggest not so much any exceptional strength of the media, but rather an exceptional weakness of the political sphere. Simply put, Eastern Europeans may be more desperate about their political elites than the rest of the continent. Secondly, relative independence from the politicians does not make the media necessarily fully independent in the right way. In fact, the media may be dependent on corporate interests, and through these interests they may be again dependent on the politicians, but in patterns that are not so transparent.

The present comparative report explores all these possibilities in the context of five Eastern European countries: Bulgaria, Croatia, Estonia, Romania, and Slovakia. All of them have different transition trajectories, and possibly all of them suffer from different illnesses. Yet, the very fact that they share one and the same hospital (Eastern Europe and the EU) gives some grounds for a comparative analysis. This analysis has two main parts: the first one focuses on the public electronic media and the different patterns of governmental interference with their work; the second part focuses on the private sector and the independence of private media in the region. The comparative report is drawn on the basis of Mediadem's country case studies (Mediadem, 2011) which have focused in detail mostly on problems of media regulation and practices. This focus on outstanding problems should not leave one with the impression that the media sector in Eastern Europe is somehow defective or totally different from the practices in the other parts of the continent. Some of the problems pointed in the reports are due to the general normative confusion existing in this sphere: most of the models of media independence are anyhow contested. Some of the problems mentioned below are a product of the natural amazement of Eastern Europeans by the ways modern media work: after all, media pluralism and intense competition are a relative newcomer to the region. All of the problems discussed, however, should be considered against the background of the spectacular political success of the five countries, which in the course of mere twenty years have been transformed from Soviet satellites into dynamic, modern democracies.

## **Part I. The political sphere, regulation and the public service media**

### **2. Governments, parties and the media**

#### **2.1. Models of interaction**

There have been two models of interaction between political and media actors over the last twenty years in Eastern Europe. The first model of aggressive majoritarian attempts to control the (public electronic) media was characteristic of the 1990s, and affected countries as diverse as Bulgaria, Slovakia, and Romania. The second model started to become dominant towards the turn of the century, when the party systems in many Eastern European countries started to disintegrate or to be seriously reformed, due to the growing strength of populist parties, which won a succession of parliamentary elections. With some distortion, these processes could be called the rise of East European new populism. Developments took place against a much more pluralistic media environment. The end result was a new pattern of relationships between political parties and specific media in which the weaker sphere started to become the political.

Curiously, in some countries as Bulgaria, for instance, the media themselves started to make inroads in the political sphere, when TV stations and programmes started to set up political parties. (Of course, this is not a pattern unfamiliar to Italian politics, for example, where the media empire of Silvio Berlusconi was successfully upgraded in the 1990s to a political party, and eventually managed to secure the confidence of the electorate). In any event, even if we exclude such extreme developments in which media become parties, the developments in Eastern Europe since the beginning of the new century are marked by a very heavy emphasis on media presentation and PR in party politics. Parties started to lose their ideological and programmatic identities and to progressively replace them by media presence.

The importance of the direct control over the public electronic media in the beginning of the transition becomes clear when one takes into account the institutional pressures to have strong and cohesive parties in a situation where the ideological differences and social cleavages are not clear and articulated. The political parties needed control over the major instrument of propaganda and public opinion formation – the electronic media – in order to assert their identity, and prevent the opposition from establishing and consolidating itself. Since all national electronic media were state-owned, the importance of such control was really crucial.

With the passing of time, however, the parties, which have been established in the early transition period, came gradually under attack by new populist, sometimes even extra-parliamentary players. Populism in this context is understood as the creation of parties, which promise to follow the will of the people no matter what, and are otherwise very light in terms of program/ideology and organisational structures.<sup>3</sup> The rise of populism in Eastern Europe is closely linked with developments in the media environment. The ideological and organisational lightness of the political parties increases the weight of PR and media in the political process. This leads to occasional interesting symbiotic creations – hybrids between media and political structures.

Consider the party Ataka, for instance, whose success as a nationalist-populist newcomer to the political scene was its close links with a regional TV station - SKAT.

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<sup>3</sup> See Mesežnikov Gyárfásová, and Smilov (2008).

Ataka – the party – was set up by the anchor of a TV programme under the same name: media audiences were converted into voters in a matter of a few weeks in 2005, without any other type of more traditional party-building activities. Similar synergies between media and politics, although having a certain invigorating impact, seem to damage both spheres, however; there is a certain levelling down in which media and political actors go hand in hand.

The Bulgarian experience suggests that at least two factors may influence the role of the media in the democratic process: the fragmentation of the party system and the erosion of the programmatic/ideological character of the parties. Four ideal types of relationships between democratic politics and the media could be established, as shown in the table below:

**Table 3.** Relation between media and democratic politics

	<b>Ideological programmatic parties</b>	<b>Non-ideological populist parties based on personal charisma</b>
<b>Low fragmentation/ stability of the party system</b>	The parties attempt to assert their ideology in the media (Eastern Europe in the 1990s: Bulgaria, Romania and Slovakia especially).	The parties attempt to assert their organisational/administrative control over the media (Hungary 2010-12).
<b>High fragmentation/ instability and weakness of the party system</b>	The media supply the political parties with specific, distinctive political ideology and agenda (Fox TV and the Republican party in the US).	Influence of business groups through the media on the parties. Media-party hybrids constitute an extreme example: parties become little more than media outlets, mobilising their voters through PR and mass media presentation (Ataka in Bulgaria).

The four models link the level of institutionalisation of the political actors in a country, the character of the political process in it, and the politics vis-à-vis the media. The assumption is that media policy and regulation are dependent on underlying factors such as the stability of the political parties and the presence of programmatic/ideological elements in their activity. In cases where political parties become ideologically/organisationally very light, the line between politics and the media fades out and the end result may be a media-party hybrid. In this scenario, political parties start functioning like the media, and shape their political activity and agenda according to the taste and preferences of their audience. In contrast, when political parties are organisationally strong and ideologically charged, attempts for party control over the media could be expected, as well as attempts to educate and indoctrinate the public, change their preferences and so on.

## **2.2 From party domination to subtle forms of political influence over public service broadcasting**

In the 1990s in many countries in the region there were direct attempts on behalf of governing political players to dominate the media, and especially the public electronic media. In the sections below we review developments in the five countries at the centre of our study.

### **2.2.1 The case of Bulgaria**

In Bulgaria, for instance, the major actor in the field of media policy in the 1990s undoubtedly were the political parties and their representatives in Parliament. In all parliaments after the adoption of the new Constitution in 1991 there has been a standing committee: until the late 1990s such a committee exercised almost direct control over the public electronic media, until a separate, supposedly independent regulatory body was set up – the National Council on Radio and Television (NCRT). However, the NCRT bore the marks of ‘an original sin’ – a political appointment of its members. In the beginning, five of its members were appointed by the parliament, and four by the President of the Republic. Especially in cases when the President and the parliamentary majority are from the same party, this formula does not ensure true political independence for the regulatory body. The appointment procedure and the ensuing political dependence continued to delegitimise this body (and its successor after 2001 – the Council for Electronic Media (CEM)) in the eyes of both internal and external observers.

The prerogatives of the regulatory body are wide: they include firstly, the monitoring of compliance with the requirements of the Radio and Television Act (RTA) in general, but also the (content) licensing of the television and radio operators and the appointment of the directors and the approval of the governing bodies of the public broadcasting media (PBM). With respect to these latter prerogatives, the NCRT (CEM) has been constantly accused of promoting the interests of their political ‘patrons’ from the Parliament and the Presidential office. As a result, the PBM have been as a rule very pro-governmental.<sup>4</sup> Yet even with regard to the licensing of commercial broadcasting media, this body has been accused of promoting the interests of its political patrons. Thus in 2011 during the presidential elections campaign one of the candidates accused not the PBM, but the national commercial bTV of being politically partial and promoting the interests of the governing party, reminding how bTV got its television licence (allegedly with political protection) and demanding from CEM to withdraw it (Dnes.bg).

The situation is similar with respect to the other major prerogative of the regulatory body– the appointment of the general directors of the PBM. Each campaign for changing them triggers speculations, and these are often preceded by a change in the members of the CEM itself. The last such case was in 2010, when just before the end of the mandates of the directors of the BNT and the BNR (the Bulgarian PBM), with an amendment to the RTA the number of CEM members was reduced from nine to five, and they had to satisfy some additional selection criteria. This brought changes in the members of the CEM, substituting figures favoured by

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<sup>4</sup> According to data quoted in Bulgarian Helsinki Committee (1998), the critical coverage of the government was between 3 and 5% of all programs in the PBM, while in the print press it was in the range between 30 and 60%.

the new government for the ones appointed by the previous government and the President (who vetoed the amendments with the argument that they were politically motivated).

Yet, since the turn of the new century attempts to secure some governmental leverage over the public electronic media have become much more subtle. First, due to the privatisation the dominant position of the public electronic media has been eliminated: new private television stations and radio have emerged, which competed successfully with the public outlets. Therefore, the role of the state has changed: instead of direct intervention in the public media, much more important became the role of the state as a regulator of the competition among private actors. The CEM continued to be an important body, but again in view of its influence in the media market. The CEM was supposed to ensure fair competition, and to impose standards of broadcasting. In the competition field it was supposed to be helped by the state Anti-trust Commission, which proved to be quite inactive in the field, however. The Anti-trust Commission has a major role in shaping the media market – it is the body which allows mergers between the media outlets and is meant to safeguard against establishing and/or strengthening dominant positions and abuse thereof. In a media market with growing horizontal and vertical integration, the role of this state body with regard to media freedom and independence could hardly be overestimated. However, in its work it does not follow special rules with respect to the media, going beyond the general provisions of the anti-trust legislation. Thus, the practice of this body in allowing mergers entirely follows the general tests for establishing dominant position, without applying media-specific rules such as a test for media pluralism. It is revealing that a leading representative of the Anti-trust Commission, speaking on behalf of this body, declined our invitation for an interview (we proposed to discuss the practice of the Anti-trust Commission with respect to media mergers).

In terms of media policy-making, in the 2000s the role of the associations of press owners, of television and radio operators, advertising agencies, the producers, etc., has grown at the expense of the role of political parties and civil society more broadly.<sup>5</sup> Thus the influence of the association of the commercial broadcast operators ABBRO, the association of television producers ATP and the association of advertising agencies in Bulgaria ARA has grown – they have become major players in shaping the media policy in the country in the last 10 years. They have been among the invited civil society organisations (through their associations, all of them NGOs) to submit positions during the discussions in the Parliamentary committees on the media of the amendments to the RTA in late 2009. Their associations have gradually been becoming more influential in this process than the associations of journalists and other civil society organisations. In the late 1990s and early 2000s there was a strong pressure from the latter type of organisations to adopt legislation that would guarantee the independence of the media, protection of freedom of expression and free access to information.

If the problems during the 1990s were more in terms of direct political interference in the workings of the public electronic media, in the 2000s the problems

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<sup>5</sup> Both the current chair of CEM Georgi Lozanov - in the interview conducted for Smilova, R., D. Smilov and G. Ganev (2011), and during the discussion of the bi-annual report on the activity of CEM in the Standing parliamentary committee on culture, civil society and the media in early 2011, and the media law expert Nelly Ognyanova (Ognyanova, 2009) have been stressing this trend of gradual weakening of the public interest NGOs and the taking over of the media policy formation stage by private-interest associations of representatives of the commercial media services.

come mainly in the form of media actors successfully imposing their agenda in the political sphere. Sometimes the lobbying takes curious forms. Consider the case of an amendment to a piece of legislation, which was ‘smuggled in’ at the last possible moment of the legislative procedure.<sup>6</sup> It was passed both in the Standing committee and in the Plenary session without being read (neither verbatim nor in summary, which is a violation of the parliamentary rules), nor was it discussed or even noticed by anyone either in the committee or in the plenary hall. Personally responsible for this controversial amendment was the Chair of the Standing Parliamentary Committee on culture, civil society and the media, on whose suggestion it was included in the text. It removed a long standing restriction for the owners of advertising agencies to own television and radio programme licences as well. The ban was introduced already in 1998 in the original version of the RTA (art. 105 (7)) and was known as the ‘Guergov clause’ – after the name of the major player in the advertisement and media market in the last 15 years - founder and president of the Association of the Bulgarian advertising agencies (ARA). With the repeal of the prohibition, further media concentration became possible in the media market – the owner of the most powerful PR agency could finally reveal in public his ownership of parts of the biggest TV station in the country.

Thus, the Bulgarian case illustrates that the pattern of influencing the media has changed: from direct interference in the workings of the public services, to impact on competition in the media market. By the rather *laissez faire* approach of the regulatory bodies, the state has allowed considerable concentration in certain areas. It has not been particularly probing in regard to ownership issues, which has also had a serious impact on competition. Overall, the focus of political interest in the 2000s has shifted to the creation of favourable conditions for specific market players – they in return secure media comfort for the governing political actors. Thus, the direct political domination over the media is over, which does not mean that politicians cannot secure favourable treatment by major media outlets – on the contrary, the opportunities for mutually beneficial activities are ample. Simply, the mode of political competition has changed parallel to the changes in the media sector.

### **2.2.2 The case of Croatia**

The Croatian case also demonstrates that in the second decade of the transition period, as direct political influences on the media started to diminish, transnational corporate interests and local private interests grew in strength. The media are quite quick in establishing new connections and alliances, be these national (particularly at the level of local and city authorities) or transnational (global companies). This may be seen as a reflection of the character of the Croatian public sphere, which demonstrates a set of local democratic practices oscillating between democratic ideals and the harsh realities of wild capitalism. Again, political influences and links do not disappear, but they are translated into the language of market relationships and state regulation of competition.

As in the case of Bulgaria, two are the main arms of state influence over the media: the regulatory bodies of the electronic media and those focusing on the

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<sup>6</sup> Several opposition members of the Standing committee complained already at the start of the discussions that they were not given the opportunity to consult the texts of the last amendments with experts and form an informed opinion about them, since they received the new texts just a few hours before the vote – in breach of all procedural rules of parliamentary legislative activity.

regulation of the media market. The Electronic Media Agency is managed by its Electronic Media Council (VEM), an independent regulatory body which monitors the electronic media ownership structure and operates the Fund for the Promotion of Pluralism and Diversity of Electronic Media. It decides on the allocation, transfer and withdrawal of broadcasting licences, and reports directly to the government and the parliament. The Croatian Post and Electronic Communications Agency regulates electronic communications (post, internet, mobile telephone networks, etc.) and the electronic media market. In this respect it influences the media market. The Council for Market Competition Protection operates within the Agency for Market Competition Protection (AMCP). Through the Croatian Chamber of Economy it monitors ownership shares in the print media companies with the aim of preventing monopolies and controlling ownership concentration in the media market. Diversity and plurality are particularly promoted by the Fund for the Promotion of Pluralism and Diversity of Electronic Media, established by the Electronic Media Act provisions that have included the Audiovisual Media Services (AVMS) Directive<sup>7</sup> solutions. The fund is administered by the Electronic Media Council (VEM), and financed by 3% of public service broadcasting licence fees. It supports broadcasters at local and regional levels who serve local communities and sometimes introduce the usage of local dialects in broadcasting (e.g. in the Istria region).

The EU influence has had a multiple effect on the media system. On the one hand, pressures toward implementing legal provisions and adopting certain democratic values have mostly had a positive effect. On the other hand, pressures toward liberalisation of the market have made the media increasingly dependent on commercial interests, rather than on the democratic interests of citizens. A specific form of state intervention was the reduction of the value added tax (VAT) in 2007 from 22% to 10% for all newspapers and magazines with daily and periodical circulation, except for those whose purpose was, for the most part or completely, advertising. The prices of the printed press remained the same meaning that the difference in tax was beneficial to the media owners. To illustrate the point one interviewee states: 'It is very simple, those publishers were then interested to support the government which reduced the tax, meaning that there is no direct influence, no direct link between the publishers and the government, but there is indirect influence through tax policy' (Švob-Đokić and Bilić, 2011: 22). As in the case of Bulgaria, here we have an example in which the media are capable of successfully imposing their agenda on the governments: in fact they are able to secure significant privileges in comparison to other economic actors.

If in the initial ten years of the transition the issues have been mostly one of direct political interference in the public electronic media, at present the question has focused mostly on competition problems. There is increasing pressure coming mostly from the corporate sector for reduction of the state support and privileges of the public broadcasters. Against this background, the HRT, the Croatian public service broadcaster, is experiencing a drop in audience share. Yet, the state has not given in to the pressure to cut subsidies, on the contrary: state aid for radio and television broadcasting was increased from 1,017 million HRK in 2007 to 1,133 million HRK in 2009. This was 29.63% of total state support for all sectors of the economy in that

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<sup>7</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L95,15/4/2010, p. 1.

year (AMCP, 2010). The AMCP determined that the licence fee is also a specific type of state aid since the obligation is imposed by law and can be regarded as a specific type of tax. While state aid was rising the HRT was also spending money under doubtful circumstances. The State Audit Office (2010) determined irregularities with regard to internal controls and internal revisions, planning and accounting operations, incomes, public procurement and advertising discounts for specific clients, among others.

In terms of governance of the public broadcasters, recent changes to the management structure of the public service broadcaster HRT in the new Croatian Radio and Television Act created a tripartite governance structure which consists of the Supervisory Board, Programme Council and Management Board. Programme schemes and financial means for pursuing them are determined through a five-year contract between the government and the HRT. Following a proposition by the Management Board and after approval by the VEM, the HRT Programme Council presents a detailed programme scheme and submits it for public debate. The VEM monitors the fulfilment of these obligations. The HRT is financed through a licence fee and advertising but according to Article 38, paragraph 2, its public income shall be used for public services as determined by the Croatian Radio and Television Act. Public income cannot be used to finance commercial activities. Advertising time is limited to nine minutes within the hour and four minutes in prime time between 18.00 and 22.00 hours. Previously, nine minutes of advertising time was allowed regardless of prime time. Therefore, there is a complex mechanism in place which includes a new governance structure, accounting obligations and advertising provisions which are all meant to secure the fulfilment of programme obligations without entering into market competition with commercial providers. Generally, state interference with the public electronic media and the competition in the media market has not been fully principled, and appears to be a product of various ad hoc compromises and concessions. For one thing, there has been no sustained effort to advance pluralism. For instance, in the case of state advertising, public funds were directed towards a single media company. In the case of VAT reduction for the print media, it was transferred into direct economic gain for the publishers. State aid assessment rules played a crucial part in restructuring the HRT which was also undergoing a management crisis coupled with irregularities in financial management.

Ownership and concentration regulations are not connected to pressures on editorial freedom. Pluralism provisions also do not have an effect on freedom and independence, since creating more advertising revenue remains the main drive of media institutions in Croatia. Media specific acts target concentration and ownership transparency and have been amended recently. Competition law mostly targets prohibited agreements, joint price increases and the misuse of dominant market position, and has not been modified for the purpose of acknowledging the specificities of the media market, in a similar fashion as in Bulgaria.

Overall, the media are not quite established as (independent) institutions and their performance and responsibilities are blurred, which is clearly seen in the rather undefined and fluid professional position of journalists. 'The journalists would probably work better if media houses had a rather clear media policy' (Švob-Đokić and Bilić, 2011: 37). The general context in which the journalism profession is exercised is reflected in the fall of professional standards and the lack of professional contacts among journalists, media owners and managers and the state administration in charge of regulatory aspects of the institutions' functioning.

### 2.2.3 The case of Estonia

Estonia is an example of an Eastern European country in which direct political interference with the media – be them private or public – is not visible. Neither has this been a problem in the 1990s, nor is it one at present. Yet, since Estonia is one of the smallest states in Europe, an advanced development in media freedom (e.g. high protection of free speech, good access to information, high level of media literacy, etc.) does not mean that public policy-making is immune to disproportional influence of small groups or individuals who make certain decisions on media policy. Namely, the smallness of the media system inevitably limits the number of groups and people who should negotiate media policy. As each society needs a certain number of people to fill a relatively rigid number of posts, small societies have relatively few people to fill that number of posts; these people are likely to encounter one another in numerous contexts (Hanretty, 2011: 170).

The key actors outside Estonia who influence the Estonian media policy are certainly the EU and the European Court of Human Rights (ECtHR).

For politicians the issues related to media policy appear to be distant and inessential. Politicians and experts have argued that public service broadcasting was the major (and often even the only) aspect of the state media policy, since Estonia follows a liberal (*laissez faire*) model of regulation. Social networks and media are increasingly used for political communication as well. As a result, the Estonian media policy concerns only the Estonian National Broadcasting. Regarding anything else – there is total freedom, and the state does not intervene in it whatsoever.

Public service broadcasting (PSB) is financed from the state budget; no licence fee has been applied for the general public. Since 2002 the share of the allocation for PSB in the state budget has been steadily decreasing (Jõesaar, 2011: 87). Still as the PSB viewing time has remained roughly at the same level during the last six years, one can assume that indeed the quality programming has helped the public service broadcaster to hold its position (Jõesaar, 2011: 50). There is almost no public debate about PSB financing today, just the question about the total of allocations each year – even this has diminished under the economic recession. The state also allocates subsidies to cultural periodicals (cultural weeklies and few magazines). In addition some ministries occasionally purchase certain programmes or additional pages in commercial media channels. According to the good conduct rules the reference to the buyer should be mentioned but this rule is often not followed.

Thus, much of the interest in the Estonian media market lies in the private sector, which is dominated by two large media corporations: Eesti Meedia (Estonian Media, owned by the Norwegian Schibsted ASA) and Ekspress Grupp (a quoted company with an Estonian core investor). The influence of Schibsted started to grow quickly in the Estonian market since 1998 when Schibsted ASA became a 34% owner in Postimees.

The broadcasting sector consists of the public service broadcaster (the Estonian National Broadcasting, with two nationwide TV channels and four nationwide radio channels), two national commercial TV channels and a few local ones (in cable) and nearly 30 commercial radio channels of various types from small regional ones to national networks. The main fears about media independence are connected with the possibility for intense corporate pressure on journalists: thus, their professional autonomy may be an issue. It is important to note that most of the

interviewees for the Estonian case study stressed that quality values are under attack in Estonian media organisations. The main reason pointed out is the commercial pressure.

Estonian journalists have described several in-house pressure mechanisms but few external barriers. Entrance to the professional job market is rather non-transparent but journalists have accustomed to this aspect. The professional (trade) union mainly does not protect the job security. Journalists rather seem to be confused about the 'autonomy' issue – it has occurred as a subject mainly for academia, but not for practitioners. It is important to note that among the professional community there exist different groups of journalists who do not share similar understandings on the journalists' professional autonomy issue.

Thus, Estonia may serve as an Eastern European example in which the political sphere has withdrawn almost entirely from the media sector, leaving it exposed mainly to market pressures. It is difficult to assess the value of this model, especially in an oligopolistic environment, where the threat of collusion of the interests of the key economic players is very high. Generally, Estonia gets high marks in international comparisons, which remains something of a mystery if we look at the combination of a) an oligopolistic market; b) the *laissez faire* approach by the state; c) journalists' complaints of corporate pressures, affecting their professional autonomy. Even Estonia, however, has an important public broadcasting company, which is a significant counterbalance to the corporate interests in the media sector – yet, the tendency there is a decrease in the public funding. Further research is necessary in order to establish why actually the Estonian model works at all. It may be that because of the smallness of the country and the market, it is thoroughly dominated by foreign controlled companies, which bring with them specific knowhow, culture and practices from other (Nordic) countries. Another explanation, again related to the smallness of the state, is that Estonia has followed a consistent political strategy of full openness to and complete integration with the EU and especially neighbours such as Finland. From this point of view policy-making has been shifted to supranational bodies (the ECtHR, the European Commission and the Court of Justice of the European Union). If this is the case, the link between the media and local politicians and political processes loses the importance it has in other places: what remains are the interests of corporations, which compete across territories in which the national boundaries are of a symbolic value. If this is true, Estonia may well be the future of Eastern Europe, but at the moment it is still rather an exception.

#### **2.2.4 The case of Romania**

In contrast to Estonia, Romania is a country of intense love-hate relationship between politicians and the media. The Romanian politicians have generally a hostile attitude towards the media, almost all of them being convinced that journalists are either the puppets of their adversaries or mercenaries of their owners. This hostility has been transmitted in the last years from the top level down, with President Traian Basescu publicly attacking some journalists using trivial, discriminatory language. On the other hand, Basescu himself is treated unfairly by many media outlets whose owners are in open conflict with the President. Recently, the situation took an aggravating turn when the draft of the National Security Strategy of Romania (a document embodying the dangers and threats to the country's security, which is the basis for the law enforcing agencies – intelligence services included) listed 'media campaigns

ordered and paid with the aim of weakening the state institutions' as 'vulnerabilities' (threats from within).

The common thread throughout the interviews for the Romanian case study was the utmost lack of confidence people are having in the Romanian Parliament as a referee and regulator of the media market. This lack of confidence has two main roots: a) the generally hostile attitude of the MPs towards the media and b) the common practice to name political protégés rather than professionals in the autonomous bodies that oversee the media (the Broadcasting Council – *Consiliul National al Audiovizualului*, CNA or the Boards of Public Television and Radio).

Because of this intense relationship, Romania has not quite transited from a model of open and direct attempts of the politicians to interfere with the media, to a more subtle one. There is still no established practice on how the Parliament appoints people in the regulatory or autonomous media bodies, despite some procedures described by laws. There is rarely any public hearing and when there is, substance lacks. Everything is negotiated behind closed doors and those who are named in these leading positions tend to regard themselves as obedient instruments of the party that installed them in those seats. So, the main constraint political forces face is their own lack of power to influence the media owners, due to internal rifts in complex political coalitions. Thus, curiously, political pluralism serves some role as a guarantee of media autonomy.

The Romanian media are not toothless in their confrontation with the political sphere, however. In fact they have been spectacularly effective in influencing policy-making. The Romanian Press Club (CRP) is a good illustration of this thesis. The club was created in the early 1990s as an alliance of major media directors and editors and it was rather efficient in promoting the interests of the media business (e.g. fiscal exceptions, collective deals with state owned distribution companies). Nonetheless, although it was an influential player, or because of it, CRP rejected any inclusive debate about ethics for several years, sticking to its own Code of Ethic and Council of Honour. The attempts of the media NGOs to organise public debates concerning this issue led to a virtual public war and strike-back effects.

In the case of the public television and the public radio there are ethics commissions elected by the employees. The situation here seems to be better than in the case of private institutions, although at times the commissions tend to function as trade unions in defending their colleagues rather than imposing some rules. On the other hand, the rulings of these commissions are just consultative for the administrations of the two organisations, which weakens even further the accountability systems inside the public media.

An attempt of the state to push for self-regulation was made in 2011, via the CNA. This council is an autonomous body that grants television and radio licences and supervises the broadcasting content. In 2011, the owner of the Realitatea television, Sorin Ovidiu Vantu, was prosecuted for alleged criminal acts (not connected to his media business). When the case was taken to court, the prosecutors submitted the transcripts of conversations between Vantu and journalists that were employees of his television. The transcripts revealed how Vantu was directly giving orders regarding the content of the programmes of his television and this was the epitome of overtly expressed interventionist behaviour of a television owner. The National Broadcasting Council reacted and asked all televisions to publish their ethic codes.

Between 2005 and 2008, the media market in Romania experienced an investment bubble: the five media conglomerates that have concentrated the property, each backed by powerful businessmen, entered an investment vicious circle meant only to capture the chunkiest market share. As for the newspapers, the most widespread practice was to sell books, CDs and other products together with the newspaper. This created an artificial demand and an artificial growth model of investment without return. Adevarul Holding, owned by Dinu Patriciu, the richest Romanian in the Forbes list, took this practice to an extreme end. The company reached the top positions both for tabloid newspapers (*Click*) and for quality newspapers (*Adevarul*).

The Romanian Public Television (TVR) has 6 channels, the last having been launched in 2011 as a news channel to compete with the already existing three private such channels. TVR has always been the object of political dispute between the governing power and the opposition, thus every change of power brought about the change of the existing board and the naming of a new Director General. TVR functions on the basis of a 1994 law (subsequently amended) and according to this law, its board members are appointed by the President, the government and the Parliament. What allows for the change of the board after each election is one detail in the law: the Parliament has to approve the annual activity report of the TVR Board. Once the vote is negative, the board is automatically dismissed and consequently changed. This detail was initially meant to ensure the accountability of the board, yet the activity report has been consistently used as a tool by the parliamentary majority to control or even to dismiss the boards. This mechanism has been functioning flawlessly after each of the last four parliamentary elections (1996, 2000, 2004 and 2008). Unfortunately this process does not even save the appearances and the board is usually staffed with political cronies who perceive themselves as the representatives of parties in the public television, each of them making sure that his party looks good on the news. The institutional design is similar for the Public Radio, but given its smaller impact the political pressure is lower there (the board of the Radio company was prematurely replaced only once after 2000). Interventions take dramatic and curious forms. For instance, at the beginning of 2011, the Agriculture Committee of the Parliament called the General Director of TVR to a hearing due to the fact that an agriculture-related show was taken out of the broadcasting programme.

Out of the 80 million euro yearly budget, 90% is tax money and 8 million euro are advertising revenues, which is a lot less compared to private televisions. TVR also faces some legal restrictions that prevent it from advertising for more than 8 minutes per hour, while a private television is allowed to advertise for 12 minutes per hour according to the same broadcasting law. While in the pre-accession period the state worked as an enhancer of the movement forward, pushing for the harmonisation of the legislation, the post-accession period witnessed some feet-dragging in this respect. Also important to note is that the state authorities do not seem to find an equal partner in the owners' associations when it comes to media market development. The media business owners do not use all the advocacy and lobbying leverage offered by the Romanian legislation to negotiate with the state favourable settlements.

The decrease of the advertising funds made the media outlets more vulnerable to economic pressures from their advertisers – private or state-owned. Therefore, as part of their 'survival strategies', some media outlets allowed their advertisers to dictate their editorial content or sweetened the tone of their reporting of the local authorities. A report produced by the Center for Independent Journalism in 2010

showed an increase in the use of state advertising contracts (including – and especially of – the European contracts) for supporting ‘friendly’ media. Some of these contracts explicitly included ‘buying news’ favourable to governmental actors. The public media is dominated by the public radio and television, while the national news agency has a lower profile. The three institutions have not completed the transition from ‘state’ media companies to ‘public’ as their mandates, functioning and management are still suffering from lack of clarity or from political dependencies. The successive governments showed a lack of political will to change the legislation that allows a direct control of the public radio and television, despite promises to foster reforms. Maintaining untouched the possibility to dismiss the board by rejecting the activity report in the Parliament weakens all attempts at independence of the public media leadership.

The Romanian case illustrates the difficulties of the transition which the political parties have to make from a situation in which they have enjoyed full control over broadcasting media, to a situation in which they face a pluralistic, competitive and diverse private sector. Romanian politicians have decided apparently to preserve direct control over the public broadcasters in order to offset the hostile attitudes towards them by the private media. On the positive side, this model allows for the political sphere to preserve greater autonomy vis-à-vis the corporate interests of the media owners. On the other hand, the transition towards real public media is impeded: the end result could well be partisan public broadcasters, and a corporate-interest oriented private sector. The hope is that pluralism (both in the political sphere and in the media market) would allow for competition to take care of the public interest.

### **2.2.5 The case of Slovakia**

Slovakia generally complies with the hypothesis of reduced direct political intervention with the workings of the media. This intervention was intense in the 1990s, while at present it takes much more subtle forms.

In terms of the broadcasting media, the Council for Broadcasting and Retransmission (RVR) is a (semi-) state regulatory body responsible for digital/electronic media. The RVR has passed some decisions in the past which were seen as controversial by experts, journalists and politicians (including the Prime Minister), and certainly limited freedom of speech and the broadcast media. A small – but perhaps critical – number of RVR decisions, which also included issues related to freedom of speech and the media, were overturned by the judiciary. The RVR sometimes serves as a ‘technical’ tool for media policy formulation by the Ministry of Culture (MC). In other words, the RVR sometimes, on request of the MC, prepares drafts of broadcast media legislation.

While in the mid-1990s the MC had attempted to literally direct the media, in the second half of the 1990s and the early 2000s it gave them freedom but not, with some exceptions, support. The MC exhibited clear, though partly contradictory, media policy goals under the social democratic Minister M. Maďarič (2006-2010) and the liberal Minister D. Krajcer (2010-2012).

The MC, as the key body defining the values of media policy-making (not only) under the government of I. Radičová (summer 2010-spring 2012), has an overarching principle of keeping the *efficient* (underlined in the 2010 Government Manifesto) public service mission of the public service media (PSM) (see Krajcer,

2010 and Manifesto of the Government for 2010-2014). This new focus on efficiency has created a new and possibly problematic pressure on the PSM, threatening their freedom and independence. There has always been pressure on PSM, initially mainly political, but currently these pressures are related to efficiency or financing in general, including pressures from vested interests. Because of such pressures, politicians regularly accuse each other of attempts to influence the media. Such allegations are not always fully principled however. Thus, representatives of various erstwhile opposition parties who had criticised R. Fico's Press Act as being contrary to freedom of the press, significantly changed their opinion on these issues once actually in government/parliament (Hrabko, 2011).

There is only one institution – the Constitutional Court (CC) as part of the judiciary – which historically has shown a long-term commitment to protect and promote freedom of expression and the media, as well as access to information in Slovakia. The CC is progressive and follows the ECtHR rulings, although there are occasional problems with inconsistencies among its various senates' rulings. This unique position of the CC has been recognised in recent years by local lawyers. This is also evidenced in the increased number of complaints the CC has received in recent years.

The ECtHR has had a slow but increasingly greater significance for media freedom in Slovakia. This can be indirectly confirmed by the unusually high number of complaints both accepted and dismissed by the ECtHR concerning Slovakia in 2010. The RVR can be seen as the other side of the coin – playing a rather negative role with respect to freedom of expression and the media in Slovakia, especially in contrast to the CC. Yet this normative evaluation can be seen less negatively if we compare Slovakia's RVR with similar regulators in EU countries such as France and Poland, which seem to be rather strict and/or conservative in broadcasting regulatory issues.

More important is the general political composition of the RVR, reflecting ideological values rather than civic or professional values. Political parties do not pay relevant attention either to professional selection or the evaluation of performed/achieved results of RVR members, although an annual detailed report on RVR activities is presented in Parliament. As a result, although some members of the RVR have knowledge and/or professional experience in broadcast media, more than half have absolutely none. RVR members (in contrast to the recently established Council of the RTVS, the Slovakian public service broadcaster) still primarily represent the interests of political parties, with no formal requirements for professionalism.

Social media and the Internet have in recent times enabled various pressure groups to put coordinated pressure on the RVR. For example, the RVR in a few weeks received hundreds of - apparently coordinated - written protests (e-mails) in the case of a reality show by a major broadcaster in the summer of 2011. The complainants organised themselves through social media and used e-mails to address the RVR.

The political plurality of the RVR is guaranteed by the bi-annual rotation of a third of its members, in addition to the normally four-year term of the Parliament. There is also only limited financial independence, with the annual budget being negotiated with the Ministry of Finance, and collected fines being fed into the state budget. Finally, the RVR has insufficient legal motivation to verify the real ownership

relationships of broadcasters. This has led (especially in the past) to *de facto* illegal but tolerated diagonal and horizontal media cross-ownership at lower levels. It appears that this is not only a local problem. A gradual drift from the democratic corporatist model to a modified model is also hinted at by the final phase of naturalisation of the PSM media. The final change lies again in the method of financing. The new bill, according to which the system of payments from contracts with the state will be substituted with only one guaranteed donation from the state budget in the amount of 0.142% GDP or a minimum of 90 million euros, was approved by the Parliament in October 2011. It was argued (Krajcer, 2011) that these policies have positive implications for the freedom and independence of PSM. First, there were the high costs of collecting fees. Second, the success rate of the collection of fees has shown a decline since 2009. Third, the percentage share for PSM based on the annual state budget was supposed to guarantee the financial stability of the PSM, thus decreasing its political dependence. There are additional changes in financing concerning advertising and teleshopping. Between 2009 and 2012, the amount of advertising has been gradually decreasing. However, even after this decrease, the PSM company (two TV channels and a minimum of seven radio stations) can in total amount to 21% of advertising per day, together with 25% teleshopping. Sponsorship and product placement are unrestricted. All these changes entail clear implications that *pro futuro* the financial independence of the PSM may be at risk.

The main journalistic organisation, the SSJ, did oppose the nationalist-populist governments (1992-1998), and tried to cooperate on media policy with either predominantly right centrist governments (1998-2006 and 2010-2011) or with the predominantly leftist government (2006-2010). However, these efforts at cooperation usually ended in conflict or, at least, disagreement over details of more than fifteen drafts of the Press Law, or other aspects of governmental media policy.

In November 2011 the overwhelming majority of journalists (about 90%) in a mini survey, conducted for the Slovak case study, agreed that journalists can work freely (30%) or quite freely (60%). The main factors that influence freedom of journalists in Slovakia at the macro-level include the business and, to a lesser degree, the political interests of media owners or sponsors, especially in local and regional media. The professionalism of journalists' output is also shaped by the sometimes limited competence of editors and many young journalists, as well as the hesitancy of state and local authorities to provide information in time or at all, as well as the obviously manufactured style of work of the journalists.

The main factors that influence freedom of journalists in Slovakia at the micro-level (day-to-day work) include pressures and threats from people who are being criticised – especially from politicians. An examination of the relationship between journalists and media owners suggests that corporate owners, and by definition larger or smaller foreign owners, are usually not interested in political issues/agenda but in overall profit, and this certainly from a longer perspective. Neither do small local, usually municipal, television stations guarantee independent and quality journalism reporting. These stations depend for their financing on municipalities (even if these television stations are based on private ownership) and are forced to broadcast - occasionally at least - positive coverage about the most important local corporations (who typically sponsor the station).

Thus, the Slovak case study confirms the general tendency of a decrease of open and direct political pressure on the media. Through regulatory bodies, however,

political parties still preserve significant influence in the media sector, mostly by using market regulatory means. Vis-à-vis the public media, a key source of influence has been the funding, which has been steadily decreasing over the recent years. Regarding the private media, influences are more subtle and are visible mostly in the reduction of the advertising time in the public media. In general, the institutionalisation of an autonomous media sphere in Slovakia appears quite successful in a comparative perspective, which is revealed by the confidence of journalists that political and corporate pressure on them is low. Slovakia demonstrates a common weakness with other states in region, however, in terms of the local media, for which the conclusion of secured autonomy from corporate and political interests does not hold.

### 2.3 An emerging model?

On the basis of the brief case studies presented above, it is difficult to infer any strict model of relationships between the media and the political sphere in Central Eastern Europe. Countries have different transition trajectories, different cultures and institutional set up. One conclusion could be that there is no longer Central Eastern Europe as a political phenomenon. Yet, it might be too premature to bury a concept, which has proved useful over the last two decades, since there are many similarities in the discussed countries. It is true that some of them are probably more advanced (Estonia, for instance) in terms of resembling more Western European models. Yet, one feature in common is the fragility of the institutional set up, and the possibility of re-emergence of problems, as demonstrated by the developments in Hungary (a country not covered by our study) after the electoral victory of Fidesz in 2010. There, a strong majoritarian government started to resort to methods of direct partisan control over the media, methods which were more typical of the 1990s, as our case studies have demonstrated.

With this important caveat, we can proceed with the formulation of a typical Central European model of relationships between the politics and the media. The following formula could be useful in this regard:

EE Media-Politics Model = PSB (relatively independent) + messy private sector (from oligopoly through problematic concentration to fragmentation) + *laissez faire* regulatory approach + important privileges for the media (taxes, advertising limits for PSB, direct or indirect public subsidies)

As the case studies have demonstrated, the countries in the region put significant resources in their public service broadcasters. In some of the countries these broadcasters still play an important role and have a significant (although diminishing) share of the market (Bulgaria, Slovakia). In some countries the public television has been marginalised in terms of influence (Romania), although even there the public radio is still dominant in its segment of the market.

In terms of levels of independence, the public broadcasters differ. In Romania, their heads are still appointed in a rather partisan fashion, and the state interference is much more visible. In the other countries, the influences are subtle, but continuing controversies and scandals indicate that there is no perfect model of insulation of the

public sector from political influences. In general, however, Eastern Europe has opted for a regulatory model concerning the electronic media with significant political input. Despite the fact that there are various degrees of partisan behavior (the strongest seems to be in Romania, and the weakest in Estonia), independent bodies with a strong political input do play a significant regulatory role.

The private sector is the dominant player in all of the countries by now: while the public broadcasters enjoyed a monopoly in the beginning of the transition, now we have complex media markets with powerful private players in them. Yet, one common feature of these markets is that they are small, and they cannot by themselves ensure pluralism through vigorous competition. The problems to which small markets lead are of two types. Either there are cartels or oligopolies that are very hard to displace (Estonia, Croatia), or there is inefficient pluralism in which numerous media are competing for small resources (Bulgaria). Both circumstances are not conducive to media independence and quality journalism. In both scenarios, the media become speakers of corporate interests. In the second scenario, the main business of the media is actually not journalism, since they cannot survive only on sales of their product (newspapers, television programmes, etc.) Thus, many media outlets actually become the PR departments of specific economic groups.

Because of this shape of the private sector, it could hardly survive without significant direct or indirect state aid. State help may take the following forms: toleration of oligopolies (Estonia is the typical case, but everywhere the state has a *laissez faire* approach to regulating competition), tax privileges for the media (Croatia), significant public subsidies for the political parties, which go mainly for paid access to the media (Bulgaria, but generally the other countries as well), significant advertisement by the state enterprises in (specific) media (a problem reported in all countries, except Estonia). Thus, despite the mostly *laissez faire* approach to the regulation of the media in the region, the state by no means has been marginalised in terms of influence. On the contrary, the leverage is there, but it is exercised through more subtle means, which are often not captured by traditional notions of media regulations, but concern competition issues, and even such remote questions as the financing of the political parties.

Now, if we come back to the suggested model, one thing that is striking is that it is hardly distinctive only for Central Eastern Europe. After all, everywhere in Europe there are relatively important public service broadcasters, everywhere the private sector is dominant, and also indirect forms of state aid do persist, despite different waves of liberalisation of regulation inspired by the *laissez faire* model.

These similarities with the West could be read in two ways. One is that Eastern European countries are 'normalizing' and that gradually they become very similar to the western part of the continent. Still, differences remain and they could be searched for in two directions. First, in contrast to Western Europe, volatility in the media markets in the region is considerable. There are new players constantly emerging. From this perspective Estonia is probably an exception with the oligopoly situation in the country. Croatia is also following the steps of Estonia, which indicates that stability is achieved only in situations where foreign capital has largely shaped the media environment. With the economic crisis hitting hard, significant foreign investors in the sector left the region, however (as the WAZ group in Bulgaria and Romania). The withdrawal of foreign capital leads to intensification of domestic

competition – in the case of Bulgaria in fact a media war broke out among the two most powerful media groups in the country (in 2011-2012).

Secondly, the party systems of Eastern European countries are much more volatile than the ones in the western part of the continent. Because of that, agreements between political players are never really final, since new players come along and challenge them in due course. All this creates a situation of fragility of institutions and vulnerability of the legal framework.

From this point of view, what is distinctive of Eastern Europe is that the processes of ‘cartelisation’ (in the meaning of Katz and Mair, 1995) in the party system and the media sector in Eastern Europe have not been completed. Again, Estonia may be a partial exception among the studied countries: in all others political and media volatility is still very significant.

There is a second interpretation of the Eastern European data as well, however. This second perspective questions the ‘normality’ of cartelisation both in the media and in the political sphere. From this perspective, Eastern Europe may appear as the more experimental and more sensitive to the problems of entrenchment of interests region, which highlights some of the flaws in the European model more generally. After all, oligopolistic private sectors, coupled with cartelised parties, cannot seriously be taken as ideal from the point of view of normative democratic theory. From this perspective, Estonia – the best performer in the region – may appear to be the most problematic as well.

Our case studies are not a sufficient basis for settling the dispute between the two competing hypotheses presented above. Yet, they provide the necessary data for probing deeper into the relationships between the media and the political sphere. In the first part of our analysis we have essentially argued that direct forms of political interference with the media have generally subsided in Eastern Europe. Now, much of the action takes place in the private media sector, and the role of politics is mostly visible in the details of its regulation. To this problem we now turn in the next section.

## **Part II: The private sector as the centre of most of the action**

### **3. The private sector: The clay-footed giant**

When discussing the media landscapes in the ex-communist-turned-EU-member countries, one cannot avoid analysing the huge challenges the public broadcast media (PBM) - the only media they had under communism - had to face. First, they had to turn from state to public institutions, a move hindered by both lack of know-how, internal inertia and external (mostly political) pressures not to do it. Moreover, the PBM had to reinvent themselves on a competitive market, shifting from a rock-solid monopoly to a quicksand-like market shared with ever more numerous (or potent) private media. Last but not least, the reforming process overlapped partially with the disruptive innovation brought about by the new technologies that changed the whole media market and even the way information gathering and processing (formerly known as ‘journalism’) has changed.

All these factors contributed at giving the private media the upper hand on policy formulation – either directly or via political connections. Therefore, it is worthy to engage in a cross-country analysis of how the private media markets have been shaped up and functioned in the five countries targeted by our study (Bulgaria,

Croatia, Estonia, Romania and Slovakia). In particular, we will focus on the private media influence over policy-making, their ownership problems and the way their content is monetised.

### **3.1 Influence on the policy formulation**

The influence of the private sector over the media policy formulation has varied from country to country, depending on the strength of the respective governments, the dimensions of the market (small markets in Estonia and Slovakia) and the vested interest of various actors in influencing such policies.

All five countries share the same pattern: a deregulated print media and a strongly regulated broadcast media. This patterns derives, on one hand, from the European model and influence (when applying for joining the EU, the five had to adjust their legislation to the EU *acquis*, which focuses exclusively on the broadcast market). On the other hand, it stems from the superior power of influence the broadcast media have over the public – hence the stronger desire of the politicians to control them.

There is also a common pattern in the development of the private markets in the five studied countries: there was no full-blown, long-term strategy behind them. The media sector, as it looks today, is the result of a balancing act between the political will in controlling the sector and the play of the market forces, which acted sometimes outside a legal framework.

As the private market developed, the influence of the private actors has increased too, following mostly the business interests rather than the public interest. For example, in Bulgaria, media experts observed that the role of the associations of press owners, of television and radio operators, advertising agencies, the producers, etc., has grown at the expense of the role of civil society in shaping the media policy in the country. The influence of the association of the commercial broadcast operators ABBRO, the association of television producers ATP and the association of advertising agencies in Bulgaria ARA has become particularly pronounced. Through these associations, all of them NGOs, the private actors have been assimilated to ‘civil society’ and were invited to submit positions during the discussions in the Parliamentary committees on the media. Their associations have gradually been becoming more influential in this process than the associations of journalists and other civil society organisations, more interested in legislation that would guarantee the independence of the media, protection of freedom of expression and free access to information (Smilova, Smilov and Ganev, 2011).

In the same time, in Slovakia, the media policy of the state is influenced by public pressure, discreet lobbying of the major media companies and by the activities of some of the self-regulatory authorities, e.g. the Advertising Standards Council (ASC) and professional associations e.g. the Association of Independent Radio and Television Stations (AIRTS), APPP and SSJ. Other professional organisations influence the media policy in proportion to their aims (e.g. the Association of Internet Media, Creative Industry Forum) or only to a minimal extent via their coexistence with the self-regulatory mechanisms (e.g. PrC). More common than lobbying in Parliament is the participation of stakeholders in legislative working groups (pre-legislative lobbying). The Slovak case study suggests that professional associations’ impact on the free and independent work of the media is mostly seen as very limited

(Školkay, Hong and Kutas, 2011).

All the same, in Romania, the influence of the major commercial players has been felt especially in spectrum management decisions and in the digital switch-over process. The major broadcasters' association, ARCA (Romanian Association for Audiovisual Communications), was also active in content regulation mostly when it came to advertising restrictions. They also preferred the discreet lobbying to a visible engagement. The same is true for the Romanian Press Club, an association of the biggest media owners and publishers in the country. As indicated above, the media business owners do not use all the advocacy and lobbying leverage offered by the Romanian legislation to negotiate with the state favourable settlements. This was particularly clear during the economic crisis that hit the Romanian media quite hard over the last three years, when the state made (or postponed) several decisions that harmed the interest of the business players, based mainly on momentary conjunctures, political interests or opportunistic reasoning. Paradoxically enough, the masters of the 'fourth estate' seem to be powerless in their negotiations with the state, although the content of the media they control is highly politicised and politically biased. Most of the public interest issues were promoted by the few CSOs with an interest in the media (Ghinea and Avădani, 2011).

In Croatia, media owners' consortia and associations are rarely established as structured organisations, but they nevertheless play an increasingly important role in the formulation and regulation of media policies. They are mainly oriented towards short-term interests, and in this respect they put strong pressures on public actors designing media policy. At the same time they may stand for media independence and promote the freedom of expression only when and if it suits their particular interests (Švob-Đokić and Bilić, 2011).

The areas of the private intervention in the policy-making process – the licensing mechanisms and bodies, the digital switch-over (a pan-European process) and some content regulations – are common across the five countries under study. This indicates the private actors' strict interest in the market-related issues, as they are driven by their commercial pressures, and less so by their public interest mandate or good journalism requirements.

Estonia, though, presents a good practice example of a multi-stakeholder agreement that benefitted everybody. At the end of the 1990s, when the public television ended up in a severe management and financial crisis, all stakeholders agreed upon the concept of an advertisement-free public service, introduced as an amendment to the Broadcasting Act (Harro-Loit and Loit, 2011). As the Estonian case study notes, this has probably been the one and only case of wider consensus on a media political issue. The state, the public and private broadcasters agreed upon the key media-political elements to launch the plan. Still, the consensus was only punctual, so that the under-financing of the public broadcasting remains a current issue.

Analysing the five countries under examination, one can conclude that, although the private media dominate the market, the dominant voice in policy formulation is not theirs, but the state's. But, in highly politicised societies such as for example Romania and Bulgaria, there are underlying links between the state authorities and the media, via political connections. Thus, the policy formulation process has been seen as serving particular interests rather than a general, public one. This kind of connections and surreptitious influences naturally stress the importance of media

ownership transparency.

### **3.2 Ownership: Transparency and concentration**

The dominance of the private media over the media policies – to a more or less visible extent – is also complicated by the issue of media ownership. The problem entails two aspects: the assessment of a monopoly/oligopoly position on the market and the informal conduct of media owners, who seek political and economic influence via their media content. For both these reasons, a transparent media ownership is needed.

In terms of transparency of media ownership, the rules vary from country to country. In Romania, the broadcasters have to submit to the regulatory body (the Broadcasting Council, CNA) their ownership structure, down to individuals controlling more than 20% in any given broadcaster). The figures and names are publicly available on the CNA site and are regularly updated. Despite this increased transparency on names, the rules on how to assess the monopoly position of a certain broadcaster are complicated and beyond the level of competence on any uninformed citizen. The calculation takes into consideration several parameters: the type of the market (national, regional or local), the share held by a legal or natural person, the audience or market share of the informative programmes (newscasts, debates, current affairs programs ‘on latest political and/or economical topics’). All these elements are composed in a weighted average. One is considered to hold a ‘dominant position’ once this parameter reaches 30% ‘on the relevant market’. In this calculation, one should also include the share held by the family members of an individual: ‘spouse, kin and in-laws, up to the second kinship’. Such figures and family links are not publicly available, therefore no public oversight on transparency is actually possible. No such transparency obligation is imposed on print or online media and no cross-media ownership provisions have been ever envisaged (Ghinea and Avădani, 2011).

In Bulgaria, with the 2010 transposition of the AVMS Directive, a public register of all broadcast operators in the country was introduced. It is administered by the Council of Electronic Media (CEM) and contains information about the control and ownership over them of both physical and juridical persons. The Access to Public Information Act (APIA) also contains a section devoted to information on mass media, both broadcast and print. Such public information concerns the owners and the financial results of their media activities, the persons in the governing or controlling bodies of the media, those on the editorial boards, the journalists and the principles and internal mechanisms used to guarantee the objectivity of the published/broadcast information (art. 18 of APIA).

Despite this legislation, the non-transparent media ownership remains a problem, and is particularly pressing with regard to the press. In November 2010, a provision requiring editors to publish the names of the persons owning the newspapers and magazines was introduced, but it is already clear that it does not guarantee transparent media ownership.

In Slovakia, there are no efficient transparency requirements on media operators regarding, among other things, ownership and modes of financing, or political influences, so as to enable citizens to make informed choices about the media services they choose and the weight to ascribe to the information they receive. For example, the advisory body set up by the Ministry of Culture unanimously agreed (October 2010) not to publish basic information about the ownership structure of the

publishers in the first issue of each periodical, but to collect this type of information at a ministerial level. This was actually a step back from the previous situation. The Slovak regulatory framework includes measures against concentration in broadcasting, but there are no specific measures for the print media.

In Estonia, transparency of ownership seems not to be a problem, given the small dimensions of the market. There is no specific ownership regulation in Estonia and this issue has not been discussed in public. The only regulation on media concentration appears in the Media Services Act, but the wording of the provision is not clear and appears to be declarative and thus not really intended to be employed (Harro-Loit and Loit, 2011). In principle, the anti-concentration provision can be enforced when applying for new licences, and does not provide any grounds for cancellation of valid licences if a dominant position is achieved. As concentration has been somewhat inevitable in a small market like Estonia, this situation has not provided much ground for contesting the conjuncture.

The Croatian case study shows that insufficient ownership transparency is one of the key issues in the media field. There are restrictions to the concentration of ownership in various fields, via specific legislation.<sup>8</sup> While all media organisations have to register with the Croatian Chamber of Economy (CCE) which is supposed to keep a register of the ownership structure, some of the data is not open to the public, including audience and advertising shares. Electronic media publishers report their data to the Electronic Media Council (VEM). There are no explicit rules on determining relevant markets for print, radio and television, but a more general *Regulation on determining relevant markets*. Thus, the ownership structures are not completely transparent and their monitoring is complicated and difficult due to the low visibility of data, which are often disguised through a number of informal arrangements among owners and other interested actors. The size of the Croatian market should also be taken into account since it would be unrealistic to expect greater competition in such a small market. The Croatian case study indicates that journalists expect pressures on their profession where there are opaque ownership structures.

It appears that the lack of effective transparency measures regarding media ownership is a common trend for the five countries examined. Still, this is not a problem that affects only the ex-communist countries. The media concentration is perceived as a serious threat to media pluralism by several other European countries. The concern is so great that the European institutions busied themselves with looking for feasible solutions. Thus, in 2010 the European Parliament created an intergroup on media, while, in 2011, the European Commission created the High Level Group on Media Freedom and Pluralism, to advise and provide recommendations for the respect, protection, support and promotion of media freedom and pluralism in Europe. In a parallel move, the European Commission has created the Center for Media Pluralism and Media Freedom, 'to reflect and advise' on this topic. The new center 'will undertake problem analysis and develop new ideas on how to meet the legitimate, high expectations of EU citizens and politicians regarding media pluralism and freedom within the EU' (European Commission, 2011).

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<sup>8</sup> For print media through the Media Act, for electronic media through the Electronic Media Act and for the telecommunications area through the Electronic Communications Act, see Švob-Đokić and Bilić (2011: 16).

Such moves at European level may benefit the new members, as well as the old ones in sorting out a problem that becomes more and more complex as the media market clearly grew into a trans-national one. Moreover, the spread of the Internet infrastructure networks, supposed to cover the whole EU territory by 2013 (as per the EU Digital Agenda), will challenge the very definition of ‘media’ and ‘media market’, in traditional terms, posing global problems that are in need of global solutions.

### **3.3 Monetising the content: Pluralism v. profit**

When it comes to pluralism of the media content offered by commercial media, there are striking resemblances among some of the new EU members, while other preserved their specificity.

Romania and Bulgaria share a common feature: a crowded market, apparently pluralistic, but lacking true diversity of media content. In the same time, in a never-ending race for audience, the media downgraded the content to tabloid-like material (the ‘dumbing-down’ syndrome).

Bulgaria sees a growing concentration of media ownership in the hands of a few major players in the field. The participation of some political parties and some (related to them) commercial banks in this process was pointed out as a major additional factor for reducing media diversity. The media themselves also play a role in this process – pressed by the falling circulations and the competition for market share, they started to produce tautological content, identical media formats, etc. The result of the combined forces of the market and political pressure is that though there is an apparent diversity of content, the differences are only apparent – and marginal: the content is of the same sort. More specifically, the media content is not only lacking in true diversity, but is also characterised by a growing tabloidisation and the substitution of serious political and analytical problems with infotainment. Coupled with the growing withdrawal of serious investigative journalism and the general pro-governmental positions of the main media outlets, this reduced diversity of media content signals a serious threat to media’s freedom in the country.

The same trends are by and large visible in the Romanian media market, the largest of the five. The traditional platforms are concentrated in a series of oligopolies, some of them belonging to people with a clear political affiliation – and political aspirations of their own (a difference from the pro-governmental stance of the Bulgarian media). The local media ownership is fragmented and the ownership is highly politicised, with local political actors actually owning media outlets (directly or by proxy). But, as the Mapping the Digital Media Romania report showed (Open Society Foundations, 2011), Internet-based media have had an impact on the pluralism and diversity of opinions. When a story is censored or presented in an unbalanced way by a traditional media outlet, it will be corrected or criticised on the Internet through comments from readers, blogs or other journalists working for Internet-based media. Moreover, Internet media and blogs are increasingly launching topics in the mainstream media. Newspapers, once an influential media platform, remained a patchwork of recycled news releases and newswire content, processed by editors only to a certain extent. From this point of view, the online media can be seen as more dynamic, helping to mitigate the inertia of the traditional media. Seen broadly, the media landscape is pluralistic, as all the orientations and voices can find a space in the media – especially in the new ones. But most of the major and most

influential media outlets have been known as willingly taking part in the political game.<sup>9</sup> All the same, yielding to big advertisers in order to secure contracts is a documented practice. Noteworthy, the state continues to be one of the major advertisers on the market, especially through the EU funded development programs, that come with in-built advertising budgets (Center for Independent Journalism, 2012).

As noted in Mediadem's Slovakian case study, Slovakia is perhaps atypical in the general lack of any clear and consistent ideological orientation shown among most of the daily press throughout the last twenty years. Yet there is obviously some ideological orientation in some media. However, it should be stressed here that the editors and journalists did not claim support for, or opposition to, a particular political party but rather for or against certain ideology. The general conditions influencing the composition and diversification of media content in Slovakia include the small size of the country and the few really significant large-scale advertisers. Obviously, advertisers do not like criticism of their companies or products. This trend has been more evident in recent years, even before the 2008-2009 crisis. Nevertheless, the three most important media houses – Petit Press, Ringier Axel Springer and Spoločnosť Plus 7 dní – are still able to keep their editorial independence vis-à-vis major advertisers. Yet all medium-size and small-size media houses and publishers are to an extent forced to take into account the wishes and interests of smaller advertisers (Školkay, Hong and Kutaš, 2011).

As small a market as it is, Estonia has its own specificities. As pointed out by the Mediadem Estonian case study, it is in broadcast that the state set up obligations regarding the quality of content. The Estonian government lacked the political will – as well as the financial means – to embark in a regular gauging of the market. For almost 20 years, there has been no regular monitoring of the output of radio programmes (on any level, but especially of those located out of Tallinn) or smaller television programmes (e.g. in cable). This has led to negligence towards content obligations or, at least, absence of any supervising data about broadcasters' compliance with content prescriptions on all levels of broadcasting.

According to the same report, the quality values are under attack in Estonian media organisations. The main reason that was pointed out is the commercial pressure. As a journalist has reportedly declared, they should '*forget the quality*', as 80% of the readers would not notice the extra-work invested in fine-tuning the articles (Harro-Loit and Loit, 2011: 32). According to the same source, such voluntary oblivion should be extended to one's own ideas about quality, sometimes even ethics. When it comes to dealing with external pressures, different media channels are in different positions. Especially the magazines, in order to survive, have developed strategies that may be seen to have erased the border separating advertisement and the editorial content. Commercial pressure on content is also immediate for the newspapers' 'soft news' or B-sections. According to the report, there were cases when journalists have been asked to forward their materials to advertisers so that they can decide if the article is appealing enough for them to buy advertising space. However,

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<sup>9</sup> For example, in the presidential election in 2009, all major television channels broadcasting electoral materials have been fined for unbalanced coverage and unfair treatment of the candidates. Noteworthy, the television stations continued to air unbalanced coverage after the first sanctions, sending a very clear message: it was not a mistake, it was a clearly, openly assumed editorial policy (Ghinea and Avādani, 2011).

journalists who had been working for (hard) news said that they had not felt any commercial pressure.

When it comes to freedom and independence of the media in Croatia, it seems that pluralism provisions have not created a freer and more independent media environment. Mostly foreign and private media companies have created an environment in which advertising revenue has precedence over fulfilling the public interest for diverse opinions and informative content. Many trans-national foreign companies are active in the country. The European Commission stated (in 2007) that ‘the fact that non-domestic owners are important players in some markets do not necessarily pose a threat to media pluralism. It depends very much on the legal safeguards in place and real editorial independence from the owner’ (Švob-Đokić and Bilić, 2011: 17). Another specificity of the Croatian media market is that it is strongly connected to the other small markets in the countries around, taking advantage of the existence of a lingua franca and of players active on the regional market. Thus, the Croatian media is living a competitive life, with a trend toward commercialisation of the content and putting a strain on the journalists’ work, sometimes pushed to stride away of the ethical standards. Thus, most of the public interest and diversity remit has been mandated to the public media that have to compensate for the ever more commercial content of the private media. In order to promote content pluralism, Croatia created the Fund for the Promotion of Pluralism and Diversity of Electronic Media, a form of state subsidy intended to stimulate the production of audio and audiovisual programmes that promote pluralism and media diversity at local and regional levels.

If there is a major common feature of the media content in the five countries, one can advance the loss of control by the members of the journalistic profession over the tools that guarantee the completion of their public interest mandate. It is rather the owners (with their political or economic interests - sometimes, they are just the same) or the profit pressure that set up the pace and quality of content provision. The fact that many media operations are part of multi-business conglomerates (such is the case in Romania and Bulgaria) make the journalists’ job even more difficult. As media are hardly surviving in the post-crisis environment (with private advertising having dropped by 90%, such as in Bulgaria), they are seen as just influence agents for their owners’ other businesses. As a result, the private media in the post-communist countries are more in the influence dealing business than in promoting the public interest.

#### **4. Institutions: The whimsical gatekeepers**

The toppling of the communist regimes left the Eastern European countries in an institutional vacuum. For decades, they were accustomed to a strong, authoritarian order and with resilient (even if ossified, Kafka-like) state institutions. The crumbling of the communist system found these states not only economically challenged, but also institutionally challenged. Some of them had to face a change in the political system (as Romania and Bulgaria), others added to this the challenges of independence (as Croatia and Estonia), while yet others – that of statehood (such as Slovakia). Therefore, building institutions was one of the major tasks in front of these countries – and they are still struggling with it. Joining the EU helped, to a certain extent, as it provided for a blue print for institution building. But the sincerity of the efforts, the genuine commitment to the democratic values, the actual know how

differed from country to country, from government to government – and produced different results in each of the countries covered by this study.

When it comes to media sectors, in general, and media policy in particular, the most relevant institutions are the Parliaments, the regulatory bodies (for both broadcast content and spectrum management) and the anti-monopoly bodies. Of equally great importance are the juridical institutions – both the various courts that judge on media cases and the constitutional ones, whose decisions influence the shaping up of the legal framework, with long-time effects.

#### **4.1 Parliaments and political parties**

The political actors have been identified by all Mediadem countries as being important stakeholders in the media policy formulation. Among them Parliaments – the quintessential expression of a nation's political will – play a special role.

In Bulgaria and Romania, they have been even the *major player* in the field of media policy mainly via the standing committees, with a sphere of competence on the media. For example, the Bulgarian Parliament, through its Standing committee on the Bulgarian National Television and the Bulgarian National Radio directly controlled the PBM and the BTA news agency, by directly appointing and dismissing their general directors. Quite naturally, this attracted accusations of political interference in their editorial policies. The direct involvement of Parliament in controlling the PBM was terminated in late '90s only via a decision of the *Bulgarian Constitutional Court (BCC)*. As the laws are the main tool of media policy-making in Bulgaria, the Parliament continues to play an important role in the media norms-setting and functioning. An analysis of licence-related practice of the broadcast regulators shows (as provided by the Mediadem case study on Bulgaria), political interference and dependence on corporate interests have been major features of the Bulgarian media policy formulation and implementation. Concerned that the freedom of the media in the country is declining after the EU accession, the European Commission commissioned a report, monitoring the activities of the Commission for Electronic Media. The preliminary conclusions are that the CEM is failing in its task to be an independent from the state media regulator.

In Romania, the situation is similar, with media committees existing in both Parliamentary chambers and with a strong inclination toward controlling the public media. The main instrument at the hands of the political parties is the annual reports of the public media institutions: public television TVR, public radio SRR and the national news agency Agerpres. The Parliament has to approve the annual activity report of the boards. The rejection of the annual report attracts the dismissal of the board. This mechanism was initially meant to ensure the accountability of the board, but has been consistently used as a tool by the parliamentary majority to control the boards. In the case of public television, this mechanism has been functioning flawlessly: since the adoption of the law (in 1994) only one board has completed its four-year mandate). Distinctive for the work of the Romanian Parliament on issues of media laws is the 'piranha model', where the body of a law, conceived as a policy instrument, overarching, coherent, predictable, harmonised with the EU *acquis* and resulting from negotiations with a multitude of stakeholders tends to be, in time, chopped bit by bit by amendments that will restrict it and, in some cases, distort its very meaning. For example, between 2007-2011, the Broadcast Law has been subject

to 14 attempts at modifications, most of them meant to restrict the editorial freedom or the leeway of the broadcasters, imposing new obligations that would have translated in additional costs. The same goes for the Public Broadcast Services Law, subject to nine attempts at modification in the same period. Noteworthy, these attempts are often singular initiatives of an MP or a group of MPs, stemming out of personal interests.

Since Slovakia is a typical parliamentary republic, the Parliament is constitutionally the most important body of state. However, in practice, as Slovakia has continuously been governed by coalition governments over the past two decades, the Parliament has effectively become subordinated to executive power – the Cabinet, becoming a ‘rubber stamp’ body in Slovak coalition politics. Thus, the main political institution that impacts the media policy in Slovakia is the Coalition Council (CoCo) - the ultimate political body outlining fundamental aspects of media policy. The Government (through the Ministry of Culture, MC) and the Parliament follow the CoCo decisions and/or the key media policies. The performance of the MC depends, in a significant degree, on the professional and ideological background of the minister or state secretary, as well as their political support inside the Government or coalition political party.

As it prepared intensely to join the EU, Croatia had to harmonise its legislation to the EU *acquis*, which made the Croatian parliament an important contributor to the process. Through its specialised Parliamentary Committee on Information, IT and Media, it had a legislative and consultative role in designing media policy. Still, it is the government that plays a central role in the processes of policy formulation, regulation and implementation. The tasks of media development, policy formulation and regulation have been assigned to two ministries: the Ministry of Culture (the central state administrative body with responsibilities for the formulation of media policy and its related legislative framework for both broadcasting and the print media) and the Ministry of Sea, Transport and Infrastructure (responsible for the technological development of electronic communications and infrastructure and for the technological regulation of broadcasting). A number of agencies have been established to follow, analyse and resolve various aspects of media functioning (e.g. technological, infrastructural, regulatory, financial).

Estonia is a distinct case, as the issues related to media policy appear to be remote to politicians. In the preparation of the Mediadem case study on Estonia, only one out of eight members of the parliament (*Riigikogu*), who were invited to answer a questionnaire, actually responded. The rest of the interviewees (politicians and experts) emphasised that the public service broadcasting served for the major (and often even the only) attribute for the state media policy and that Estonia follows the liberal values. Apparently, the government embraces a minimal approach to media regulation and state intervention in media policy-making.

## **4.2 Regulatory bodies**

The birth of the broadcast regulatory bodies has been a complicated one. They appeared on unregulated markets, populated by media outlets that had already carved their niches. Thus, from the very beginning they have been perceived as instruments of coercion and of political control over the budding broadcast markets.

In Bulgaria, the first attempts at regulating the broadcasting field resulted in the apparition, in 1996, of a ‘specialised *state* body’ – the National Council for the Radio and Television (NCRT), with a wide range of attributions on both public and private media. After a series of amendments adopted and subsequently rejected by the Bulgarian Constitutional Court (BCC), a functional form of the broadcast law was finally adopted in 1998. The BCC considered that the quotas of Parliament and the President in appointing the members of the NCRT were politically neutral, since both were directly elected by the citizens and represented ‘an emanation of the entire people, and not of separate social groups’. Thus, the regulatory body was born with ‘an original sin’ – a political appointment of its members (Smilova, Smilov and Ganev, 2011). The appointment procedure and the ensuing political dependence continue to delegitimise this body (and its successor after 2001 – the Council for Electronic Media (CEM)) in the eyes of both internal and external observers to this day. Its prerogatives are wide and include the monitoring of compliance with the requirements of the Radio and Television Act (RTA); the (content) licensing of the television and radio operators; and the appointment of the directors and the approval of the governing bodies of the PBM.

Quite similar in functions – and in problems - is the broadcast regulator of Romania, the Broadcast Council (CNA), the regulatory autonomous body that grants licences and oversees the television and radio content. It is vouched to be the warrantor of the public interest in issues pertaining to audiovisual content and market. CNA members are appointed by the president, the government and the two chambers of the parliament. They are usually a mix of former journalists and former politicians. There was a positive tendency in the last years to appoint more professionals than politicians. The president of CNA is elected by the members, but the Parliament has to validate this election. In practice, the majority in CNA has to elect a president that is already agreed by the majority in parliament. Nevertheless, the political affiliation of CNA’s members is still visible in their voting patterns – and it gets more and more visible (and a matter of confrontation) during the electoral periods, when the media take visible sides in the political competition. Like its Bulgarian counterpart, CNA suffers from the same ‘original sin’ of politicisation. For years in a row the licensing process has been labelled as biased and politically manipulated. When the major analogue frequencies have been eventually allocated, the pressures on CNA eased and its content regulatory and law compliance monitoring functions prevailed. With the digital switchover process on the horizon, the interest of the political actors in CNA got a new swing and the licensing of the digital operators is expected to stir the same old suspicions – and most likely pressures.

In Slovakia, the Council for Broadcasting and Retransmission (RVR) is perceived as having had a negative influence on the media freedom. RVR has a primarily political composition. As a result, although some members of the RVR have knowledge and/or professional experience in broadcast media, more than half have absolutely none. Even the conditions set in the law for candidates to RVR membership disqualify the majority of media professionals. They were designed to guarantee the absence of any vested interests or other professional influences, thus practically all professionals (except theoreticians and *out-of-the-business professionals*) were excluded from candidacy. The seniority of the RVR members (the average age of the members of the RVR was 54 years in 2011) and the overall low professional media competences are also considered factors in the conservative attitude of RVR. In this respect, the most controversial regulatory issues are

‘objectivity and balance’ in news broadcasting and the protection of minors. Implementation of media policy by the RVR is essentially a bureaucratic process.

In Croatia, the Electronic Media Agency is managed by its Electronic Media Council (VEM), an independent regulatory body which monitors the electronic media ownership structure and operates the Fund for the Promotion of Pluralism and Diversity of Electronic Media. It decides on the allocation, transfer and withdrawal of broadcasting licences, and reports directly to the government and the parliament. The Electronic Media Act defines detailed rules regarding objective and impartial reporting, including the obligation to publish true information, respect human dignity and human rights, and contribute to tolerance of different opinions. Programme content is expected to contribute to the provision of comprehensive and impartial information for the public, and to free public debate, as well as to the education and entertainment of viewers and listeners. News and current affairs reporting must be impartial, commentaries clearly attributed, and differences of opinion on political or economic matters respected. No official data (from the broadcasters themselves or the VEM) are available regarding compliance of media companies with diversity and pluralism requirements, though (Švob-Đokić and Bilić, 2011).

Estonia’s broadcast regulators seem to be simpler. The legal framework is simpler itself, with just a limited number of laws regulating the media content and conduct. The Broadcasting Act was passed in 1994 and was amended 33 times before being replaced by the new Media Services Act (2011), a transposition of the AVMS Directive. The regulatory body is the Broadcasting Council, the supervisory organ of the public service operator, which presently consists of eight members. On the proposal of the Parliament’s Cultural Affairs Committee, the Parliament shall appoint four members of the Broadcasting Council from among its members, on the basis of the principle of political balance and four members of the Broadcasting Council from among recognised specialists in the related fields relating to the performance of public broadcasting functions, for a term of five years. Most remarkably, Estonian authorities tend to be extremely liberal when it comes to licensing. The comment by the current Minister of Culture Rein Lang indicated in the *Mediadem Estonian* case study report allows one to conclude that the government would rather abolish licensing and the restrictive programming conditions to it than allocate more resources for surveillance of the compliance to the legal requirements (Harro-Loit and Loit, 2011). According to the same report, there is a reluctance of the Estonian state to monitor the media content. The monitoring of broadcasting (audiovisual media services under the new law, including radio) has been random *in re* the content remits, except for advertising quotas followed by the large free-to-air televisions. As mentioned above, for almost 20 years, there has been no regular monitoring of the output of radio programmes or smaller television programmes (e.g. in cable).

Working in cooperation – and sometimes in collusion – with the broadcast regulators (mainly interested in content licensing) are the technical gatekeepers, the bodies that manage the spectrum: the communication regulators. As most public authorities managing a public resource, these institutions tend to be highly politicised and some times are controlled by different actors than the broadcasting regulators, which results in conflicts or confusions.

The Bulgarian Communications Regulation Commission (CRC) (prior to 2001 called State Commission on Telecommunications - SCT) is responsible for granting individual technical licences for the use of the radio spectrum. The STC members

were directly appointed by the government and STC has been accused of politically biased decisions. The Bulgarian Constitutional Court dismissed such accusations, considering that SCT had only a technical role. Its successor, CRC, assumed special responsibilities within the framework of the digital switch-over process. It organised the bids for selecting the multiplex operators, which produced numerous scandals. The decisions of the CRC were one of the grounds for the European Commission to start a penal procedure against Bulgaria.

A troublingly similar story has the Romanian communication regulator, ANCOM. Until 2011, the telecom regulator was directly subordinated to the prime minister. Between 2006 and 2008, ANCOM was reorganised three times, as the then government tried to replace the chair. Two dismissed chairs won lawsuits over their dismissal and asked to be reinstated. In response, the government changed the name of the institution and reorganised it, preventing the two dismissed chairs from being reinstated. The European Commission repeatedly criticised the lack of independence of the telecommunications regulatory body and started the infringement procedure against Romania in January 2009. In its 15<sup>th</sup> report, released on May 2010, the European Commission criticised the Senate for delaying the decision to transfer control of ANCOM from the prime minister to Parliament. One day after the release of that report, the Senate approved a Governmental Emergency Ordinance, which later became law, and which, among other things, transferred control over ANCOM to Parliament. This change was praised by independent media observers as positive because it gives more independence to the regulator than before, when prime minister controlled it directly (Open Society Foundations, 2011).

On the other hand, Croatia has not reported such problems, as VEM, the body in charge of programming licences, also grants concessions to radio and television publishers in accordance with the Electronic Media Act and the Concessions Act.

It is not unheard of for these two types of bodies to work on the same kind of regulation at the time, but starting from different directions and aiming at different outcomes. As a rule, there is not a natural cooperation between the two and the power struggles on who has the upper hand on the spectrum are not rare.

### **4.3 Anti-monopoly bodies**

Together with the content and telecommunication regulators, the antimonopoly bodies are expected to play a role in the preservation of pluralism of the media market. Apparently, this is not the case in the countries studied for this report, as they prefer to keep a rather lower profile when it comes to media policies.

The lack of any mono-media or cross-media ownership legal restrictions in Bulgaria is indicative of the strong position of the media owners vis-à-vis the Bulgarian governments in the post-2001 period. Still, the trend of building quasi-monopolies and rapidly emerging media empires is quite visible. The existing rules aim only at the prevention of the monopolisation of the market, and mono- and cross-media ownership are not interpreted as posing such a threat. There are no strict limits on market shares, circulation and audience shares, advertising revenue shares in the media market or on the capital shares in a media company. Since the Bulgarian Anti-trust Law does not prohibit monopoly, concentration, or dominant market position per se - just *the abuse* of the latter, it is the independent Anti-Trust Commission which decides whether such an abuse is in place. The law also does not set strict ceilings

above which a dominant position is deemed unacceptable, leaving it to the discretion of the state Anti-Trust Commission to decide. The unchecked concentration of non-transparent in terms of ownership media is a major threat to the transparency of the media.

With no specific anti-concentration provisions in the legislation, Estonia does not have a strong anti-monopoly body. The small size of the national media market favours an oligopoly of professional media channels, affects the journalists' job market and inevitably limits the number of groups and individuals who should negotiate media policy.

The Croatian body mandated to supervise the market is the Agency for Market Competition Protection (AMCP), in charge of preventing limiting or violating market competition on the territory of the Republic of Croatia, or outside of the territory if it has consequences for the Republic of Croatia. Measures in general competition law that can also be applied to the media market include prohibited agreements and the misuse of dominant market position. Competition law does not have any specific rules on taking into account media diversity nor has it been modified for that purpose. AMCP judged on a series of competition cases on the media market, but did not ask for any expert opinions from the specific regulators in the media system. The AMCP relied on the data provided by a specialised market research company and directly from involved actors in the designated markets.

In Romania, it is the Competition Council that enforces the competition legislation. Before and after Romania's accession to the European Union, the Council was the beneficiary of a number of assistance programs and it became more and more active in the past few years in enforcing legislation and sanctioning deals that are uncompetitive. Any take-over of a company evaluated at a value higher than ten million Euro must be brought to the attention of the Council and consequently approved by it. Given that the traded media assets were ranked under this value, the Council did not play a role in this field until now.

Not only the Council, but generally speaking the Romanian state is rather a missing actor in the media competition field. The concentration of media property has been increasing in the past five years around five big media trusts, but Competition Council experts consider that this is a normal trend and, to a certain extent, a positive evolution, preferable to an over-fragmented media market, that would not guarantee the economic survival of the media companies.

A system of anti-concentration measures is to be found in the Slovak media legislation on electronic communication services and in general competition law. The competition legislation in the area of electronic communications is in substance shared by all EU member states via the common regulatory framework. The competent body in concentration issues is the Anti-Monopoly Office (AMO). Its anti-concentration criterion is the threshold of turnover, in accordance with EU legislation. As far as the coexistence of general competition law (the regulator in this case is AMO) and media law (several regulators) is concerned, AMO has priority with the exception of the passive measures (mainly legal restraints concerning property (shares) or personal links (connections) of the owners of the media enterprises that should prevent vertical or horizontal concentration of content providers) and the *ex-ante* regulation of the competition. AMO has generally followed liberal policies.

#### 4.4 Courts

Courts played a significant role in the shaping of the media policies in the countries under study, both at backbone level and in fine-tuning them – for good or for bad. A cross-reading of the case studies of the five countries reviewed reveals the importance of the European Convention on Human Rights (ECHR) and the ECtHR for the shaping up of the media policies and conduct. In all of these countries, it is the European standards that set up the measuring stick, defined values and modelled courts' judgments, including at constitutional level.

The Bulgarian Constitutional Court (BCC) is considered to be the second major player (after the political parties and their institutional expression, the Parliament) shaping media policy (Smilova, Smilov and Ganev, 2011). The BCC issued several crucial decisions connected to the regulation of the media, ruling on the unacceptability of the direct state control over media, the excessive political control over public media (via the political appointees in their boards), and the prohibition for television operators to be also multiplex operators (as a matter of free competition). The courts have been also involved in shaping up the broadcast market, as there is hardly an important decision of the CEM and the CRC, with respect to the licensing process, which has not been appealed. The CEM's decisions concerning the appointment/dismissal of the general directors of the BNT and the BNR are also always appealed (where in all but one of the cases they are upheld by the court). The case law of the ECtHR has had no direct impact to this point on the media policy in the country. In April 2011, for the first time, the ECtHR convicted Bulgaria for violations of Article 10 (freedom of expression) ECHR with respect to journalists (two Bulgarian journalists, convicted in 2000 for defamation). These ECtHR decisions may have a positive effect on the legal practice in libel and defamation cases against journalists in the country, which are one of the triggers of self-censorship in journalistic practices.

In Croatia, the democratisation of the media system since the 1990s was mainly influenced by the standards of the Council of Europe in the media field and their implementation. The impact of the EU harmonisation process has been twofold. On the one hand the implementation of standards was evaluated through the political criteria, thus contributing to freedom of expression and the media. Other standards, especially the rules on public subsidies related to the funding of public service broadcasting, have so far contributed to limiting the independence of the public service broadcaster and increasing the possibility of government pressure on editorial policy. There were only three media-related cases brought to the ECtHR so far. The ECtHR found no violation of Article 10 ECHR by Croatian courts and thus upheld their judgment.

In Estonia, the judiciary plays a very important role although there are relatively few lawsuits against the media (approximately 40 lawsuits since 2000 were identified by the Mediadem Estonian case study report). Still, the Supreme Court in particular has been increasingly active in creating the elaborated discourse on freedom of expression and its conflicting rights. Noteworthy, the Estonian courts are very cautious not to substitute their ruling to a media regulator. In their view, the role of the law court is rather to remain passive: to assure balance between the freedom of speech and the individuals' personal rights, when needed. Basically the Estonian National Court has been interpreting the following values: media freedom; freedom of expression; privacy-related rights (human dignity as a universal value); public

interest, the defamatory nature of factual statements and value judgements. Identity related issues (blasphemy, hatred speech) have not been a media-related court case in Estonia. The key actors outside Estonia who influence the Estonian media policy are certainly the EU and the ECtHR.

In Romania, after an escalation in the early 2000s, lawsuits against journalists became less and less numerous and most of them were filed under accusations of libel and defamation. These two felonies have been expelled from the Criminal Code in 2006, under the pressure of EU accession. New Criminal and Civil Codes have been adopted in 2009.<sup>10</sup> The two emphasise the right to privacy (a new concept in the Romanian juridical system), while offences to the human dignity (honour and reputation) are dealt with exclusively by the Civil Code. As the Codes are fairly new, they still have to produce jurisprudence. In most of the cases, the journalists won the cases against them, the Romanian courts complying with the practice of the ECtHR. Still, a new trend appears in regard with the use of new media, as Romanian courts have already issued a couple of decisions that ordered bloggers to delete content from their publications or prohibited them to ‘ever’ tackle certain topics or even persons. Decisions of the broadcast regulators (especially the sanctions) and the Competition Council are regularly contested in courts, but the number of upheld such sanctions is increasing.

The Slovakian Constitutional Court has historically shown a long-term, relatively consistent, and increasingly liberal commitment towards the protection and promotion of freedom of expression in the media, as well as to access to information in Slovakia. However, in themselves, constitutional rules concerning freedom of expression and freedom of information do not seem to influence the adoption of particular regulatory patterns for the media in Slovakia. More influential are tradition, foreign examples/directives, and state pressure to regulate. In its rulings, the judiciary defines the limits of freedom of speech and the press, as well as the conditions for access to information in general and in the media in particular. Further, the judiciary quite often reverses or confirms the regulatory decisions of the broadcast regulator RVR. In general, the quality and speed of the decision-making of courts/judges is seen as unsatisfactory in Slovakia, due to the unreasonable length of time for decisions to be made, the low quality of judges and their rulings, the low standard of execution of post-court agendas (e.g. execution of sanctions), the low quality of administrative staff, and insufficiencies in the system of on-going education of judges (Školkay, Hong and Kutaš, 2011). An important role here is also played indirectly by the ECtHR which is a standard-setter in these issues. The ECtHR has already overturned decisions of the Slovak courts.

## **5. Conclusions and the way forward**

Based on the examples above, one can conclude that, despite the differences in historical background, political orientations and strategies adopted, the five countries under study share a couple of common features regarding the role and the solidity of their institutions.

As it was described, the main feature of these institutions is the political control, what the Bulgarian case study report described as ‘the original sin’. The regulators, in particular, are prone to a strict political control, as they were called to manage and

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<sup>10</sup> The Civil Code came into force in October 2011, while the criminal one is still pending.

allocate an important (and lucrative as well as influential) public resource: the Hertzian spectrum. The grip of political actors on these regulators was so strong that it attracted EU sanctions, such as the ones against Romania and Bulgaria. With the advent of the digital switchover, when the broadcast markets will re-open to competition, the interest of the political class for the broadcast and telecommunications regulators may be revived and the controlling practices may be re-enacted.

Estonia may present a different situation, with authorities there being rather uninterested and reluctant to engage in media policy formulation, leaving it to the industry and the courts to sort it out.

Another common feature is the lack of a long-time vision that would entail a long-time strategy in media policy-making. Most of the institutions analysed in the five countries in this study are rather reactive than proactive in their approaches, even opportunistic (which stems out of the political control). Strategies and roadmaps seem to have shifted with every change in political power with the sole purpose of securing the control over the media – or market advantages for the ‘friendly’ media companies.

A third common feature that we identified is the formative impact of the European influence – either via the EU *acquis* and membership, or the ECHR standard-setting. The broadcast systems – with regulations, regulators and common playing rules – have benefitted clearly from the EU influence, as it imposed the creation of certain institutions, delivering a standard set of services in an independent manner. All the same, the courts have been positively influenced not only by the ECHR provisions, but also by the ECtHR rulings, with a modelling effect over the judiciary in the studied countries, although in some of them this modelling effect has been rather slow.

One can thus conclude that the institution building process in the new EU members (including Croatia from 2013 onwards) is still a work in progress. A true democratic society has to rely on predictable institutions, with replicable conducts and responses, animated by recognised democratic principles and immune to formal or informal political, economic or personal influences.

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### **3. New media services: Current trends and policy approaches in a comparative perspective**

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#### **1. Introduction<sup>1</sup>**

This report provides a comparative analysis of the impact of new media services on traditional media, the contribution of new media services to democratic processes and the freedom of expression, and the guarantees in place or needed to ensure media freedom and independence in the digital environment in the fourteen countries which are part of the Mediadem project: Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the United Kingdom. The purpose of this report is to identify and, if possible, to explain the major trends in new media and their impact on traditional media as well as on journalists' work; to examine cases of positive or negative contributions of new media services to democratic processes, and to suggest further possible developments, including potential policy responses to emerging controversial issues related to new media services. Primary sources included country policy reports published in late 2011 and background study reports published in 2010 for all fourteen Mediadem countries, our own survey, which was based on approximately 20 specific questions addressed to country experts (members of the Mediadem research consortium) and the most recently available additional literature in the field.

The following sections will mainly focus on the new media tools used for the expression of opinion (blogs, online news portals), and their social, economic, political and professional impact on traditional media. They will also focus on online services provided by public service media (PSM), online services by traditional newspapers, as well as on journalists' work for online news portals with their own independent editorial structure.

The importance of online media services has increased recently. Oriella's 2011 digital journalism report (Oriella, 2011) shows a drop in numbers to 50 percent of those who agreed that their offline print or broadcast audience had the largest audience. It also documents a clear shift of journalistic work towards online channels. However, as claimed by Oriella (2011), there was no change in the proportion of online and offline content in 2010-2011. A large majority of experts expect online media to exceed broadcast television in terms of time consumption by 2020 (Blackman, Brown, Cave, Forge, Guevara, Srivastava, Tsuchiya and Popper, 2010). Overall, these changes make the importance of our comparative study even more topical and relevant, as well as having possible longer term predictive power.

Although there is no scientific or EU-wide legal definition of new media services or networked media in general, there is a consensus that new media allow on-demand access to content any time, (almost) anywhere, on any digital device, as well as interactive user feedback, creative participation, and community formation around the media content. Thus, there is a 'popular democratic' aspect characterising the creation, 'publishing', distribution and consumption of media content. This is

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sometimes called ‘convergence culture’ (see Anagnostou, Craufurd Smith and Psychogiopoulou, 2010: 9-10). According to Jenkins (2008: 243), convergence culture ‘represents a paradigm shift – a move from medium-specific content towards the content that flows across multiple media channels, towards an increased interdependence of communication systems, towards multiple ways of accessing media content (see Brewer, 2012), and towards ever more complex relations between top-down corporate media and a bottom-up participatory culture’. Technological lines separating audiovisual and written communication have definitely become blurred (see more in Storsul and Stuedahl, 2007).

The term new media services also reflects the commercial exploitation of new media, i.e. the typical symbiotic historical nature of media and business. However, there is also a potential ‘mass democratic’ aspect of new media services, which can be seen in their large mass of users and self-creators (in the case of social media and user-generated content), and in their political impact on the ‘democratisation of communication’ (see the Shirky-Morozov debate regarding the Arab Spring, Morozov & Shirky, 2010).

As will be shown, the impact of the Internet is felt - although to different degrees - on media work and on journalists’ work methods as well as on the active involvement of citizens and social movements in politics, at least at a discursive level.

## **2. Policy strategies in the Mediadem countries with regard to new media services**

Regulatory policy strategies, or a lack of them, reflect the (lack of) interest of the society and its political leaders in a certain public issue. In this report, media policy is understood as an activity which deals ‘with the organisation of media markets and media performance’ and more specifically, ‘with the policy tools that are employed to shape the media in a way that promotes their role as facilitators of communication through which public discourse is produced’ (Anagnostou, Craufurd Smith and Psychogiopoulou, 2010: 11). Clearly, although policy strategies should not only focus on public legal regulation, this is often the most frequently-used media policy tool, especially in the public media sector. However, currently there seems to be a regulatory vacuum with respect to new media services (except for audiovisual media services on demand). New information and communication technologies (ICTs) have raised practical challenges concerning possible policy convergence between the media and telecommunications. In addition, as pointed out by Heller, Søndergaard and Toft (2012: 27), there has been a lack of support for the online media initiatives so far, putting them at a distinct disadvantage with regard to market entry and competition with the online products of established media houses.

As new media services are a relatively new issue, there still exists a legal and definitional vacuum around new media services in most, if not all EU countries. Indeed, there is a lack of legal and/or self-regulatory or co-regulatory rights and duties for new media services. Mostly, general civic and criminal legislation, as well as regulation used for traditional audiovisual and/or print media is applied.

Rather than a proper set of regulatory responses, there is rapid technological evolution. In fact, the most frequently used tool for the regulation of new media services is *individualised self-regulation* which denotes the norms that are developed at the level of single media organisations. Therefore, the Internet and related new media services by and large have not had a significant impact on traditional media

journalists' freedom and independence at the professional level. For example, in Romania, some online publications were actually established as a result of the political or editorial pressures the journalists had to face in the traditional newsrooms (Ghinea and Avădani, 2011: 8). At the same time, many traditional media have developed their own ethical guidelines and codes of conduct regulating the behaviour of their online readers but also the behaviour of their editors on social networks. Journalists' online behaviour has thus been further regulated and their autonomy reduced. Thomson Reuters was among the first to publish social media guidelines in 2010.<sup>2</sup> Some general codes of conduct recommend bloggers to follow the codes of conduct used by the traditional media (e.g. in Slovakia). In Spain, most of the principal wire agencies have developed their own social media guidelines to control the activities of their employees. The guidelines of Agencia Efe for instance focus on controlling journalists' participation in social media.<sup>3</sup> As a result of these self-regulatory efforts, many journalists publish blogs under a pseudonym. For example, a number of Greek journalists retain their anonymity as bloggers to maintain freedom of expression and their ability to criticise (Psychogiopoulou, Anagnostou and Kandyla, 2011: 42). There was at least one case reported in Slovakia in 2011, where a journalist who published a regular blog was critically questioned by his superiors in PSM television (Školka, Hong and Kutaš, 2011: 54).

This regulatory trend suggests two preliminary conclusions. First, there seems to be a more urgent institutional need to regulate the behaviour of professionals and non-professionals in the online world than was the case off-line. Secondly, the regulation comes, perhaps surprisingly, from the media owners (who are normally against any such regulation of their activities) rather than from state or professional bodies. In this context, the OSCE's 2008 Media Self-Regulation Guidebook indeed suggests that self-regulatory mechanisms can be 'extremely' well-suited to address the Internet-based media because they tend to be inherently more flexible than statutory tools (Gore, 2008). Although such self-regulatory mechanisms are indeed necessary (especially in the absence of statutory regulation), at the same time, they can perhaps be more restrictive than it is actually necessary for free discussion. In addition, their successful enforcement is questionable outside the editorial offices.

State regulation is present indirect, through constitutional and human rights norms originally developed for the traditional media, as well as through judicial constraints, emanating from both national and European levels.

Some argue that there is also a role for online media ombudsmen ('cyberombudsmen'), since media ombudsmen are allegedly better prepared than online critics to hold the media accountable and promote transparency (Dworkin, 2010). Dworkin suggests that the code of ethics found at [www.cyberjournalist.net](http://www.cyberjournalist.net) should be used as a self-regulatory tool.

In contrast, Darlington (2011) indicates that statutory regulation is the key and continues that 'as far as is practical; what is illegal offline is regarded as illegal online'. However, he also notes that extending current regulation of broadcasting and the Internet would be both technically impossible and socially unacceptable.

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<sup>2</sup> See <http://thomsonreuters.com/social-media-guidelines> (date accessed 11/07/2012).

<sup>3</sup> For instance, one's personal and professional Twitter accounts have to be clearly differentiated. The personal Twitter account is under the user's own responsibility, but the professional one has to be authorised in order to include @EFE in the nickname. EFE journalists cannot use this medium to publish scoops or to link to other media websites.

Therefore, he expects some sort of regulatory convergence when he calls for deregulation as regards the delivery of broadcasting and more regulation for online content in the near future.

The Audiovisual Media Services (AVMS) Directive,<sup>4</sup> a regulatory tool of the European Union (EU), covers only audiovisual media services - both traditional television (linear services) and video-on-demand (non-linear services) for the wider public. It does not cover all new media services, such as the online versions of traditional newspapers, TV and radio stations, online news portals or blogs, although these seem to be the most important new media services and/or new media in political systems based on liberal democracy (and as the 2011 Arab Spring suggests, also for illiberal democracies and autocracies). Possibly a legal definition of new media or new media services exists in a few EU countries, and some regulatory attempts have been made to regulate new media services, but to our knowledge there is still no specific, exclusive regulation of all new media services in any EU country. This lack of statutory regulation is partially a result of the complicated definitions of some of the new media services, especially of blogs and private information sources open to the public. Only in late 2011, did the Council of Europe develop six criteria, supplemented by a set of indicators, which would allow policy makers to recognise whether a new communication service amounts to a media service or whether it provides intermediary or auxiliary activity for media services.<sup>5</sup>

The section below will further examine the media policy responses (or lack of them) of governments and non-governmental actors (i.e. the private sector and NGOs representing journalists) in the new media environment, and investigate whether and how these policy responses (or lack thereof) and self-regulatory and technological developments promote or hinder freer and (more) independent journalism.

## **2.1 Regulation of new media services**

Specific comprehensive regulation of new media services is absent in all Mediadem countries. In all these countries, the regulation and supervision of new media services is shaped by the traditional (offline) legal framework for traditional media. This explains the controversies concerning journalism and non-journalism, or quasi-journalism, in the online environment, as well as the transition from a free (and by and large irresponsible) online world towards one regulated by the courts. Heavy-handed state regulation usually exists in the case of PSM online offers, sometimes co-regulatory approaches are applicable for the protection of minors in the online environment, while the self-regulatory ethical press standards seem to be slowly transposed to the online press as well as to (some types of) bloggers. All online content, irrespective of its origin, is further subject to the general laws concerning libel/defamation, the protection of privacy/private data, and criminal activities such as child pornography. The enforcement of these regulations is carried out through the traditional chain of control - police, prosecutors and courts.

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<sup>4</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15/4/2010, p. 1.

<sup>5</sup> Recommendation CM/Rec(2011)7.

And yet there are some national peculiarities. In Croatia, for instance, the new media services are generally covered by the Act on Electronic Media although their definition remains elusive (Švob-Đokić and Bilić, 2011: 12 and 21). In Denmark, new media are either regulated as old media (if they register as media with the Press Council, thus gaining access to traditional media privileges, such as the protection of sources) or they fall under the general provisions of media law and civil/criminal law (Helles, Søndergaard and Toft, 2011: 9-10, 12). The Danish approach to regulation thus varies, depending on the (self-) registration of new media services. Germany seems to introducing similar but more complicated regulation of bloggers which will be discussed at a later point (Müller and Gusy, 2011: 10).

## 2.2 The main policy issues concerning the new media services

Nine main policy issues concerning the new media services in the 14 Mediadem countries have been identified. Obviously, only some of these issues emerged as widespread, while others are rare or country specific. In general, these issues concern resistance towards any form of regulation (1), hate/libel speech issues (2), the tabloidization of major traditional (print) media (3), the profitability of major traditional (print) media (4), protection of minors (5), the politicisation of the online world (6), concerns expressed by the commercial sector over the development of online PSM services (7), data retention and protection of informants (8) and copyright issues (9).

	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
Typology of issues	3, 4, 7	1, 2	3, 4	3, 4, 5	1, 3	2, 4	4, 5, 7, 8	2	2, 4, 7, 9	1, 2, 4	1, 2, 3, 4, 6	2, 6	2, 4, 5, 7	2, 3, 4

The table above provides a clear overview of the frequency of each policy issue according to our experts, as well as of national peculiarities. It shows that issues related to hate/libel speech in new media services concern most Mediadem countries. Internet-based media services have facilitated illegal activities in various fields, including hate/libel speech, mainly due to easier anonymity. However, there is a discrepancy in some countries (e.g. Greece) as to whether blogs should be considered as having the same level of responsibilities as the professional media. In other words, although blogs have brought the same or even more serious problems related to hate speech, some country legislators/courts are reluctant to consider blogs as a public space which should follow certain standard rules in common with the offline world.

The profitability of major traditional media has emerged as the second major issue in most Mediadem countries. This has actually become an issue of international dimensions. For example, on the initiative of Belgian print media, in 2011 the Brussels Court of Appeals condemned the US company Google for violating Belgian copyright law by publishing links to, and abstracts of, articles from newspapers

through its Google News and Google Cache functions, without the permission of publishers. Separate legal proceedings are ongoing regarding the calculation of damages to be paid by Google to the Belgian publishers (Van Besien, 2010: 31). Similarly, in Italy, traditional paper-based newspapers felt online competition to be unbearable, and lodged appeals with the Italian Antitrust Authority (AGCOM) requesting remuneration for the use of content by third parties. The Italian Federation of Newspaper Publishers (FIEG) claimed that Google News gathered news online from the main information websites and enabled users to read it without having to access the homepage of the original websites. FIEG also claimed that those newspapers that did not consent to appear on Google's specialised services, would have suffered negative treatment in general search engine services, being lowered down in, or even excluded from the results list. Although AGCOM did not find the overall level of competition affected by Google, it accepted the obligations to improve competition proposed by Google, mainly the possibility for newspapers to exclude the retrieval of their news content on Google News without being penalised in searches on the general search engine (Caticala, 2011 in Casarosa and Brogi, 2011: 28).

In almost half of cases, tabloidization of major traditional media is perceived as a problem, seen as a result of the expansion of free offers of infotainment online.

Protection of minors on the other hand seems to be an issue in one third of the Mediadem countries.

It should be mentioned that in Bulgaria, Estonia and Romania there seems to be especially strong resistance towards any form of regulation of online media services. While in Estonia this can be explained by their traditional attachment to freedom of expression, in Bulgaria this may have roots in a strong community of hackers, as well as the strong presence of online defenders of civil liberties (Heikkilä, Domingo, Pies, Glowacki, Kus & Baisnée, 2012: 66). Romania remains a puzzle, however. Most likely, these two post communist countries still feel the need to compensate for years of harsh suppression of freedom of expression reflected in the visible trend towards major deregulation. Indeed, in Bulgaria, during the early transition from communism to a liberal democracy and market economy after 1989, freedom of expression was interpreted by the Constitutional Court, the major political players and the general public to demand freedom from state regulation. The ideological climate in the early transition period (the early 1990s) was very much neo-liberal and the magic word was 'deregulate', the general recipe for reforms being – 'get the state out' (Smilova, Smilov and Ganev, 2011: 44). In Romania, there are actually two trends present: one in favour of regulating everything, and one considering that sufficient regulation for freedom of expression already exists in Romanian law, but requires sincere application. The first trend is mainly represented by politicians and MPs (Ghinea and Avădani, 2011: 9-10), while the second trend is represented by NGOs interested in media freedom and freedom of expression in general. The latter groups consider that the current legislative provisions properly address the need to protect the rights of any person concerned, yet take the view that there is a certain lack of technical understanding concerning the Internet and new media among law makers, which explains why the solutions they propose are impractical, inapplicable or extremely expensive (Ghinea and Avădani, 2011: 11).

The concerns of the commercial sector over the development of online PSM services appeared as an issue in only four Mediadem countries.

Finally, although the issue of data retention seems to be especially pronounced in Germany, in all likelihood it is or might become a more widespread concern (similarly to copyright issues). Internet providers in all EU countries are obliged to store all communication data and IP-addresses for six months and submit them on request to state prosecutors, intelligence services, and other law enforcement authorities. This obligation was partly successfully contested by journalistic organisations before the Constitutional Court in Germany, but it is an issue in Romania too. The German Federal Constitutional Court quashed the national legislation because of deficient precautions for data protection, but it did not question the data retention policy in general (Müller and Gusy, 2011: 41).

### 2.3 Do online-only news media have similar status to traditional news media?

	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
<b>Yes</b>	x				x	x	x	x	x	x	x	x	x	
<b>No</b>			x											x
<b>It depends</b>		x		x										

This table concerns public regulation (legislation) rather than self-regulation of online-only news media. As mentioned above, the case of Denmark is specific, as are the Bulgarian and Estonian cases but on different grounds – since there is no press law, online-only news media are similar in their lack of regulation only to print media. Similarly to the Danish case, but perhaps more authoritatively, Greek online newspapers and news media services in press-like form have a similar status to the press in terms of their rights and obligations. Online-only news media must register with the Secretariat General of Information and Communication. At the same time, Greece does not regulate new applications and media services that do not strictly fit into the traditional regulatory systems for the press and broadcasting (Psychogiopoulou, Anagnostou and Kandyla, 2011: 12). In Italy, online-only news media fall into the category of electronic editorial products. Although the Italian legislation tried to regulate both the traditional and the electronic press, Legislative Decree No. 70/2003 clarified that the publishers of electronic newspapers have the same obligations as traditional publishers (they need to register with the National Registry, pay annual fees, etc.) only if they wish to apply for the grant of press subsidies under Act 62/2001. On the other hand, in Turkey, journalists from online-only media until spring 2012 could not obtain the accreditation that traditional media outlets receive. In Slovakia, the Press Law does not recognise online-only news media (except wire agencies) and the Broadcasting Law considers only audiovisual services on demand.

Furthermore, we can differentiate between the implicit and explicit definition of equality of status, as well as legal and/or ethical equality (in terms of rights and duties) with respect to the status of online-only news media. Obviously, in all countries, the online-only news media must comply with the general legislative framework. However, the emerging trend seems to be that it is explicitly stated in the

Press Law or in similar media acts whether, and if so, under what conditions, online-only media can have equal rights and duties as the traditional media.

Regarding self-regulation (mainly in the form of codes of ethics), the status of online-only news media is more complex. Firstly, in some countries self-regulation is binding only for signatories (e.g. in Bulgaria, Finland). This analysis is further complicated by the fact that in Bulgaria signatories to the Code of Ethics of the Bulgarian Media are not individual journalists, but their respective media outlets. In addition, Bulgarian bloggers have no journalistic status, and online-only media are not considered media outlets, so the online media are not signatories to the Code of Ethics. In other countries, self-regulation is *de facto* binding for all journalists, while there is often no clear definition of what constitutes a journalist. For example, in Slovakia, the Code of Ethics of the Journalist is binding only for signatories; however, the Press Council also deals with the media or individual journalists who have not signed the Code of Ethics. It also mentions bloggers. Similarly, in Belgium, the guidelines of self-regulatory organisations also apply to online media and ethical codes apply to all journalistic activities, irrespective of whether the authors are professional journalists or not or whether the authors are members of the self-regulatory organisations. In Estonia, both local Press Councils apply their rules in relation to online-only news media as well. Interestingly, in some codes of ethics, there is still no mention of the rights and duties of online-only news media and bloggers (who are in some countries under certain conditions already seen as equal to professional journalists).

#### **2.4 The problematic status of independent online journalism and participatory journalism**

In spite of the relatively short period in which the Internet has grown, there is already discussion about a third wave of development of consumers of online journalism (Pryor, 2002) and/or about a third generation of online journalism (Lemos, 2007). Yet media law is not adapted to the digital environment. In particular, the definition of the journalistic profession in the new media is not clear. This is not a new issue - the definition in the offline world remains different in many countries. Europe-wide, although the European Court of Human Rights has never provided for a clear-cut definition of a journalist as such, it has on several occasions applied the same reasoning used for journalists to extend journalistic privileges and defences to non-journalists. The criteria used by the Court were the exercise of a public watchdog role of organisations, or the expression of individuals regarding matters of public interest (Cafaggi and Casarosa, 2012).

The key question is to define the role of non-professional activities (i.e. blogs) and the legal status of bloggers. Already in 2008,<sup>6</sup> the European Parliament's Culture Committee discussed a report on the regulation of user-generated content and blogs, which advocated 'clarifying' the status of blogs and the establishment of a 'right to reply'. This is increasingly an important policy issue since in some countries there is a blogosphere critical of the mainstream news media. Among the Mediadem countries,

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<sup>6</sup> See <http://www.europarl.europa.eu/sides/getDoc.do?language=en&type=IM-PRESS&reference=20080605STO30955>. The European Parliament then adopted a non-binding resolution on this topic in September 2008. See: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0459&language=EN> (date accessed 11/07/2012).

the United Kingdom and Germany enjoy a lively blogosphere scene with a relevant number of blogs devoted to media criticism, while technology and media industry trends attract more attention in the blogosphere of Finland (Heikkilä *et al.*, 2012: 63).

Interestingly, while a number of blogs view themselves as ‘new news sources’, few bloggers see themselves as journalists (Fenton, 2009: 144-145). Nevertheless, examples from some countries (to some degree Croatia, Belgium, Germany, Spain, but especially Slovakia and Turkey) show a considerable impact of bloggers on local or national politics. Perhaps in anticipation of this trend, some countries (e.g. Denmark) have established voluntary registration of blogs and online media, if they wish to qualify as professional journalists. In Denmark the purpose of the rule is to make it easy for bloggers to achieve the same privileges as other media and to make them responsible in accordance with the Media Liability Act.

Among the Mediadem countries, three main problems merit attention. The first one concerns the identification of the author(s) of a blog and other new media outlets. This identification influences the ability to establish liability for content and comments. It also reduces the chances of leaks, anonymous comments or disclosure of secrets. A major case in the UK regarding the anonymity of bloggers (*The Author of A Blog v. Times Newspapers*) already occurred in 2009. A policeman wrote an anonymous blog about his job and requested an injunction against the Times Newspaper, which was threatening to publish his real identity. The court rejected the request, ruling that ‘blogging is essentially a public rather than a private activity’, rendering the use of the blog in this case as ‘analogous’ to journalism.<sup>7</sup>

Secondly, recognising the professional status of the blogger entails that the blogger must comply with the rules, registration and establishment of a professional relationship with sources. Also, professional status may require compliance with the general ethical standards for professional journalists. For example, in Germany, the fulfilment of the basic journalistic standards of reporting includes ‘delineation of reporting and opinion, accuracy in research and checking and assessment of sources’ (Müller and Gusy, 2011: 32), which the blogger has to comply with if the blogs are to be comparable to traditional news media (or in the words of the law: journalistic-editorial). The German Interstate Broadcasting Treaty provides for accuracy as a reporting requirement for journalistic editorial online content, especially online news websites, politically relevant online magazines or blogs. In Denmark, bloggers are required to register at the Press Council to obtain legal status of protection. According to the Danish Media Liability Act, the protection may include electronic storage of research data or protection of sources. In Finland, registration allows access to collective contracts (and other advantages for professionals) in exchange for accepting a set of editorial duties. In Slovakia, the Press Law does not grant special rights to bloggers yet the Press Code is binding for online journalists and even bloggers. To make this even more puzzling, the Press Council only began considering extension of its activities in the online world in 2011 and in the first half of 2012. In other countries, there is a liberal interpretation of the blogosphere and online activities are not seen as related to professional journalism. It is true that in many countries (e.g. Slovakia, Spain, the United Kingdom) bloggers do not see themselves as journalists, but rather their interest in publishing online is primarily related to their wish to

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<sup>7</sup> See <http://www.shrlg.org.uk/2009/06/18/the-author-of-a-blog-v-times-newspapers-ltd> (date accessed 11/07/2012).

publicly express their professional expertise and other professional activities rather than to be part of traditional journalism.

The third issue stems from the responsibility of a blogger as an entrepreneur (and businessperson). If the blog is considered a media company, then liabilities are foreseeable. For instance, in the German law, the Interstate Broadcasting Treaty establishes that online media, especially political blogs, are free to publicise content with a clear bias, as long as journalistic standards are respected (i.e. delineation of fact and comment). The regulation of journalistic and editorial online content depends on the outlet. In contrast, in Greece blogs are not considered to be media companies. Therefore, in case of defamation, responsibilities and compensation are lower.

*Do bloggers have similar status to journalists?*

	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
<b>Law</b>	yes	no	no	yes / no	no	yes	yes / no	no	yes /no	no	no	no	yes	no
<b>Code of ethics</b>	yes	no	no	yes	no	no	yes / no	no	no	no	yes	no	no	no

In the majority of the Mediadem countries, bloggers and similar quasi-journalists have no special protection either under the law or under the code of ethics. Only in Belgium, through the jurisprudence of the Constitutional Court (as regards the Act on the Protection of Journalistic Sources) and in Finland by means of the Act on Freedom of Expression in Mass Media, is full protection provided to ‘everybody who exercises an informative activity whether or not they are professional journalists’ without further conditions. In addition, both Belgian self-regulatory organisations for journalism ethics, the RVDJ and the CDJ, hold the opinion that journalistic ethics apply to all individuals who undertake journalistic activities.

Similarly, the courts in the UK have not sought to draw distinctions between professional journalists and private publishers. However, professional journalists tend to be subject to codes of ethics, whereas most private publishers are not (Craufurd Smith and Stolte, 2011: 40). Therefore, a blogger may be interested in being protected under the professional umbrella. As there is less control in online activity (e.g. ease of comments or tweets), bloggers can claim ‘responsible journalism’ principles such as good faith and an accurate factual basis.<sup>8</sup>

As previously mentioned, Denmark is a special case. If bloggers are affiliated with a newspaper website, they are seen as journalists. If not, no protection is given to them. Similar, but not legally binding, is the situation in Bulgaria. When a journalist has a blog, then it is seen as a journalist’s blog and as journalistic activity. Even more complicated is the position of online media in Germany. There is no unambiguous legal framework for online media. First, different terminology is used for online

<sup>8</sup> See *Reynolds v Tomes Newspapers Ltd* [2001] 2 AC 127.

media in the Interstate Treaty on Broadcasting and Telemedia referring to journalistic-editorial content, and in the Penal Code of Procedure referring to journalists. Second, the legislation provides for certain obligations as well as rights for those online services that offer journalistic-editorial content. Those who fulfil the requirements of journalistic-editorial content (accuracy, impartial and balanced reporting) enjoy the same position as journalists. Third, it is not definitely decided how to interpret the notion of journalistic-editorial content. According to a recently established understanding, journalistic-editorial content requires the use of journalistic skills and methods by those working on the blog and providing information with the intention of shaping public opinion. This includes a basic structure of different people and a basic organisation working on the outlet.

In some countries (e.g. Estonia, Slovakia, or Romania) bloggers can *de facto* be seen as journalists. This can be confirmed by the fact that bloggers can be included in journalistic competitions or by their inclusion into self-regulatory mechanisms. These cases also show that the absence of statutory regulation may bring different practical results. For example, in Estonia, blogging is an opportunity to enter the journalistic job market. In Slovakia and Romania, being seen as an online journalist does not mean having any extra privileges but rather, more responsibilities.

Finally, there are also specific situations such as in Italy where there is a status-based definition. A journalist is whoever is a member of the Journalists' Association (*Ordine dei giornalisti*). In order to become a member a candidate must have a two year employment contract with a media outlet and pass a specific exam (provided by the Association) (Cafaggi and Casarosa, 2012).

## **2.5 Do new media services promote regulatory convergence?**

The developments around new media point to the necessity of regulatory convergence as the same content is regulated online and accessibility towards it is often not regulated offline (e.g. pornographic materials). More importantly, the courts have no strict rules on how to regulate online media; they apply standard civic and criminal legislation, sometimes with different results in identical court cases, even within the same country (e.g. Slovakia). Yet this is not unique to online media – the courts in Slovakia also seem to be confused in the case of offline media.

Technological convergence has transformed news consumption and journalistic production patterns. From a user perspective, new media services are consumed on different platforms with little difference. This change raises the issue of regulatory convergence. There are three types of response: countries which have opted for convergence, countries which keep the two spheres of the media separated, and countries without any legislation for new media services. There is no clear trend towards institutional convergence in most Mediadem countries. A single regulator for traditional audiovisual and new media has to date only been established in the UK in 2002 (Ofcom), Finland (FICORA) in 2004 and Italy (AGCOM) in 2004. In approximately half of the Mediadem countries there seems to be some confusion or uncertainty over institutional regulatory convergence. Even a converged regulator may not be necessarily a unified one. For example, Ofcom can only regulate a very small part of new media and there are several other regulators active in all media fields. The following table suggests approaches to convergence in the Mediadem countries.

<b>Trend towards convergence</b>	<b>Belgium</b>	<b>Bulgaria</b>	<b>Croatia</b>	<b>Denmark</b>	<b>Estonia</b>	<b>Finland</b>	<b>Germany</b>	<b>Greece</b>	<b>Italy</b>	<b>Romania</b>	<b>Slovakia</b>	<b>Spain</b>	<b>UK</b>	<b>Turkey</b>
<b>Yes</b>				x		x			x				x	
<b>No</b>		x			x			x		x		x		x
<b>No clear trend</b>	x		x				x				x	x		

Perhaps, in most of the Mediadem countries, the situation is similar to Belgium, where technical convergence has not seriously affected the institutional structures of media policy - the legislation still makes a distinction between the written press and the audiovisual media, and different levels of state authorities are responsible for the regulation of these media. Moreover, in the case of new media the legislators (but not necessarily the courts) usually impose softer rules on the new media in line with the AVMS Directive. The analysis reveals that most Mediadem countries do not favour convergence of institutional structures and separate traditional and digital activity. Consequently, legislation and institutional structures are divided, and sometimes not aligned. For example, in Greece, the proposed merger between the National Telecommunications and Post Commission (NTPC) and the National Council for Radio and Television (NCRT) has been ruled out because the main policy-making actors disagreed, arguing that these two industries must be kept separate, and what is more, even considered the proposal unconstitutional.<sup>9</sup> In Belgium, the Constitutional Court forced the audiovisual regulators for the French-language and the Flemish media (CSA and VRM) and the telecom regulator (BIPT) to cooperate closely within the Conference of Regulators for the industry of Electronic Communications (CRC). Both regulatory bodies considered the Internet as a natural extension of their exclusive cultural (and media) competences, so there was no need for a federal body. In Turkey, rapid deregulation has not favoured a more open institutional structure. Instead, political power managed the Internet and new media as a complementary sphere of media control. Only in the name of competition do new media converge with traditional ones under the autonomous regulatory body named *Rekabet Kurumu*. In Spain, convergence is not addressed. The current audiovisual law has created a powerful independent regulator (CEMA). However, it has not been developed at all and the Spanish Government has not expressed an interest in continuing regulation through institutional structures as of early 2012.

It is interesting that other countries maintain separate structures, while recognising convergence in some aspects. For example, in Germany, legislation distinguishes different functions and media content while recognising the convergence of devices. Regulatory convergence exists in some areas while it does not in others. It is evidenced in the Telemedia provisions for PSM and editorial-journalistic content in the Interstate Treaty on Broadcasting. The same applies to the assessment of state media authorities to scrutinise whether an online offer is web-television and thus within the remit of the authorities.

<sup>9</sup> See Imerisia (2011).

In other countries, for example in Finland, the Finnish Journalists' Union and the Council for Mass Media (CMM) have established guidelines for professional activity no matter the platform. Moreover, the Basic Act on the Exercise of Freedom of Expression in Mass Media (460/2003) covers both traditional and new media.

## **2.6 Judicial responses concerning the freedom of the new media services**

There has been so far little evidence in most countries to draw definite conclusions concerning the courts' recent approaches to new media services. Yet it seems that courts will sooner or later start adopting 'hard' approaches to new media services in issues related to freedom of speech and libel/defamation, i.e. an approach similar to the one used in the case of the traditional media. In some countries (e.g. Greece), this contrasts with a soft approach initially applied in the case of new media services, which do not have equal status with traditional media, and thus have no or limited duties and, consequently, face softer punishments by the courts.

In contrast to the Greek courts' (at least initial) ultra-liberal approach, some Mediadem countries do not hesitate to ask international bodies/companies to block access to some websites or remove some content from the Internet. These countries included Belgium, Denmark, Germany, Italy, Spain, the United Kingdom and Turkey in the second half of 2011. Google accepted 100% of Belgian courts' orders but only 45% of those coming from the UK.<sup>10</sup> As far as controversial content is concerned, for example, in 2011 a German court ordered Google to remove 898 search results which linked to forums and blogs containing statements about a government agency and one of its employees that the court determined were not credible. Google also restricted, at the German authorities' request, some videos from being viewed in Germany for allegedly violating the German Children and Young Persons Act. Google received 14 requests from the Spanish Data Protection Authority to remove 270 search results which linked to blogs and sites referencing individuals and public figures. The Spanish Data Protection Authority also ordered the removal of three blogs published on Blogger and three videos hosted on YouTube in 2011.<sup>11</sup> In addition to Google, Twitter was also subject to governmental and court requests for removal of some data. In the first half of 2012, authorities in three Mediadem countries (Greece, Turkey and the UK) requested removal of some data from Twitter, in all cases without success (Twitter, 2012).

The following table represents Mediadem countries' expert views on court approaches to new media services which may differ slightly from the Google data.

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<sup>10</sup> Google Transparency Report, July to December 2011, <http://www.google.com/transparencyreport/removals/government/countries> (11/07/2012).

<sup>11</sup> Google Transparency Report, July to December 2011, <http://www.google.com/transparencyreport/removals/government> (date accessed 11/07/2012).

Courts	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
<b>Hard approach</b>				x	x				x				x	x
<b>Soft approach</b>	x								x					
<b>No clear trend yet</b>		x	x			x	x	x		x	x	x		

An example of a ‘hard’ judicial approach can be seen in a ruling by a local court in Slovakia in 2011. In this ruling (partially overturned by a higher court in 2012), the court decided that a local news portal should pay non-pecuniary damages worth 5,000 EUR to a local businessman who felt offended by an anonymous criticism presented on the web portal. In addition, the provider was ordered to delete the offensive words (Piško, 2012). A similar trend can be seen in Romania, where some court rulings ordered bloggers to remove content from their blogs. The trend towards hard-approach regulation can be seen in the UK, where there is no difference between the traditional and the new media outlets in judicial approach. There are also no distinctions between professional journalists and private publishers in their online activities. Blogs are considered to be of a public rather than a private nature. The case law of Italy has demonstrated two opposing tendencies: one to equate blogs and blogging to newspapers and journalism, and the other to deny such an equation. In Greece, the legal rules regulating the press also apply to the e-versions of magazines and newspapers. However, in the case of blogs, the regulation of content in order to protect the honour, reputation, personality or private life of persons has not been fully settled. A strong defence of the distinctiveness of blogs as a medium of communication was advanced in a relatively recent court decision which ruled that blogs should not be treated in the same way as traditional media (Anagnostou, Psychogiopoulou and Kandyla, 2010: 29, Psychogiopoulou, Anagnostou and Kandyla, 2011: 42).

Bulgaria mixes both hard and soft approaches. As far as the country lacks any specific press law and the Radio and Television Act covers only the old electronic media, there is no clear position on the new media. The approach followed is in fact ambiguous. On the one hand, the Penal Code and the courts do not distinguish between the types of media with respect to libel and hate speech. In October 2011, a district court for the first time convicted a youngster for instigating racial hatred by initiating a group in a social network, urging people to ‘go and kill the Roma’. On the other hand, there was a legislative initiative to include special restrictions for libel against politicians specifically in the Electoral Code from 2011, which would apply to all media – both old and new ones. After a public outcry, the new media were excluded from this special pre-election regime. In Croatia, there was a lawsuit by a former starlet against the owners of a website which had published compromising old photographs of her. She claimed that this had caused her emotional distress, and she won the case on this basis: as well as having to withdraw the material, the website owners were ordered by the court to pay her damages (Vilović, 2010: 126). This

suggests a hard approach from the courts to new media services. In Belgium, the courts apply regulations for the traditional media (print and audiovisual) to online media. However, regulation for the print media is in general very light, and the same applies to the online media. The Belgian Constitutional Court (Constitutional Court, no. 91/2006 of 7 June 2006) established that the protection of journalistic sources covers all individuals that exercise an informative activity – both professional and non-professional journalists. In Germany, once an online offer can be classified as ‘journalistic-editorial’, the person generating this content has certain rights but also some obligations, such as the obligation to adhere to journalistic standards. Another question is whether the administrator of a blog can be held responsible for the content of comments and other entries in forms. Usually, website administrators are not the main actors in civil litigation. In Germany, legal action is taken against copyright infringements and this can be deemed as a hard approach; the legal framework of freedom of speech and possible payment of damages or injunctions to cease further publication is developing and follows a differentiated approach.

### **3. The impact of new media services on PSM, commercial media and journalists**

This section discusses cases and trends of impacts and controversies of the new media services in relation to PSM, commercial media and journalists. Most recent studies suggest that traditional news organisations are being sidestepped by newsmakers using social media to communicate directly with audiences; that news products are being unbundled across multiple platforms; and that production processes are becoming more networked (Bradshaw, 2011: 2). This first trend should be welcomed for plurality of information, but at the same time it may mean that traditional media will continue losing important sources of income due to the limited attractiveness of their offer (i.e. lower number of readers or copies sold leading to lower income from advertising).

Lasorsa (2010) has identified four major trends affecting the production and reception of news in the new online environment: news proliferation, audience fragmentation, news migration online and news owner concentration. Thurman (2011) has also noticed a trend towards personalised news (on-demand journalism) as a result of either computer-generated algorithms (e.g. Google News) and/or end users (e.g. RSS readers). All these trends lead towards diminishing the traditional role of journalists. On the one hand, this trend gives power to the online reader. On the other hand, considering that, worldwide, the reliance on established sources (PR and corporate spokespersons) in digital media remains around 60% (Oriella, 2011), this seems to be a positive trend towards more balanced news coverage.

#### **3.1 Conflicts between private media and PSM over online services**

In some EU countries conflicting issues have already emerged over who should dominate and benefit from the online information/business world, and what is the role of direct and indirect state subsidies in these conflicting situations. The EU doctrine recognises the value of public radio and television as an essential part of democratic politics. There is a broad consensus on its role as a guarantor of pluralism, diversity and minority protection, among other classic functions (Manfredi, 2004). However, the digital environment requires a thorough review of public media as far as deregulation and liberalisation create a totally different environment. The need to

regulate the role of public television in the process of technological convergence is recurrent in academic literature (Noveck, 1999; McGonagle, 2001). It is broadly accepted that there is no longer public service broadcasting but rather PSM, which is the result of convergence. However, it is not mandatory for all online new media services to accomplish public service. The new situation does not justify the unlimited extension of services to all areas of activity (creation, production, distribution, commercial or media programming). An additional constraint is the scheme developed by the European Commission (EC) to finance PSM. In order to avoid market distortion, a company receiving any state aid must explain which public service obligations are covered by public money (see Case C-280/00 *Altmark*, the Court of Justice of the EU 2003/C 226/01). This entails the establishment of *ex-ante* or *ex-post* criteria to control the aid, set by the EC Decision of 20 December 2011.<sup>12</sup>

As mentioned, in four of the fourteen Mediadem countries, private media started disputes against the funding of the online activity of PSM. In the United Kingdom, the private broadcaster ITN officially stated that ‘the BBC’s expansionist strategy poses a threat to plurality’. ITN considered the online strategy, the mobile services and the map-based news services of the BBC as initiatives intruding on emerging markets and crushing nascent commercial business.<sup>13</sup> In Germany, PSM’s online activities are clearly defined after private company complaints to the EC. PSM are entitled to offer only online services which are not comparable to print media. This procedure and the legislature adopted, exclude PSM from commercially viable activities as well as any state aid (see also Daly and Farrand, 2011: 35-36).

Criticisms of the online activities of PSM come also from the press. The Belgian French-speaking newspapers association (JFB) argued that the public service broadcaster RTBF could not receive public money to develop online projects and, at the same time, compete for advertising investments. The court ruled in favour of RTBF because its online activities were considered to fall within the broadly-formulated public remit of RTBF (Docquir, 2012; Van Besien, 2011: 15). It is remarkable that in Denmark, the PSM achieved a better position to negotiate the renewed contract to finance PSM activities, including online activities, in 2010. There is a wider consensus that PSM activities should be served across various platforms, including publishing content such as news and entertainment online. This approach legally and normatively justifies the state funding for Danish PSM (Helles, Søndergaard and Toft, 2011: 23).

Brevini (2010) suggests that the threat to the existence or prosperity claimed by the private media is most likely not substantiated. Nevertheless, these disputes can also have a negative impact on democratic processes, resulting in less socially relevant and balanced news provided by the PSM, including their online services. Also, the PSM online media services are more likely to be free of advertising and more attentive to the protection of personal data and the protection of minors. There is usually less important commercial motivation and more respect for regulation in the case of PSM.

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<sup>12</sup> European Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11/1/2012, p. 3.

<sup>13</sup> ITN submission to Ofcom’s second PSB review, Phase 2: Preparing for the digital future, [http://stakeholders.ofcom.org.uk/binaries/consultations/psb2\\_phase2/responses/ITN.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/psb2_phase2/responses/ITN.pdf) (date accessed 11/07/2012).

### 3.2 The major ‘constraints’ that various new media services face in relation to their independence

It is well-known that the private print media in particular, face or at least claim to face serious problems as a result of free offers in the online world and have therefore attempted to find new solutions to their professional and economic challenges. On the one hand, publishers and also broadcasters address new media as a platform to improve the quality of their content, offer specialised programmes or services, encourage feedback and participation from readers and viewers, and make profit from online activities, and on the other hand, in order to adapt their traditional business model into the new realities where new market players (e.g. search engines and online news portals) can easily exploit their investments in the online content.

The research in this area was focused on possible problems related to (1) market entry, (2) ownership, (3) finances, (4) access to information, and (5) the regulatory framework concerning what the media can publish. Some of these issues were raised independently and indicated as problematic by country researchers.

	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
<b>Type of constraints</b>	1, 3	3, 4	3	3	3	3	3	3	3	3	3	3	3	3

In most countries, the major or the only issue relating to constraints faced by new media services is claimed to be finance. This is a typical problem of those new media services which have no backing by traditional media parent companies. This issue is related to fierce competition in both offline and online markets. A general issue seems to be the reluctance of advertisers to invest sufficiently in online ads. However, this is probably only a temporary and local problem, although obviously entrepreneurs may always claim that they need more investment. Indeed, in the UK, for example, advertising is actually moving online to such an extent that it damages the finances of traditional media.<sup>14</sup>

As expected, the traditional problem of ownership (related to plurality and to possible or real pressures of media owners on certain types of content), as well as the issue of market entry, have disappeared.

The following table reveals how free new media services are comparatively seen as.

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<sup>14</sup> E-mail from Yolande Stolte, 27 June 2012 (Yolande.Stolte@ed.ac.uk). See also Internet Advertising Bureau UK, ‘2011 online adspend full year results’, 2/4/2012, <http://www.iabuk.net/research/library/2011-online-adspend-full-year-results> (date accessed 11/7/2012).

	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
<b>More likely free and independent</b>		x	x	x	x	x			x	x	x	x		
<b>More likely not free and independent</b>														x
<b>The same status</b>	x						x	x					x	

New media services face similar constraints as traditional media do, though their nature and intensity may vary depending on the type of service involved. New media services facilitate freedom of expression, but this does not automatically mean they are seen as free and independent. Obviously, however, they are freer than audiovisual traditional media in terms of regulation, which is stricter for linear broadcast programmes. As can be seen from the table, in almost all Mediadem countries, new media services are seen as free and independent, or having equal status to traditional media. The only exception is Turkey. To be precise, Turkey can be seen as having traditional media which is also not free. A number of factors contribute to the overall gloomy picture of the Turkish media, including new media services (see Zlatev, 2011: 36, Tunc and Gorgulu, 2012: 41-42). However, since there is a common distrust of the print media, digital platforms are used as a refreshing alternative in Turkey too (Tunc and Gorgulu, 2012: 39). For example, Twitter has become one of the most effective tools for Turkish journalists since 2010. Numerous Turkish columnists, correspondents, and photo-journalists disseminate news on Twitter in advance of the newspapers editions, adding their commentaries and criticism.

### 3.3 The impact of online news media services on traditional media

The Internet (as the backbone of all new media services) has already provided cheap and varied sources of information and simplified archive searches. Online new media services have multiplied not only news services but also independent sources of information. However, more information may not necessarily mean better (more socially useful) information. On the contrary, the sudden expansion of the Internet in the late 1990s brought more rumours and scandals into the reporting of the traditional media. The most recent research (Lim, 2012) casts doubt on the notion that vast amounts of instantly changing news circulate among online media. Lim (2012) also claims that the immediacy of online news is a myth. This myth is not supported by statistical data. Furthermore, this myth ignores the fact that traditional institutional practices govern the news production activities of news websites. This was well-documented by Murár (2012: 66), who pointed out that the overall trend of traditional media - offering the most recent information as quickly as possible - also results in the re-evaluation of the traditional model of institutional authority. Moreover, traditional media actually still compete at the traditional level of professional journalism, i.e. on

speed and the importance of news. In other words, the key professional parameters of journalism so far remain the same, regardless of new forms of communication (see Paterson and Domingo, 2008). Nevertheless, blogs and social media have provided interesting leads for reports as well as for identifying experts in various fields. The Finnish study (Kuutti, Lauk and Lindgren, 2011: 38) confirms that journalists use social media to some degree in their professional routines (seeking background, mapping discussion topics, etc.). Similarly, Oriella's 2011 report confirms that more than 40% of journalists from various countries use blogs when sourcing news and more than a quarter use blogs for verifying information (Oriella, 2011).

Even more importantly, some media have introduced the concept of 'iamreporter' or 'ireport', i.e. encouraging viewers to send tips and video clips or photos. Another type of contribution is readers' active participation in the editorial process – and journalism production. This has led to interesting projects with tangible results.<sup>15</sup> It seems that the British Guardian is a leader of this type of open journalism. This so-called 'open journalism' is composed of principles related to public issue debates, real time conversation and adding value through audiences. In Finland, the online version of Aamulehti has assigned a group of 'online correspondents' to operate within the immense digital information flow on the Internet (Heikkilä Domingo, Pies, Glowacki, Kus & Baisnée, 2012: 39). Most recently, in April 2012, the Italian daily La Repubblica launched a new platform - Reporter - for users to submit videos. A comparative study done by Heikkilä *et al.*, (2012: 54) suggests that collaborative news production in online news organisations can be found worldwide. These collaborative practices bring new professional challenges to editorial offices. The use of ICTs has required the media to hire or train more experienced editors who are able to process multiple sources of information of various quality/reliability and (ideally) in different languages. Additionally, online editions apply pressure for continuous editing and revision of already published stories. Finally, the new media services provide a platform for criticism and feedback on media issues. This criticism is perhaps most present in the United Kingdom, where the new media services are often regarded as instrumental in giving a voice to public criticism of the excesses of tabloid journalism (Heikkilä *et al.*, 2012: 39).

From the above analysis, there seem to be two important types of impact of new online media services on traditional media services: a professional impact and an economic impact. The professional impact is understood as an increase or decline in the quality of traditional media output. Economic impact includes positive or negative consequences for the prosperity of traditional media, and thus, indirectly, on the free and independent work of the traditional media. In other words, if advertisers increasingly invest in online media, this clearly lowers the sources available to the traditional media which may in turn undermine their financial autonomy. As can be seen from the table below, there seems to be a weak or medium positive professional impact on the traditional media in about half of the Mediadem countries and a weak or medium negative economic impact in some countries. There are three unusual exceptions: Finland (a medium positive professional impact), Italy (a weak negative professional impact) and Romania (a medium negative economic impact).

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<sup>15</sup> See <http://www.guardian.co.uk/uk/series/reading-the-riots> (date accessed 11/07/2012).

<b>Professional impact</b>	<b>Strong positive</b>	<b>Medium positive</b>	<b>Weak positive</b>	<b>No impact</b>	<b>No clear trend yet</b>
		DE, FIN	BE, SK, BG(?), RO, EST, HR		DK, TR, GR, UK
	<b>Strong negative</b>	<b>Medium negative</b>	<b>Weak negative</b>		
			IT		
<b>Economic impact</b>	<b>Strong positive</b>	<b>Medium positive</b>	<b>Weak positive</b>	<b>No impact</b>	<b>No clear trend yet</b>
			BE	TR, GR, EST, IT	BG, DK, FIN, HR
	<b>Strong negative</b>	<b>Medium negative</b>	<b>Weak negative</b>		
		RO	DE, SK, UK		

The impact of blogs and citizens' journalism on traditional media in economic terms is in general rather weak. Concerning professional impact, the traditional media are sometimes inspired by blogs and the online news media services (an agenda setting function). What is of social importance is that these sources brought to public attention several topics, which were not covered regularly or even at all by the traditional media. Yet, in spite of a number of alternative sources, it seems that in most Mediadem countries the media still rely on PR/wire services.

There are some interesting variations present here too. For example, there are significant differences between two similar small markets (Belgium – with two linguistic submarkets, and Slovakia). In Belgium there are few online citizen news initiatives, and most blogs come from established journalists writing in their free time or after being dismissed from their jobs and failing to find new employment in established media groups. In contrast, in Slovakia the majority of blogs come from citizens, some popular blogs come from politicians, and relatively few blogs come from (usually unemployed or partially employed) journalists.

### 3.4 The impact of online-only news media on traditional media

In general, it appears that there is a positive impact of online-only news media services on the professional development of traditional media but, at the same time, a prevailing negative economic impact.

<b>Professional impact</b>	<b>Strong positive</b>	<b>Medium positive</b>	<b>Weak positive</b>	<b>No impact</b>	<b>No clear trend yet</b>
		DE, RO, BE, FIN	TR, HR, SK	IT	BG, DK, UK, GR
	<b>Strong negative</b>	<b>Medium negative</b>	<b>Weak negative</b>		
		BE	EST		
<b>Economic impact</b>	<b>Strong positive</b>	<b>Medium positive</b>	<b>Weak positive</b>	<b>No impact</b>	<b>No clear trend yet</b>
		BE		FIN	BG, DK, UK, EST, HR
	<b>Strong negative</b>	<b>Medium negative</b>	<b>Weak negative</b>		
	RO	BE, SK	DE, TR, GR, IT		

In Romania, the online media forced the traditional media to be more active, more dynamic, to include more interactive features, and fostered cross-medium reporting. However, online media have rather tended to lower professional quality standards due to continuous output which favours timeliness rather than accuracy.

Still, the pressure of being online and providing content online left the traditional media on the losing side. They still have not found a healthy way to monetise their online content and they simply lose money just because they must have an online presence. As put by the Belgian Mediadem research team: ‘Economic impact has been probably so far negative but everybody sees the Internet as the future, so there is no option to stay away from it. Publishers are convinced they will eventually find a way to make profit from their websites. Economic impact might be introducing time-accentuating business models. But as there are few online-only outlets, it cannot be distinguished clearly whether it derives from “online-only” outlets or from online as such’.<sup>16</sup>

In general, online-only news media produce little original journalism. Paterson (2006) suggests that the picture of the offline news world (in the English language), at least in relation to international news, is little different on the web. Only four organisations do extensive international reporting (Reuters, AP, AFP, BBC), a few others do some international reporting (CNN, MSN, New York Times, The Guardian

<sup>16</sup> E-mail correspondence with Bart van Besien (bvbesien@ulb.ac.be) from June 5, 2012.

and some other large newspapers and broadcasters), and most do no original reporting.

The shrinkage of revenues for the mainstream media, especially press outlets, can for the most part be attributed to declining advertising revenue and sales due to competition from the online versions of the newspapers themselves and secondarily by online-only news portals. The availability of free online news in general has impacted the economic viability of the newspaper sector, but this mostly concerns free online news from traditional sources and national or international news agencies. Some economic impact of the availability of alternative and free sources can be seen in the fact that even quality newspapers produce a relatively high number of 'light' articles (even gossip articles).

It may be useful to illustrate the general economic consequences of digital technology, free online publishing and free of charge broadcasting through the following case study. A controversial court decision was issued in Slovakia in late 2011 related to the protection of copyrights of journalistic work in the case of use of journalistic output by private monitoring agencies (which aggregate and to some degree categorise data mostly available freely online, including their own monitoring of audio and audiovisual broadcasts) who then distribute their output further to customers for a fee. According to the Slovak courts (including an appellate court), although there is some creativity involved in this type of journalistic work, this is routine work, i.e. the production of daily news - which is not protected under the Copyright Act (Husovec, 2012). In other words, the Slovak courts do not give sufficient protection to the most typical journalistic output. This approach can be seen as a further blow to traditional print media profitability. Two key judicial arguments were that information is made available freely online and that individual journalists have no exclusive claims on their news products.

### **3.5 The impact of blogs, citizen journalism and online-only news media on journalists' work**

About one third of all Mediadem countries claim a positive impact on professionalism as a result of the development of online media services, but there are also cases of reported negative impact. Generally, there is no clear trend concerning the impact of new media services on the journalists' profession. Such an impact can be understood as an improvement or decline in the quality of journalistic output (professional impact) as well as in changes in social behaviour (social impact as a consequence e.g. of more revelations).

<b>Professional impact</b>	<b>Strong positive</b>	<b>Medium positive</b>	<b>Weak positive</b>	<b>No impact</b>	<b>No clear trend yet</b>
		FIN, SK	RO, HR	TR, EST, IT	BG, GR
	<b>Strong negative</b>	<b>Medium negative</b>	<b>Weak negative</b>		
			DK, UK, RO		
<b>Social impact</b>	<b>Strong positive</b>	<b>Medium positive</b>	<b>Weak positive</b>	<b>No impact</b>	<b>No clear trend yet</b>
		FIN, SK	RO, EST, HR	TR	BG, DK, GR, UK, IT
	<b>Strong negative</b>	<b>Medium negative</b>	<b>Weak negative</b>		
			RO		

With respect to structural changes in the development of media companies, these do not have a clear business model for new and digital services. There have been various attempts to monetise online contents, but results are unequal across the Mediadem countries.

	<b>Belgium</b>	<b>Bulgaria</b>	<b>Croatia</b>	<b>Denmark</b>	<b>Estonia</b>	<b>Finland</b>	<b>Germany</b>	<b>Greece</b>	<b>Italy</b>	<b>Romania</b>	<b>Slovakia</b>	<b>Spain</b>	<b>UK</b>	<b>Turkey</b>
<b>Paywall</b>										X		X		X
<b>Free access</b>		X		X			X	X					X	
<b>Combination</b>	X		X		X	X			X		X			

In some countries, such as Greece and Germany, access to most leading newspapers' online content remains free for all users. Only one leading Greek political-economic newspaper has a paywall, allowing no access to a small part of its content without subscription (including the archive). Most Greek newspapers require a subscription for PDF access to their print edition on a monthly basis or charge a fee for a single edition. In Italy, a full version of the digital version of the printed newspaper is available only upon payment; whereas single articles published in a timely manner (including comments and opinions) are available freely on the website. Similarly, in the UK, the majority of the national newspapers have not charged for online content so far. The exceptions are The Times and The Financial Times. Estonia, well-known by its strong preference for freedom of expression, used to have free access to the online versions of newspapers. However, a paywall has recently

become a new feature. Estonian publishers, although forced to charge for their content, have adopted a specific approach: articles tend to be closed only for a certain period of time (to favour buying the paper versions), later becoming freely accessible. However, there are also a number of more sophisticated distinctions between various online versions. For example, in the case of the Spanish daily *El País*, the print newspaper and tablet applications (e-print version) are charged for; online and mobile content is free. Similarly, in Belgium, most articles are freely available, but specialised news outlets (in particular financial newspapers) normally have paywalls. Paywalls are also used for opinion pages and archives. Furthermore, access to news through mobile phones and tablets is generally not free in Belgium.

In some countries there is also present a ‘transitional’ approach. The online version of the German *Tageszeitung (taz)* can be accessed without any restrictions. The publisher, however, has instigated a process called ‘fair payment’. If a reader accesses the website, s/he is asked to donate for the service voluntarily or give a regular (mostly monthly) donation comparable to a subscription but also on a voluntary basis. The whole approach can be described as one of awareness building and encouraging online readers’ financial participation. The actual costs of online publishing are covered by the online-service *Flattr* (see <http://flattr.com/>). However, as indicated above, free access is absolutely prevalent in Germany. Only some papers charge for single articles or their archive function.

Some publishers in a number of countries (e.g. in Slovakia) believe that online publications (and associated advertisements) will become the main source of income in the future and that perhaps the print versions of newspapers will become expensive and possibly personalised supplements to the online versions of the print media. This can be seen in a new business approach where some newspapers have even offered tablet deals to readers (e.g. in Spain but also some newspapers in the USA).

There is also a variety of approaches in the case of access to the online archives of newspapers which seems to be associated with a trend to lock access to these archives. However, only few media businesses have dealt with the issue of charging for content online strategically. For example, in Slovakia, by means of the *Piano* project, launched in May 2011, all major Slovak newspapers and some others (not major papers) went behind one common paywall and offered unlimited access to content considered exclusive. The project brought mixed results during the first month – three web portals participating in the project observed a higher number of unique visitors, while four portals noticed a lower number, though generating some profit. Perhaps more importantly, there was general satisfaction with improvements in the quality of readers’ online comments (which were limited without payment to three per day) and half-a-year’s experience with *Piano* did not discourage most pioneers from the new system. Although some critics argued that this approach might lead, in the short term, to narrowing the diversity of information, others argued that this approach avoids the cultural trap of capitalism, i.e. it motivates the online media to produce more and better media content – at least in the longer term: if there is no interesting content, there will be no subscribers. Interestingly, Slovenia has followed Slovakia in this project.

In Spain, there are two major alternatives. The first one is called ‘*Kiosko y más*’ which is an editorial alliance including a number of media outlets. Each company establishes the prices for each product (commentary, news article, etc.), although it is possible to bundle content. The content is available for PC, Apple

products and also in the android market. The second alternative is Orbyt, led by El Mundo. It includes a complete offer of newspapers, magazines and services. In both cases, there are no clear figures showing the success or otherwise of the marketing campaigns.

Recently, a one-click online payment system has been introduced using Facebook and Twitter that could boost Internet sales for newspapers. This new system, developed by a start-up company Paycento in Belgium, means that Internet surfers can pay to read a single article without having to fill out forms or enter credit card details on the website (see <http://www.paycento.com/>).

In addition, Google launched a new micro survey option in March 2012 as an alternative to paywalls and ads. Customers have two options: to answer a market research question or to complete another action specified by the publisher (signing up or purchasing access).

According to Nielsen (2010), micro-payments (52%) and simpler and safer payment systems (43%) are crucial world-wide to persuade users to pay for content access. However, 79% of European survey participants expect to use online content for free if they already subscribe to a newspaper, magazine, radio or television service. In the case of newspapers' websites, about 6% of Europeans have already paid for online access, but almost two thirds (62%) are not willing to pay for online content. In the case of online-only news sources, only 4% are willing to pay. Europeans are the least willing to recognise that there is a close relationship between quality and price. Therefore, in addition to micro payments, further exploitation of multimediality, hypertextuality, interactivity, personalisation, ubiquity, immediacy and a memory seems to be necessary in order to attract more consumers willing to pay for online content. Furthermore, the use of advertisements should be considered carefully, with 66% of respondents believing that if they must pay for content online, there should be no advertising. Surprisingly, the younger the consumers are, the more apt they are to have already paid, or be willing to pay, for various types of content.

New media have a remarkable influence on journalistic practice in some countries. The Internet has contributed to multiplying the opportunities and removing intermediaries in the value chain. Actually, new media services create new channels and platforms, often with a greater impact due to their free character and easy accessibility. They also offer opportunities for direct communication with the audience, through forums and social network sites, or offer feedback in the form of comments. Moreover, blogs are also used (pseudonymously) in many countries by journalists to publish information or commentary, which they cannot publish/broadcast through established media. On the other hand, the online news market encourages journalists to plan stories around popular Google search words, as advertising rates are increasingly based on the number of 'hits' a page receives (Fenton, 2009: 59). This can lead to an increased commercialisation and potential distortion of the choice of news topics.

The new media also influence the working conditions of journalists, e.g. they generate more media channels as it is easier to create digital media which need fewer resources than traditional media companies.

However, as mentioned above, the lack of a clear business model has become an important constraint to the development of high-profile journalistic products. For

instance, it is common to hire less capable editors and offer lower standard working conditions.

Under these conditions, journalists have started to rely on the Internet as a source of information, without double-checking the information and without giving attention to copyright issues. Additionally, some media entrepreneurs produce private media to speed up news and gossip, without necessarily enhancing their credibility but rather for the purposes of supporting commercialisation of public/journalistic communication. In the short term, there is more room for spreading rumours and false accusations.

There are also common claims about increased work pressure as stories need to be produced faster, in both their online and offline versions. Online editions, in particular, require fast production of content, leaving less time to check stories. Most worryingly, this also applies to the content produced by wire agencies (Lewis, Williams, Franklin, Thomas and Mosdell, 2008). Media outlets and journalists want to be the first to publish a scoop, instead of properly checking information. In some countries, for example in Greece, the Internet has further enabled a kind of degenerative 'blog journalism' to flourish (Psychogiopoulou, Anagnostou and Kandyla, 2011: 54).

Thus, quality in terms of reliability and the social importance of online news is often lower than in the traditional media when journalistic production routines are not adapted to the new environment.

To sum up, working conditions are worsening in terms of the pace of work, increasing workload, greater internal and external competition, and pressure on salaries.

At the same time, in countries where the PSM are politically oriented (engaging in what is in effect government-sponsored propaganda), the new media set the standards of investigative journalism higher and have led to fairer, more de-politicised reporting. The combination of better access to information and proper freedom of information legislation has resulted in more open communication of civil servants or authorities in general with the media. On the negative side, enhanced access to information has led to a reduced need for journalists to leave the office and this, combined with the pressure to produce several stories a day, has resulted in independent investigation by journalists becoming rarer. In some countries, e.g. in Belgium, the output of investigative journalism is in general, simply not freely available online (but only in print version or behind an online paywall).

Additionally, there is a new phenomenon in terms of litigation against the media enabled by their online presence reaching out to other countries: foreign libel legislation can be used in the case of local print media. There is an interesting case in this respect from 2006. That year the Danish newspaper Ekstra Bladet began an investigation of the curious rise of the Icelandic bank Kaupthing. The paper found out that the bank had links with tax havens and, more worryingly, may have overstretched its financial capacities. The bank issued a complaint to the Danish Press Council, which was rejected. But then the bank sued the paper in the UK, because Ekstra Bladet was available online in Britain. The newspaper, afraid of huge legal costs, agreed to pay substantial damages to Kaupthing and print an apology. Damages in libel cases are much lower in Denmark than in the UK, which explains why it was decided to bring the case in the UK - a form of libel tourism.

#### **4. The contribution of new media services to democratic processes and freedom of expression**

It is important to examine what the impact of new media services on liberal democracy is. Much has been already written on the Arab Spring and the use of Twitter, essentially for non-liberal democracies. Clearly, new media services have widened or created spheres of dissidence and offered a tool for instant communication, mobilisation and organisation. Non-commercial utilisation of new media services and/or creation of information and analytical purposes with political or knowledge-based effects can also be observed here (e.g. Wikipedia, WikiLeaks or the Bookcrossing.com project). At the same time, porous and blurred boundaries between information and discussion have emerged. Deuze (2002) has already noticed a trend incorporating a distinct media logic in the culture of online journalism leading towards empowerment of audiences as active participants in the daily news co-production. Some studies suggest that this collectivistic approach leads towards more accurate and comprehensive news available to the public (Weiss, 2008). There seem to be three dominant discourses concerning the impact of Internet users on democracy/journalism (Heikkilä, *et al.*, 2012: 38-39). In the first discourse, the most important feature is deduced from their qualities as seemingly ('good') political citizens (e.g. UK). Secondly, their impact is described as almost the opposite, based on the low level of public debate in the online environment (e.g. the cases of Finland or Slovakia). Thirdly, Internet user cultures are outside the realm of (good or bad) citizenship and are regarded as distinct features of a commercial culture and the commodification of online news and journalism.

Jakubowicz (2012: 140) also claims that although 'technologies of delivery are changing fast, the media themselves and user habits and expectations are changing much slower'. However, this may ultimately be a slow but fundamental generational shift. As pointed out by Balková (2012), some Slovak teenagers already feel self-conscious for reading hard-copies of traditional media. Finland, which does not have a lively blogosphere, is one of the countries with several cases of Facebook groups directing complaints to the press council. Similarly, the interplay between blogs and Twitter in the United Kingdom resulted in the Press Complaints Commission getting a record number of 25,000 complaints for one article (Heikkilä *et al.*, 2012: 66). In Turkey, numerous columnists, correspondents, and photo-journalists disseminate news on Twitter in advance of the printed or television news, using the opportunity to add personal comments and criticisms. An example of the contribution of new media services is the revelation of the former German Minister of Defence's plagiarism in his PhD thesis. In this case, an online forum publicly analysed the thesis and compared it with original sources. The Internet brought together the amount of persons necessary to do the work within a short time (Müller and Gusy, 2011: 44).

The following analysis suggests an emerging impact of some new media services (including WikiLeaks) on certain features of the political systems of some Mediadem countries.

#### 4.1 Editorial approaches to free or moderated discussions online - commentaries by readers

An important aspect of freedom of speech in democracies is how the media regulate accessibility to online discussion. A comparative study done by Heikkilä *et al.* (2012: 58) suggests that user comments published in connection with online news are internationally widespread. Yet early experiences of the blogosphere suggest the problematic nature of unregulated, anonymous and immediate discussions (see Školokay, 2010). There is some early evidence of an online political discussion emerging with only some of the individual characteristics of offline discussants. This is primarily related to the need for privacy and a level of social anxiety (Stromer-Galley, 2002). This claim, however, seems to be only partially true. Research by Brundidge (2010) implies that the socio-economic and cognitive hurdles are actually greater for accessing the online public sphere than accessing the offline public sphere. Online political discussion does appear to be somewhat more accessible than online news, but not substantially more accessible than offline forums of political discussion. Yet online political discussions do appear to be enhancing the ease with which people transit from news to political discussions – thus potentially connecting news and political discussions in new and powerful ways, conducive to the development of public opinion. Perhaps surprisingly, traditional television news and discussions on politics within the family actually seem to be a fairly traversable discursive environment, though somewhat less than the online environment.

The following table presents a variety of approaches with an overall tendency towards regulation of online discussions and commentaries.

Online discussions	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
Moderated	x	x		x	x	x		x	x	x	x	x	x	x
Not moderated														
No clear trend			x				x							

As can be seen, in the majority of the Mediadem countries moderated online discussions or commentaries are included under articles. This means that there is an editor responsible, and/or automatic software which deletes offensive words. Even countries which traditionally value freedom of speech have recently moved towards regulation. In Estonia this happened following the Supreme Court ruling in the *Leedo v. Delfi* case which stated: the more the news items get comments, the more the media organisation earns a profit. Hence, Estonian news organisations shall be liable for comments. The court's argumentation was partly based on the economic model of the particular media organisation: the reader-generated comments were considered to be part of the business model of the outlet (Harro-Loit and Loit, 2011: 28). The motivation of some Belgian media to use automatic software rather than a natural person for detecting and deleting offensive words lies in the fact, that this could

reduce liability under the E-commerce EU Directive<sup>17</sup> and similar laws. According to the Belgian legislation,<sup>18</sup> newspapers can claim an exoneration of liability if a number of conditions are met (e.g. they should not have actual knowledge of the illegal character of the messages). An interesting fact is that at least one Belgian newspaper has reported significantly increased quality in the content of readers' commentaries after having monitored spelling and/or grammar mistakes. This is certainly important because the quality of discussions is vital to enhance public deliberations.

The institutions for self-regulation have adopted different policies on the matter. However, most developed journalistic cultures tend to extend responsibilities for online commentaries to organisations. This has already happened in Germany and Finland. Clearly, there is an overall trend towards regulation of online discussions and commentaries.

#### 4.2 Leaks in the online media environment

Certainly, the leaking of documents to the media occurred in the 'old' media world. However, the relative anonymity afforded by publishing sensitive information online, and its easy and cheap applicability, is changing the ways in which the traditional media, public authorities and private companies operate and are increasingly becoming a target of public criticism. The role of traditional media is changing too – often following rather than leading investigative reporting. Yet it is true that the major scandals related to published classified documents by WikiLeaks in 2010-2011 were facilitated by traditional print media.

WikiLeaks has – in a sense - its national versions too. Indeed, there have been cases when leaked documents published online have had a significant impact on politics and society. As can be seen from the table below, there are two Mediadem countries in which the serious impact of online leaks on national politics was noted: Slovakia and Turkey. A lighter impact can be noticed in Germany, Croatia and Belgium, among other countries. The political and social effects of WikiLeaks in Spain were limited.

Impact of revealed documents online	Belgium	Bulgaria	Croatia	Denmark	Estonia	Finland	Germany	Greece	Italy	Romania	Slovakia	Spain	UK	Turkey
Yes											X			X
No	X	X	X	X	X	X	X	X	X	X		X	X	

In Turkey, WikiLeaks partnered with the daily Taraf, which published Wikileaks documents concerning Turkey. More recently, WikiLeaks revealed a collaboration between Stratfor (a subscription-based provider of geopolitical analysis)

<sup>17</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17/7/2000, p.1.

<sup>18</sup> Articles 12-15 of Directive 2000/31/CE and articles 18-21 of the Belgian Act of 11 March 2003 (provisions regarding 'mere conduit' or 'hosting' services).

and some Turkish media outlets and journalists. There have also been many instances of documents and unlawfully obtained recordings of tapped telephone conversations leaked to the Internet (via anonymous sources) which were subsequently picked up by Taraf and other selected Turkish media outlets. These leaked documents had a tremendous impact on national politics, particularly after they were picked up by prosecutors and used as evidence against defendants in high profile cases concerning failed coup attempts against the government.

In Slovakia, the case with the codename 'Gorilla' caused a political and media earthquake in late 2011-early 2012. 'Gorilla' was a wiretapping operation carried out by the Slovak Information Service (SIS) related to privatisation deals between 1998 and 2006. This politically and commercially sensitive document had been circulated in Slovakia at least two years previously. However, at that time no media outlet had been courageous enough to publish it either entirely or in part. Moreover, the state authorities, under two different governments, had been reluctant to investigate the document further. The document described a planned conspiracy between a large financial group and many top politicians concerning the privatisation of state-owned companies. The authorities, including prosecutors, downplayed this case until it was finally made public on the Internet. The reasons for this reluctance to publish and investigate included, among others, doubts about the truthfulness of the documents, including missing transcripts from originally wiretapped phone calls, and unavailability of any direct witnesses (see Kostolný, 2012). The socio-political importance of making this document public in full (another specific feature of online publishing) was underlined in the pre-election period (early elections were scheduled for March 2012). Once the document was published online by various - mostly foreign - web portals, the media started to report on this case extensively and a new investigation started. It is interesting to note that first, angry citizens organised themselves via Facebook, and then took to the streets, subsequently attracting further attention from the (traditional) media. The Facebook organisers (who had never met before personally) organised their first press conference. This clearly shows that new media services are pushing politics and traditional media into a new era of openness and public pressure. As a result, at least one, until then major political party (the one most frequently mentioned in the leaked document) lost almost two thirds of its voters in the March 2012 elections (in comparison with the 2010 elections) and almost failed to pass the required 5% threshold for a place in parliament.

In Germany, Daniel Domscheit-Berg, a former colleague of Julian Assange (Wikileaks), established with other colleagues a new leak-portal in Germany, [www.openleaks.org](http://www.openleaks.org), in August 2011. Openleaks maintains a media partnership with the daily *taz.die tageszeitung*. As Openleaks has only started to work relatively recently and provides information solely to its media partners, its political influence cannot be ascertained as yet. There was noted, however, one case where there was a combined use of both communication channels related to investigative work with political intentions. The online version of *Die tageszeitung* published a long article about the nuclear power lobby's activities in Germany to influence (or manipulate) public opinion on nuclear power. The newspaper complemented the printed article with two original power-point presentations by the PR agency which had created a sophisticated strategy in order to gather public support for the withdrawal of the restrictive legislation. This is an example in which a newspaper itself made leaked documents public on the Internet. But as the article was published after the Fukushima

accident had happened, the political stance in Germany had already changed and therefore there was no tangible impact on the political process.

In Greece, Wikileaks has partnered with the leading newspaper Kathimerini, while other leading newspapers' websites (such as Eleftherotypia) have 'mirrored' the Wikileaks website. Even though some of the leaked documents were about Greece, their publication had no significant (if indeed any) impact on politics. In the UK, there are no instances of data leaks on the scale of Wikileaks, although smaller cases have taken place, such as the leaking of a disk containing scanned receipts of UK Members of Parliament, which led to the prosecution of several MPs for fraud and an overhaul of the expenses system. This type of leaked information is usually offered to traditional media, as it was in this case. Wikileaks itself chose to cooperate with the traditional media (The Guardian) in the UK.

In Bulgaria, there is a specialised portal, balkanleaks.eu, but leaked documents are reported both in the blogs and in the quality press. No clear policy response has been noted yet. However, some of these leaks are being used in political debates by non-mainstream politicians. Similarly, in Romania, some of these materials appear in the print media (for example, minutes and decisions of the board of public television), but their publication has not triggered any political changes.

In Croatia, most of the leaked documents that might be of public interest have typically been published in daily newspapers. A number of documents which were not taken over by the printed press have been published on the site Vjetrenjača (<http://vjetrenjaca.org>) and by the blogger Peratovic ([www.45lines.com](http://www.45lines.com)). A major scandal occurred in 2010 when a top secret document – a list of veterans of the Homeland War, including their personal data – was published online. The Croatian government had earlier refused to publish this information because they considered it a state secret, and so there was an investigation into who might have been responsible for its publication. It could be argued that the public had the right to know who the veterans of the war were, particularly as it was not clear why the number who claimed to be Croatian veterans had grown from approximately 300,000 to more than 500,000 in just a few years (Vilović, 2010: 122-123).

In Belgium, there are no national versions of Wikileaks. Some documents relating to Belgium were published on Wikileaks, but they did not reveal major new facts. Only the documents which confirmed that there were US nuclear mid-range missiles stocked in Belgium caused a stir. This was already public knowledge, but official sources had until that time never confirmed or denied it. Wikileaks published police files from the investigation on the Belgian paedophile killer Marc Dutroux, including unproven allegations and conspiracy theories on child abuse by public figures. This publication by WikiLeaks did not give rise to new revelations in Belgium, rather to general public outrage over the publication of such unproven allegations and of classified information on the victims of Marc Dutroux.

All the above-mentioned cases suggest that new media services can be used to publish scandalous, often classified information that has the potential to cause public outrage. This public outrage can sometimes turn into significant political change as the Slovak case suggests. Importantly, the traditional media follow suit rather than acting as leaders, as their social watchdog function would require. However, as pointed out by Fulmek (2012), this new area of online leaks can also lead to more rumours, wire-tapping, and the making public of private information, with the purpose of damaging the reputation of private and public opponents.

In spite of (or perhaps because of) the positive examples of the leak cases above, Daly and Farrand (2011: 34) argue that the WikiLeaks situation, where one of the major threats to free expression online in European jurisdictions comes from private entities, shows the inadequacies of the current legal protection of freedom of expression in the Internet context, and highlights the extent of private entities' control over the Internet and the information disseminated there. Daly and Farrand note that these jurisdictions should consider explicitly enacting such protection into their national laws.

## **5. Conclusion**

This comparative study has revealed some common trends concerning the impact of new media services on traditional media and the work of journalists; their contribution to democratic processes and freedom of expression, and the guarantees in place, or needed, to ensure media freedom and independence in the digital environment in the 14 European countries.

On the basis of the preceding analysis we can agree with Smilova, Smilov and Ganev (2011: 43) who claim that the penetration of new technologies and new types of media is a process which can have both types of consequences for the democratic process. However, in contrast to the general claim of all three authors, we believe that there is enough evidence available to suggest that the new media services have initially brought more freedom and independence if not to traditional professional journalists then certainly to citizens and amateur/civic journalists. In fact, as we have mentioned, it is becoming more and more blurred who is a journalist and who is not, and what conditions must be met partially or fully to consider an online service as a news and current affairs medium. Some clarification on this important issue has been provided by the Council of Europe's Recommendation CM/Rec(2011)7. However, it is also becoming clear that there is a trend towards moderated online discussions and commentaries and/or de-anonymised online discussants/commentators.

In some countries, such as Slovakia, the new online media services have directly impacted political developments and leaks have led to changes in national politics. A new public watchdog service thus supplemented, and in some cases overplayed, the watchdog role of the traditional media. In fact, online anonymity allowed for a higher transparency in politics and business when traditional media were hesitant to publish some important revelations. Thus, anonymity can be helpful for democracy (e.g. supporting whistleblowers and specific types of investigative journalism), although it should not be the norm in the public sphere. There is a - probably temporary - exception in this regard in the case of the anonymity of bloggers in Greece. As the domestic jurisprudential approach shows, bloggers are not normally required to be de-anonymised and thus made responsible for their writing.

There is a broad consensus on the impact of convergence on the distribution and consumption of media products. Yet the so-called convergence culture, which turns around devices, does not provide specific solutions for the functions, media outlets' business strategies or citizen participation. Both public and private institutions understand the impact of digital devices on consumers/citizens. Most public documents (laws, white papers and so on) measure ICTs' use (for instance, the use of mobile phones) and try to develop some initiatives to guarantee digital literacy. However, state media policies for the most part create solutions for the old media

system or more specifically, outline strategies in order to support the old media outlets' transformation into new media services. There are no original legal solutions for new media services. Indeed, in all 14 countries studied, there is no specific regulation of new media services and it is the courts which supplement this missing regulation. Most of the legislative initiatives are based on traditional media industry criteria and the rules for the traditional media are applied. The lack of regulation of new media services is reflected in the recognition of the same duties for new media services as traditional media and the absence of any special rights. Only a few countries (e.g. Denmark, Belgium, and Germany) put the rights and duties of new media services by and large at the same level as the traditional media.

Three fundamental findings concerning the development of public policies in relation to new media services should be highlighted. The first finding is that technological developments advance faster than legislation. This explains why some countries (the UK and Bulgaria) have opted for limited regulation focusing on assuring free market and competition.

Secondly, there is no absolute consensus on the definition of new media, new media services or the consequences for the digitisation of media production processes. Without prior definition, the political and legislative branch has no way to legislate properly. Consensus only exists regarding the growing need to regulate participation through online comments, as the early experience of blogs suggests a recurring socially unacceptable participation. In most cases, this option ensures the (co-)responsibility of the editor only for the content provided, if there is no identifiable author or other conditions for exclusive responsibility are not met.

Thirdly, the current AVMS Directive provides only a partial solution. It does not cover all new media services, such as the online versions of traditional newspapers, television and radio stations, online news portals or blogs. The AVMS Directive is a regulatory tool created to assist the transformation of the technological and communications industries but does not address the impact of the new media revolution (e.g. new actors, participatory journalism). It is a regulatory tool which is not based on the new media conditions but on the old media system.

These problems hinder the establishment of a policy paradigm. This is also reflected in the position of the judiciary which is not always ready to adapt to the new conditions in the online world. Thus, the response of the judiciary varies between two poles. On the one hand, in a group of countries, judges have taken the position that the new media do not have the same status as the conventional news media. For this reason, they do not require the same protection. The Greek case can serve as a reference: blogs are not considered to be a part of the media and therefore do not receive the same treatment as traditional media. On the other hand, in other countries the judges ruled that the new media, especially blogs, should have the same status as traditional media. The Reynolds' case is possibly a key example of this understanding of equality. Bloggers and other non-professional users can claim new media 'responsible journalism' principles sustained by good faith, an accurate factual basis and the public interest of the information provided. This model may indeed become the future standard.

In the field of journalism, new media have had two contradictory consequences. On the one hand, they have multiplied the possibilities of editing and publishing quality information. The rise of leaks and investigative journalism has substantiated that it is possible to practise the journalistic profession outside the

traditional production routines. On the other hand, the newcomers have devalued the role of the journalist, journalists' working conditions and, in some cases, the quality of journalistic products. Our findings show a growing concern about the lack of full-time professional journalists in the newsroom as well as the increasing workload, the imposition of more tasks on journalists requiring more skills and often with salaries at the same or a lower level. So far, these increasing weaknesses have contributed to the devaluation of journalistic media as a political actor in democratic systems. Regarding their everyday task, private media companies self-regulate digital activity by guidelines and ethical codes. It is not always the case for the public media.

Our findings further show that the main constraint concerning the initial development of some of new media services is finance. The current economic crisis, as well as the advertising disinvestment and the lack of stable business models limit the use of new media opportunities. The pressure exerted by private companies against the development of digital public media is worthy of note here. Through regulation and both *ex-ante* or *ex-post* controls, private media try to avoid market distortions, or, according to some critics, to keep their dominant position through online presence. The impact of this conflict is also evident in the reduction of quality standards.

In short, public policies are in the process of adaptation to the new media environment. The institutional structure (boards, councils and other press-like structures) have not yet been able to give a coherent answer to the great transformation of the media sector.

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### **List of interviews**

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Slišková, N., editor-in-chief of the daily Pravda, a board member of the publishing house Perex, Slovakia, e-mail interview by Miroslava Kernová, 15/05/2012

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Vavro, P., editor-in-chief of the daily Hospodárske Noviny and deputy director of the publishing house ECOPRESS, Slovakia, personal interview and written communication by Miroslava Kernová, 15-16/05/2012

Zankova, B., media expert, Bulgaria, [bzankova@gmail.com](mailto:bzankova@gmail.com), e-mail interview by Andrej Školka, 18/05/2012

#### **4. Professional autonomy in journalism as a factor for safeguarding freedom of expression: A comparative perspective**

*Halliki Harro-Loit, Epp Lauk, Heikki Kuutti and Urmas Loit*

##### **1. Introduction**

In the era of information overflow where marketing communication aggressively saturates the everyday information flow, people need relevant, trustworthy and unbiased information more than ever. Democracy needs plurality of opinions, but it also needs an alert 'fourth estate' able to critically scrutinise the use of power in society and debate issues that matter. The more freedom and diversity of ideas we have, the more we need professional journalists who select and analyse, interpret and frame information that is genuinely directed at *public interest*. Therefore, political support to the autonomy of journalistic performance and the professional community is a crucial issue of media and communication policy. There is no journalistic professional autonomy without freedom of expression, and there is no free journalism without autonomy – freedom of journalists to define, shape and control their own work processes and act on their own judgment, taking responsibility for their independent decisions. Professional autonomy is also one of the core values uniting the journalistic community that consists of people with very different backgrounds, incentives, experiences and working conditions. On the other hand, journalists in different political, economic and cultural environments face different constraints that limit their personal autonomy as professionals.

Based on the case studies of 14 European countries (Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK) completed within the Mediadem project ([www.mediadem.eliamep.gr](http://www.mediadem.eliamep.gr)), this paper focuses on two issues: (1) how is journalistic professional autonomy safeguarded in these countries and what are the factors that support or constrain this autonomy; and (2) what could be the policy means for supporting journalistic autonomy in European democracies.

We begin with a brief theoretical introduction of the concept of journalistic autonomy as a central value of professional behaviour and a precondition for free and independent journalism. On the basis of the conceptual framework outlined in the theoretical introduction, we then focus on various factors that influence journalistic autonomy: political, economic and technological frameworks as the sources of external influence; organisational and procedural frameworks (editorial practices, internal hierarchies and relationships in the newsrooms, working conditions and trade organisations); and the professional framework (journalists' own perceptions of their role and autonomy, journalists' integrity and rights, codes of ethics and self-regulation, journalism education, etc.). Finally, we outline some policy recommendations aimed at developing policy means for supporting journalistic autonomy in the countries under consideration.

## 2. Theoretical framework

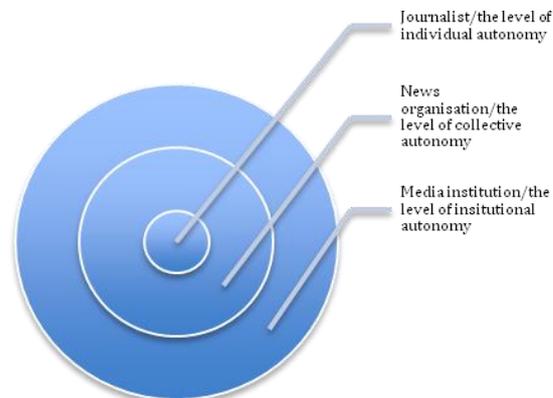
### 2.1 Journalistic autonomy

The concept of professional autonomy derives from the core function of journalism in a democratic society, rooted in journalism's occupational ideology: to provide people with truthful and unbiased information and a plurality of opinions. Occupational autonomy is a criterion of professionalism: to constitute a profession, the members of an occupation have to be able to control their own work, to have autonomy in their everyday practice. A central claim of any profession, including journalism, is autonomy over the articulation and enactment of its own norms (Singer, 2007). Autonomy is legitimised, for example, by voluntary adherence to ethical principles: a code of professional conduct reflecting the standards of good journalistic practice.

Journalists do make their own decisions, but those decisions are guided by the larger forces surrounding them in their organisations as they 'live their lives, for the most part, within organizations; even the freelancer /.../ must contend with the conventions, pressures and objectives of organizations that purchase the product of his or her pen' (Lambeth, 1992: 57). In addition, the relations with other agents and agencies of the wider media institution and society play a significant role in the realisation of the individual autonomy of a media professional.

The analytical framework can be adjusted from McQuail's (2010: 278-281) analysis of the media organisation in the field of social forces (figure 1).

**Figure 1.** Three levels of professional autonomy



The three levels of journalistic autonomy are well captured by Scholl and Weischenberg (1999): *Journalists (individuals) ought to be free in selecting information and in covering stories; newsrooms (organizations) ought to be independent from external influences, such as commercial or political constraints; media systems (society) ought to have guaranteed press freedom and ought to be free from all kinds of censorship.*

*The level of individual/personal autonomy* is commonly understood as journalists' freedom to decide about the aspects of their stories: to choose the topics, and to select information and the angle or perspective of coverage, which are in line with their personal responsibility and professional values. Individual autonomy also includes journalists' ability and possibility to be involved in the value clarification concerning the news content, and the organisational and work culture.

*The collective autonomy* refers to the news organisations' editorial independence from external political and economic (e.g. advertisers') pressures and constraints. It also refers to the news media's accountability to society for their performance, especially concerning fulfilment of their public service commitments.

*Institutional autonomy* refers to the media institution's legally secured freedom for critical surveillance and access to information, as well as freedom from any kind of government control or censorship. Here, the substantial difference between the freedom of expression and freedom of the press becomes very obvious. Freedom of expression is a human right and individual freedom that does not give an individual (journalist) the same degree of influence and power in society as the news media have. This raises the question of responsible use of this power for the sake of public interest and democracy.

In the context of policy analysis it is important to note that while the journalistic institution itself seeks to exercise autonomy from external or governmental control, individual journalists actually give up personal autonomy to a significant degree (Merrill, 1992; Christians, Rotzoll, Fackler, 1991: 33-57; Shoemaker and Reese, 1991: 115-144; Sanders, 2003: 27; Singer, 2007). John Merrill, a leading advocate of the existentialist approach (in relation to journalism), cynically declares: '... journalists in the lower echelons are going about their duties not as professionals who deal with their clients directly and independently, but as functionaries who fashion their work in accordance to supervision and direction by their editors, publishers and news directors' (Merrill, 1989: 36).

## **2.2 Factors influencing journalistic autonomy**

Various external and internal factors influence the three levels of journalistic autonomy.

The external pressures mainly come from the spheres of politics and economics. Also cultural and historical circumstances play their role in defining the limits of autonomy. Within the societal context, we can distinguish between social and political influences (legal/political control and regulation, various pressure groups, other institutions) and economic influences (owners, advertisers, competitors, (job) market conditions). In addition, some pressures and demands derive from audiences and sources (McQuail, 2010: 281). These influences are not necessarily always constraining journalistic autonomy. 'Some of the forces cancel or balance each other (such as audience support against advertiser pressure, or media institutional prestige against external institutional or source pressure)' (Ibid: 280). On the other hand, even if the freedom of expression protects the media and journalists from outside pressures that affect journalistic operations, it does not prevent possible self-censorship in the editorial offices. Journalists may abandon their subjects and their points of view and slant stories not only voluntarily, but also because of the pressures emanating from their own superiors.

Although academic scholarship claims the decisive role of the political and economic pressures in limiting journalistic autonomy, journalists regard the factors stemming from their immediate environment (newsroom, news organisation, peers, everyday working routines, etc.) or from within the profession (e.g. ethical conventions) as more important. Hanitzsch *et al.* (2010:15) define these factors as ‘procedural’, ‘professional’ and ‘organisational’ influences. ‘The impact of political and economic factors may be less noticeable under the circumstances of routine news work, mostly because their significance is masked by organizational and procedural influences that have a stronger grip on the journalists’ everyday practice’ (Ibid:17).

Procedural influences include ‘the various operational constraints faced by the journalists in their everyday work’ (Hanitzsch *et al.*, 2010:15), appearing as limited resources in terms of time and space (like pressing news deadlines and shortage of resources). Professional influences ‘refer to the policies, conventions and customs of the profession in general and specifically, the newsrooms for which the journalists work. The cultural conventions mostly pertain to what is commonly believed to be good and acceptable practice of journalism’ (Ibid). The organisational influences stem from multiple levels: from within the newsroom (supervisors and senior editors) and from within the media organisation (management and ownership). This dimension also reflects the ‘eroding walls between newsrooms and boardrooms around the world’ (Ibid).

In the context of the present comparative exercise, it is noteworthy that all these factors may have different effects even within the same country’s media system. For example, several case study reports (e.g. Bulgaria, Croatia, Estonia, Germany) point out that the degree of journalists’ autonomy in their countries may differ depending on their employment status (permanently employed or freelancer), the status of employer (public service or private) or the range of distribution (national, regional, local).

When comparing media policy in different countries it is important to take into consideration that similar effects and phenomena may be the results of various specific and complex configurations that are unique in each country. For example, in Belgium the external political (or commercial) pressure on the content of the news seems to be more widespread within local media outlets with small editorial boards. A possible reason is that local journalists in general are often closer to their sources (Van Besien, 2011: 36). In the case of Bulgaria, it seems that the relationship between financial stability and independence of the media is reversed: the local and regional print media as a rule enjoy less adequate financial resources than the mainstream media, but they demonstrate more independence in their performance (Smilova, Smilov and Ganev, 2011: 29). The Mediadem case reports also demonstrate that various policy instruments, actors and media policy implementation problems have different significance in different countries. Therefore, it is not possible to make overarching generalisations or conclusions that equally apply to all countries. Hence, the aim of the present comparative report is to outline how general and theory-based media policy instruments, actors and pressure mechanisms influence the journalistic autonomy in the fourteen countries of the Mediadem project.

### **3. External influences on journalistic autonomy**

In the following, various external factors that influence journalistic autonomy on all the afore-mentioned three levels will be described and discussed. Among the factors of political origin, the relationship between politicians and journalists, the state involvement in influencing the profession and access to information (as an instrument of media policy) will be analysed. Another group of factors that stem from the economic environment and affect journalistic autonomy include the size and type of the media market, the job market situation, employment and working conditions.

#### **3.1 Relationship between politicians and journalists**

Political circumstances in the first instance influence the journalistic autonomy on the institutional level. In the countries with long democratic tradition and freedom of the press (Finland, Denmark, Belgium, Germany) the degree of journalistic autonomy at all levels is remarkably higher than in the countries that recently have gone through transitional turmoil (East and Central European post-communist countries). When for example the reports of Spain (De la Sierra, and Mantini, 2011: 39) and Belgium (Van Besien, 2011: 38) explicitly underline absence of external pressures on the work of journalism, then the reports of Romania (Ghinea and Avădani, 2011: 7-8, 34), Croatia (Švob-Đokić and Bilić, 2011: 9) and Turkey (Kurban and Sözeri, 2011: 28) indicate that journalists experience political pressure, or graft (Croatia) or even repressions (Turkey).

In the 'old democracies' the relations between politicians and journalists are rather implicit and linked to certain interest groups. For example, Belgian media do not openly support specific politicians or political parties but there is still some reluctance from politicians to implement media policies that contradict the interests of specific media groups (e.g. RTL, the Luxembourg based main commercial broadcaster for French-speaking Belgium has not been forced to comply with Belgian audiovisual media regulations) (Van Besien, 2011: 35). In Finland, the interaction between journalists and decision-makers is frequent and informal and emphasises networking and personal contacts (Kuutti, Lauk and Lindgren, 2011: 34).

In East and Central European countries, as well as in Turkey, the tradition of free speech and a free media is not yet robust. In Turkey, at the beginning of the 1980s, a shift from political power towards the economic took place. The traditional family-owned media ownership was replaced by new investors who had already operated in other industries of the economy (Kurban and Sözeri, 2011: 28). This indicates a change of sources of pressure to journalists' individual autonomy.

In Estonia, in addition to a high level of press freedom, the general liberal (market) ideology also applies to the media. The ruling Reform party (and the Minister of Culture) argue that the media should be regulated as little as possible. However, it is noticeable that within recent years, the parliamentary parties have made bigger efforts to influence public service broadcasting (exercising more pressure on the Broadcasting Council) than in the 1990s. In Bulgaria, political and economic pressure groups are mixed (Smilova, Smilov and Ganev, 2011: 7). In Romania the relations are rather influenced by the general 'freedom-culture': verbal and sometimes physical abuse against journalists do not trigger public outcry. Romanian politicians have generally a hostile attitude towards the media, almost all of them being convinced that journalists are either the puppets of their adversaries or mercenaries of

their owners (Romania (Ghinea and Avădani, 2011: 9). In the countries with high political parallelism, which Hallin and Mancini (2004) characterise as Polarised Pluralist model countries (Greece, Italy, Spain, France), the influence of political parties and politicians on the media is palpable and public broadcasting is under the government's control. In Italy, some newspapers are acting now effectively as kinds of political parties. The major investors in the media industry are mostly entrepreneurs in other production fields and even entrepreneurs and members of a political party or of the government (Casarosa and Brogi, 2011: 30). The government also indirectly influences the governance of RAI and constraints the pluralistic editorial line of the public broadcaster (Casarosa and Brogi, 2011: 30). A specific threat for freedom of information in Italy, about which journalists complain, is the pressure from criminal associations. In Greece, since the 1990s, a substantial number of journalists cultivated personal relations with political parties and members of the government and economic elites. This systematic instrumentalisation of the media by broadcasters/publishers, corporate economic interests and the political class restricts journalists' independence and distorts the professional commitment to provide responsible and objective news information (Psychogiopoulou, Anagnostou and Kandyla, 2011: 49). Many Greek newspapers (particularly local ones) make losses, but are still financially maintained by their owners to support their political ambitions. They were established to serve as platforms for the promotion of the interests of their proprietors and they are maintained for that purpose despite their falling revenues (Psychogiopoulou, Anagnostou and Kandyla, 2011: 12). For years, public sector advertising has breathed life into a number of newspapers that would not have survived in the market, in return for covering news and issues in ways that were favourable to the government (Psychogiopoulou, Anagnostou and Kandyla, 2011: 39).

In Spain, the degree of political influence seems to be smaller. It is not self-evident that political actors are the driving forces behind the process of formulating and implementing public policy measures regarding the media structure. Media policy is based on liberalisation and self-regulation (De la Sierra and Mantini, 2011: 27). In this aspect, Spain and Estonia seem to be most similar.

The closeness of the British media to the political system is more manifest in substantial and party-centred reporting of politics (Hallin and Mancini, 2004: 214) than party-political control over the news media.

### **3.2 State involvement**

The role of the state in media regulation and policy implementation differs according to the configuration of the political sphere, the level of political culture and the peculiarities of the media system. In France, Greece, Spain and Italy (Polarised Pluralist model countries) the 'state plays a large role as an owner, regulator, and funder of the media, though its capacity to regulate effectively is often limited' (Hallin and Mancini, 2004: 73). In Finland, Denmark and Belgium (Democratic Corporatist model countries), the 'media are seen to a significant extent as social institutions for which the state has responsibility, and press freedom coexists with relatively strong state support for and regulation of media' (Hallin and Mancini, 2004: 74).

State involvement appears most clearly in the regulation of public service broadcasting with various degrees of control over its content. The state can also take

responsibility for maintaining the plurality of the media market, usually by means of indirect subsidies (e.g. the exemption of the media from VAT, etc.), or direct subsidies to certain types of the news media. State subsidies also contribute to decreasing the commercial pressure on the journalistic content. Subsidising through taxation usually applies to all media and does not constitute any danger to the autonomy of the profession. Direct subsidies may weaken the profession's integrity if the autonomy as a value is not rooted in society.

Among a select group of Mediadem countries – Greece, Italy, Finland, Denmark and Belgium – state subsidies have a long tradition. Today, it is important to ask, whether this system still serves the public interest. In contrast, there are new democracies where the news media completely depend on market regulations, and state subsidies are very limited or non-existent (Bulgaria, Croatia, Estonia, Romania, Slovenia, Turkey).

In Greece, state involvement in the media economy seems to be the strongest among the Mediadem countries. Many private media enterprises depended for decades (directly or indirectly) on state resources. The Greek print media have been supported by considerable indirect subsidies, such as distribution subsidies, reduced value added tax, and preferential rates for telecommunication services. This non-selective aid policy has been complemented by other highly selective support instruments (Psychogiopoulou, Anagnostou and Kandyla, 2011: 12-16).

Denmark is another country where the state takes a strong responsibility for subsidising media outlets. The Danish media get indirect support in the form of the exemption of the print media from VAT (of 25 per cent). Danish journalists are also allowed to make unsolicited phone calls to consumers. The direct support includes distribution support, means for founding new newspapers, the reorganisation of newspapers in financial difficulties, and the restructuring of newspapers in immediate danger of failing (Helles, Søndergaard and Toft, 2011: 28). However, according to the Danish case study report, media ombudsmen appear to have contributed to keeping the state at a distance when it comes to control of media content (Helles, Søndergaard and Toft, 2011: 28). The financial support has been focused on the print media. Recently, the regulators have realised the need for a reform of the support system. The aim is to arrive at a (more) platform-independent model for the allocation of support (Helles, Søndergaard and Toft, 2011: 28).

Subsidies for the Italian media have a historical (post-WWII) background: legislators tried to eliminate economics-based obstacles to pluralism, safeguarding the existence and development of smaller publishing enterprises and cultural initiatives (Casarosa and Brogi, 2011: 24-25). Today the editors welcome the subsidies, but state aid for some kinds of newspapers reflects that political power has been involved in this industry. Therefore, this form of financing has also been seen as a surreptitious funding for political parties (Casarosa and Brogi, 2011: 32-34).

In Spain, public funding takes place through various channels: direct state aid or privileged taxation (tax relief, beneficial treatment in the case of specific taxes, etc.). The risk of not gaining access to these public funding systems may lead information providers not to be too critical towards the political parties in power, in order to benefit from the aid. There is no specific tax system for media outlets and no proposals in this direction were found in the political parties' manifestos for the general elections on 20 November 2011 (De la Sierra and Mantini, 2011: 23).

The Belgian regulatory framework has been relatively well suited to safeguard media freedom and independence (Van Besien, 2011: 42). The state sponsors journalists' associations, so that these can co-finance (together with the publishing sector) the activity of the CDJ (French-language Council for Journalistic Deontology) and the RVDJ (Dutch-language Council for Journalism). However, the state has no impact on the content of the decisions made by these organisations (Van Besien, 2011: 36).

In large media markets, like the UK and Germany, the state has a limited role in the private media system.

In Central European and Baltic countries (Bulgaria, Croatia, Romania, Slovakia, Estonia), the state does not protect the media market, but only regulates public (and commercial) broadcasting. However, Estonia has introduced some limited subsidies to cultural and children's publications.

In Bulgaria the pressure of business interests was always present during the entire transition period and has grown in importance in the years of the economic crisis. The problem is that when there is no 'fresh money', no new investment in the media, the state and some powerful economic groups (using the media for trading in influence) become the major players in the media market. This particularly applies to the state, which through its EU structural funds-related information and publicity activities is a major source of fresh money for the media (Smilova, Smilov and Ganev, 2011: 32).

### **3.3 Access to information**

The state can legally guarantee access to information and also can restrict it with laws. Usually, all countries have a kind of access to information legislation. Among the Mediadem countries, Greece does not have a special freedom of information act (FOIA). In Greece, the Constitution and the Code of Administrative Procedure state that any interested party and thus also journalists have the right, upon written request, to access administrative documents held by public authorities (Psychogiopoulou, Anagnostou and Kandyla, 2011: 43).

Legally guaranteed access to information releases a journalist from dependency on the information sources. This only happens if the authorities responsible for creating and archiving public documentation are obliged to publicise the lists of documents in their possession, and if journalists are skilful enough in using these documents.

The FOIAs are fairly similar in different countries, but the practices of implementation largely vary. For example, Denmark and Finland can be seen as positive model countries, while Estonia, the UK and Romania each report about specific problems with the daily implementation of the FOIA. In Turkey and Bulgaria, public authorities are often resistant to provide access to information.

The Danish Public Administration Act [PAA] specifies rights of access to documents, declaring that all public records must be made available on request, unless there are important reasons against this (for example professional secrets and personal data). In Denmark all decisions regarding rights of access may be brought before the Parliamentary Ombudsman, who has the authority to recommend cases to be re-evaluated. The Ombudsman has issued many rulings regarding the relationship

between journalists and the right of access, and has underlined the need for a broad interpretation of the positive principle of access to information (and the restrictions in a more narrow sense) on several counts (Helles, Søndergaard and Toft, 2011: 50).

In Finland, freedom of information is connected to the country's Constitution, which enshrines everyone's right to freely access documents and recordings in the possession of the authorities unless the access is 'specifically restricted by an Act'. In practice, this right is implemented by the Act on Openness of Government Activities (621/1999). The intention of the act is to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to influence the exercise of public authority (Kuutti, Lauk and Lindgren, 2011: 10).

In Estonia, the Public Information Act (PIA) forms the basis for information management in general, while more specific areas are covered with other laws. Concerning investigative journalism, the whistle-blower policy for public servants is regulated by the Anti-Corruption Act (ACA). The PIA sets the main principles for publishing and withholding information, the obligations of institutions, the requirements to the document registry, etc. Concerning official information of different administrative levels, local governments tend to be the less transparent. Their web sites are not always user-friendly regarding the ease of finding information. Journalists also complain that as the law prescribes a 5-day deadline for information delivery, the bureaucracy, knowing that the journalist would need that information swiftly, often releases the information at the last legitimate minute. Journalists suspect that during the period of reply to the request, the holder of information manages to rectify the issues and paperwork under investigation (Harro-Loit and Loit, 2011: 34).

Unlike the practice in other countries, the Freedom of Information Act in the UK states that the purpose of an information request does not have to be revealed and public authorities cannot impose conditions on the use of the requested information. There are, however, 24 grounds on which information can be withheld, of which 6 are unqualified and 18 require a public interest test. Most of the exemptions are of a very general nature and may therefore be used to withhold information. Where an information request is refused, an appeal can be made to the Information Commissioner, who will decide whether the public interest requires the information to be released. This decision can be appealed to the Information Tribunal, whose decision can be appealed to the High Court and ultimately an appeal can be made to the House of Lords. The appeal system is generally conceived to be slow, for which both the Government's liberal user of exemptions and the adequacy of staff at the Information Commissioner's office may be blamed. The practice of access has been criticised by (among others) journalists, who accuse various administrative organs of stalling and of granting access to partial files, or of denying access based on very narrow interpretations of the Act. Journalists also often complain about the unwillingness of the authorities to provide them with access to required documentation. British journalists have generally remarked that the FOIA has not had a major impact on their reporting, though the added avenue of information gathering can assist them in certain cases. The act is of more use to investigative reporters, who have emphasised that the FOIA has made a 'noticeable' difference to their reporting and a number of investigative reporters have become skilled in the use of the FOIA for their stories (Craufurd Smith and Stolte, 2011: 33-34).

In Romania the FOIA (adopted in 2001) grants journalists privileged access to information (media requests should be answered on the spot, if possible, or within 24 hours). All the public bodies are obliged to have a spokesperson and to have press conferences at least once a month. A lot of state institutions, both at the national and local level, have created special departments dedicated to public information. However, as time has passed, the efforts have decreased. It is a real paradox that access to public information is today more problematic than it was in the early 2000s (Ghinea and Avădani, 2011: 35-36).

While Turkey has adopted a Right to Information Act in 2004, public agencies often resist providing information to citizens and civil society, in blatant disregard of their obligations (Kurban and Sözeri, 2011: 22). The same tendency can be observed in Bulgaria: some public institutions quickly learned how to engage in procedural manoeuvring to delay and obstruct attempts by the media and citizens to obtain public information (Smilova, Smilov and Ganev, 2011: 28).

### **3.4 Economic conditions and their impact on journalistic autonomy**

Economic factors, such as organisations' profit expectations, advertisers' needs, the implications of market forces and audience research have direct impact on journalists' work and behaviour. 'Contemporary journalism across the world faces similar pressures in regard to technological and commercial changes' (Obijiofor and Hanusch, 2011: 154). 'Making money and surviving in the new competitive environment have become the key concerns of commercial media' (Ibid: 160). These claims refer to the crisis of the traditional business model of professional journalism (high costs of quality-news production versus availability of free news on the Internet; advertisers moving away from traditional media, etc.) and its consequences. In order to survive, media organisations introduce business models that aim at cost saving (reducing budgets and distribution costs, and cutting salaries and jobs). Under the pressure of gaining profit, media companies invest rather in advertising departments than in the quality of news production. As a consequence, the pressure is to produce less expensive entertainment content rather than discuss serious societal problems or develop investigative journalism. The traditional role of journalists as democracy gatekeepers is very hard to play in the global market, which is driven by economic interests. The professionals are barely able to reconcile their traditional values with market-oriented practices, which are at the same time antithetical to social responsibility.

The economic pressure influences all levels of journalistic autonomy: institutional, organisational and individual. In addition, although the market pressure is universal, it appears differently under different circumstances.

#### **3.4.1 The institutional level: The size and type of the media market**

At the institutional level, the size of the market (determined by either or both the language and the size of the population) makes the difference. Germany, the UK, Romania, Spain and Turkey are certainly big markets. Denmark, Finland and Bulgaria are medium markets. Belgium (divided by language), Croatia, Slovakia and Estonia are small markets. Tens of thousands of employees and freelancers work in the German media market, where public and private broadcasters together yield annual turnovers of more than 18 billion Euros (Müller and Gusy, 2011: 7). In Bulgaria in

2007, the total number of journalists was estimated to be around 7,200; the total number of employees in the media business was 16,250 in 2006 (Smilova, Smilov and Ganev, 2011: 28). In Estonia, in 2011, the number of employed journalists (including part-time employees) was about 1,100.

In Estonia, the oligopolistic media market certainly diminishes journalistic autonomy. This situation, however, is unavoidable in a small market. A limited number of relatively strong companies have more resources for producing quality journalism than fragmented ownership with many financially poor companies.

A fragmented and overpopulated media market seems to be the problem in Romania – the naturally large market grew organically from the 1990s onwards, with too little care for strategic development. Populated initially with small entrepreneurs with small budgets and medium to low managerial skills, the media market evolved towards a polarised structure, with a cluster of big media conglomerates and a cloud of small local media outlets. The media outlets employed thousands of journalists and technical staff. The economic crisis that marked the end of the first decade of 2000 strengthened the competition for jobs among journalists in a shrinking market (Ghinea and Avādani, 2011: 7).

### **3.4.2 Economic factors affecting the autonomy of news organisations**

A universal problem that affects news organisations is the diminishing border between marketing and journalism. According to the Belgian report, it is not uncommon that editors are paid bonuses for increasing sales figures (which creates the risk of commercial interests prevailing over journalistic interests). In other words, separation between journalistic activities and commercial strategies seems to be dismantled at the level of the editorial board (Van Besien, 2011: 38).

In Estonia, journalists detect immediate commercial pressure on content, and it seems to be most evident in the magazine sector and the newspapers' 'soft news' or B-sections (Harro-Loit and Loit, 2011: 34).

The Greek advertising companies have gained an increasingly influential role in the management of broadcasting content, especially when critical issues concerning important clients are in question. Advertisers have also influenced the news organisations to prioritise entertainment to the detriment of information, and to remove news that could damage their clients (Psychogiopoulou, Anagnostou and Kandyla, 2011: 12, 39).

The rapid growth and professionalisation of the PR industry has a direct impact on journalists' work. Due to the increased time pressure in the newsrooms, news sources are selected on the basis of easy reach. Journalistic reporting relies more on the material provided by information sources without journalistic filtering or critical evaluation. It seems clear that strategic communication is impinging on journalistic independence in a negative way, since its one key output is ready-to-print press releases and information materials. Research demonstrates that the proportion of the news derived from press releases and other PR material in both press and broadcasting is globally increasing (cf. Davis, 2000; Juntunen, 2011; Larsson, 2009). According to a UK study (Lewis *et al.*, 2008: 15), 38 per cent of press news and 21 per cent of broadcast news rely on PR material. The Internet has facilitated the circulation of PR material as news agencies are now easily bypassed and PR material can be e-mailed directly to reporters (Fenton, 2009: 94). In the Estonian daily

*Postimees*, for example, in 2011, 51 per cent of the news was composed using mainly PR information (Kase, 2011). Journalists' extensive use of, and reliance on, PR material as news sources raises questions concerning journalistic independence and the journalists' role as a fourth estate (cf. Lewis *et al.*, 2008).

### **3.4.3 Economic factors influencing the individual autonomy of journalists**

Most of the Mediadem reports emphasise that the degree of journalists' individual autonomy depends on the media sector (public or private, national or local) and channel for which they work as well as a journalist's job position in a news organisation. Several reports mention that the Internet era has changed the situation in the job market: the online media have created new job opportunities and the profile of journalistic competencies has changed. The reports also reflect the fact that policy makers have not analysed and debated the effects of the changing job market, working conditions and career opportunities of journalists on democracy. The majority of country reports describe economically unsustainable situations where the intensity and amount of work increase, but salaries do not. In overpopulated job markets (e.g. Romania), a cheap and unprofessional labour force competes with qualified, but more expensive journalists and as a consequence, the quality of journalistic content decreases. In small media markets, the lack of resources (both workforce and finances) causes stress and worsens working conditions. None of the Mediadem country reports tell about discussions on policy mechanisms, which would be able to reduce these economic pressures on the journalism profession.

#### **3.4.3.1 The job market**

The situation in the journalistic job market (the conditions of entrance, competition, job security and career models) strongly affects the individual autonomy of journalists. The conditions of the entrance to the profession largely vary in different countries. In many countries, it is easy to become a journalist without any specific education or training. For example, in Bulgaria the entry to the job market is entirely open, which leads to an exponential increase in the number of journalists and to a toughening of the competition among them (Smilova, Smilov and Ganev, 2011: 28).

In Romania, a number of good and experienced journalists are unemployed or choose to be freelancers. Employers prefer to give low-paid temporary jobs to beginners and inexperienced young journalists, which makes the job perspectives for the experienced generation uncertain (Ghinea and Avădani, 2011: 45).

Similar tendencies are described in Spain: around 4,000 journalists of the older generation were dismissed in favour of younger ones, thus getting rid of reputed professionals along with their memories and know-how (De la Sierra and Mantini, 2011: 21). In the 1990s, the Estonian media organisations also got rid of older journalists (who in some cases were labelled as 'Soviet relicts'). The problem that followed was similar to the Spanish situation: the loss of the collective memory of the profession as well as awareness of professional values. These cases refer to the problem that the age balance is an important factor concerning continuity of the values and standards of journalism as a profession.

The entrance to the job market in Estonia has no restrictions, but the conditions for jobs and the requirements for candidates are not clear and transparent,

and journalists seldom get to know why, or why not, they got the job (Harro-Loit and Loit, 2011: 38).

In Italy, by contrast, journalists must be enrolled in the national Register, they enjoy a set of limitations of liability when exercising their professional activity, but this cannot be extended to anyone providing the same activity online without being enrolled in the Register (Casarosa and Brogi, 2011: 5). Still Italy needs more defined rules on the definition of the journalistic profession vis-à-vis the common use of the web as a means for the diffusion of user generated content (Casarosa and Brogi, 2011: 55). The digitalisation of the information market mostly worsened the working conditions of young and freelance journalists. Some newspapers in Italy remunerate their staff from €4.30 gross per piece to €325.00 for two months of work Register (Casarosa and Brogi, 2011: 50).

The recent economic crisis has seriously affected job security in all countries. In Finland, hardship in the media's profit making has led to the recruitment of less professional journalists, and reducing the overall number of the working force. The increased amount of editorial work is reflected in a 2010 survey by the Journalists' Union, in which 53 per cent of 600 respondents feared losing their jobs, 45 per cent regarded their work meaningful and 54 per cent said they have too much work to do (Kuutti, Lauk and Lindgren, 2011: 32).

In Greece, the financial crisis has exposed the weaknesses of a defective media market, which has been for years artificially supported. During 2010 and 2011, many print outlets, even large and established ones closed down, while TV channels have introduced cuts in their output and many journalists have lost their jobs (Psychogiopoulou, Anagnostou and Kandyla, 2011: 58). Another factor that has a negative effect on professional autonomy is the multiple job-holding that has been prevalent among Greek journalists. Many journalists try to have another job in the public sector (i.e. in the public service broadcaster or a press office of a public administration unit) because a public sector job pays for the social security contributions (Psychogiopoulou, Anagnostou and Kandyla, 2011: 52).

Turkey represents a country with a low level of job security for journalists. Despite the special rights legally granted to journalists, for many years the media sector has practiced employing journalists without insurance. The competition among the workforce and the fear of unemployment prevent journalists from voicing their problems. No collective agreements exist to secure an extent of balance in salaries and individual job contracts. Informally employed journalists agree to work for much lower salaries than formally employed journalists and this causes an unfair competition (Kurban and Sözeri, 2011: 33).

In the UK newspapers hire journalists often on short-term rolling contracts, which creates pressure to comply with the style and political orientation of the newspaper (Craufurd Smith and Stolte, 2011: 38).

### **3.4.3.2 The status of freelancers**

All Mediadem countries report about inequality of freelance journalists' status compared to journalists with permanent positions. In most of the countries, the number of freelancers is growing because of the decreasing number of jobs in news organisations. Freelancers have fewer possibilities to protect their rights and secure their incomes. For example, in Finland, the members of the Journalists' Union are

secured by a collective agreement (a majority of Finnish journalists are members of the Union). Freelancers are required to sign two-party contractual agreements, and they are not in a position to negotiate contracts collectively, as this is regarded as a cartel-like activity (Kuutti, Lauk and Lindgren, 2011: 35).

The financial situation of freelance journalists in Germany has been stagnating or deteriorating and thus, also their willingness to invest into time consuming printed articles or other media coverage. According to the German report, 69 per cent of all freelance journalists earn less than 1,600 Euros per month (Müller and Gusy, 2011: 39).

### **3.4.3.3 Working conditions**

Increasing work overload seems to be a universal problem in the Mediadem countries. The importance of this problem, however, varies in different countries. According to several case study reports (Finland, Denmark, Germany, Spain, the UK, Estonia), current journalistic practices do not give much time for fact checking and considering and editing since media houses are oriented towards financial accountability and industrial production of news. The proportion of entertaining media content is increasing at the expense of analytical journalism and criticism. Instead of doing individual information gathering, journalists have to analyse increasingly more information provided by news agencies and other online services.

Time pressure has become a significant factor that determines the ways in which journalists work, especially in online news production. Increased emphasis on rapid production makes it harder to produce well-researched news stories. The situation obviously reduces time for research, specialising, analysis and control of the issues. According to the Belgian report close to 80 per cent of Flemish journalists are of the opinion that the workload of journalists has been increasing in recent years and no less than 10 per cent of the Flemish journalists are fighting 'burnout'. A survey among Belgian French-speaking journalists shows that almost half of them are unhappy about their working conditions and almost 80 per cent see a negative evolution in recent years (Van Besien, 2011: 39).

Also the other reports (Croatia, Estonia) tell about increasing workloads and time pressure in the news production process. Journalists work with more products, deadlines and across more media, which also reflects media convergence processes. The struggle for survival creates the situation where the market logic prevails over professional logic or, in the rare cases where professional logic is respected, journalistic production becomes relatively uncompetitive (as reflected in the Estonian and Croatian reports).

Even in Finland, where the employment of journalists is relatively well protected, the crisis has influenced the working conditions: due to the cuts in the workforce, newsrooms have become smaller and the workload of individual journalists has grown. In a 2010 survey by the Journalists' Union, 54 per cent said they have too much work (Kuutti, Lauk and Lindgren, 2011: 32).

In Germany, however, the overall working conditions enable journalists to produce for press, broadcasting, and online outlets that are relevant for societal and democratic discourses (Müller and Gusy, 2011: 38).

In Turkey, media enterprises are located in big cities, and mostly in Istanbul, where working and living costs are extremely high compared to the rest of the country (Kurban and Sözeri, 2011: 33).

#### **4. Factors of influence stemming from the organisational and professional domains**

According to the results of a global survey of 1,700 journalists in 17 countries (Hanitzsch *et al.*, 2010), journalists perceive the most important limits to their individual autonomy stemming from organisational, professional and procedural factors, rather than economic or political factors. In the following, these factors in different countries are compared from five perspectives: a) journalists' perceptions of their autonomy; b) self-censorship; c) internal relationships within the news organisations and editorial autonomy; d) self-regulation as an indicator of journalistic professionalism and autonomy; e) the potential of professional education in supporting journalistic autonomy; and f) journalists' trade unions and their role in safeguarding professional autonomy and independence.

##### **4.1 Journalists' own perceptions of their autonomy**

First of all, it is important to ask how journalists understand the concept of professional autonomy and how they perceive their individual autonomy in their everyday work. An interesting paradox appears here: journalists highly value their personal freedom of choice and decision making, but they do not think about it in terms of the larger concept of professional autonomy. The Estonian report demonstrates that only two out of ten interviewees could describe 'journalistic autonomy'. When the journalists estimated their degree of independence on a 5-point scale they mostly marked it as 'good', but when they started to tell different narratives on value conflicts, it became evident that there is a number of situations where journalists just accept the (commercial) values of the media organisation they work for, and are in the first instance loyal to the employer. The Estonian report also tells us: 'Most of the interviewees could not easily express themselves while speaking about the professional autonomy. They admitted to the interviewer that they had not been thinking about these issues before and only while being interviewed had they apprehended some new viewpoints to professionalism' (Harro-Loit and Loit, 2011: 37). Conceptually, the autonomy issue seems to be more the concern of academia than the practitioners. However, when 'translated' into questions, for instance, 'How free do you feel in choosing the topics to cover?' and 'How free are you in choosing the angle of your coverage?', journalists reflect in terms of personal independence. According to the Belgian report, close to 80 per cent of Flemish journalists are content with their personal independence (Van Besien, 2011: 39). The same appears to be the case in Finland, although there are estimations that the independence and autonomy in journalism would decline in the near future as media houses develop towards industrial production of news (Kuutti, Lauk and Lindgren, 2011: 32).

In some countries autonomy and integrity are not highly evaluated professional values. Up to 50 per cent of the Bulgarian journalists accept payment 'under the table' for their publications and materials. It is a practice among Bulgarian journalists to accept trips, paid by the companies, on whose activities and products they report (Smilova, Smilov and Ganev, 2011: 39). There is a lack of sensitivity

among the majority of journalists and editors that accepting such ‘gifts’ is an unacceptable form of trading in influence. Journalists’ perceptions of autonomy also reflect how sensitive they are concerning self-censorship. The latter is a highly subjective category, but journalists’ awareness of it and sensitivity towards it may effectively support autonomous behaviour.

## **4.2 Self-censorship**

Both, political and economic pressure mechanisms can provoke self-censorship. Self-censorship may also stem from the need of journalists to maintain good relationships with their sources. Today, the main source for self-censorship is economic dependence on owners and advertisers.

Self-censorship may also occur in connection with a low level of professionalism – the inability to present reliable, well checked critical information from trustworthy sources.

In Greece, the situation where journalists work for different employers who may have conflicting interests generates a kind of self-censorship where journalists at one employer may not contradict the interests of their other employer (Psychogiopoulou, Anagnostou and Kandyla, 2011: 44).

All interviewees in the case of Croatia admit to being exposed to censorship or practising self-censorship. The Croatian report also refers to ‘forbidden issues’ that should not be covered (e.g. details about media magnates), and some journalists feel pressures from their editors and editorial boards. Writing for different news portals seems to be a way out of the self-censorship trap for Croatian journalists (Švob-Đokić and Bilić, 2011: 32).

In Bulgaria, where lots of the journalistic workforce is looking for jobs, the fear for losing job forces journalists to obey the line of the owners and editors even if they do not agree with them (Smilova, Smilov and Ganev, 2011: 29).

In the countries where the media enjoy extensive protection of the right to free expression and journalists’ right for protection of their sources is strongly safeguarded (Denmark, Belgium), cases of self-censorship are not reported. However, even in Finland (which is ranked the first in the Reporters Without Borders and the Freedom House press freedom lists), self-censorship could be a common threat among small companies, which have a strong economic dependence on advertisers. In such situations editorial offices may avoid critical reporting about advertisers, but also be obligated to publish groundless positive news in order to foster their business goals (Kuutti, Lauk and Lindgren, 2011: 30).

## **4.3 Internal relationships (among journalists, management and owners) and editorial autonomy**

According to a recent study,<sup>1</sup> journalists regard the in-house guidelines and rules as the most important factors that influence their professional behaviour. Traditionally

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<sup>1</sup> An online survey of the EU funded research project MediaAct (*Media Accountability and Transparency in Europe*) among journalists in 12 countries (Austria, Estonia, Finland, Germany, Jordan, Italy, Netherlands, Poland, Romania, Spain, Switzerland, Tunisia) in 2011 (total 1732 respondents). See [www.mediaact.eu](http://www.mediaact.eu).

editorial autonomy has been regarded as the benchmark of professional autonomy. Editorial autonomy relates to the internal goals and structures of the organisation. In many countries, the owners' interests are balanced with legal or self-regulating requirements (editorial statutes or other conventions) supporting the independence of editorial staff. For example, in Flanders, the law imposes that the public service broadcaster must in all its informative programmes respect the code of ethics and the editorial statute (Van Besien, 2011: 37). Editorial statutes deal with the relationship between journalists, the editorial board and the management. They also contain guarantees for the independence of the journalists from internal and external pressures and for the editorial line of the news outlet (Ibid.).

Doug Underwood in his classical study *When MBA's rule the newsroom* (1993) raised the problem about the different incentives and values of people who fulfil different functions in media organisations and have also a different education and ideology. The media political problem is that traditionally the in-house value conflicts are not the issue of public concern. Where the editors are primarily loyal to the owners' private interests, they may even promote unprofessional and unethical practices in the newsrooms. In the Croatian case, the owners often exercise power over editorial decisions and exclusively decide about the employment conditions (Švob-Đokić and Bilić, 2011:34). In Estonia, when asked about editorial transparency (e.g. personnel policy, decisions concerning news production, etc.), most of the chief editors see the media organisation similar to any other business organisation, whilst the journalists' perception of a news organisation contains more transparency and openness for the general public about the everyday practices and editorial policies (Harro-Loit and Loit, 2011: 37).

Concerning in-house pressures, Estonian journalists referred to cases where errors were inserted into the texts during the editing process and they were not able to control the publishing process in all its stages. The responsibility for the final result (text with errors) still stays for the journalist.

When Spanish journalists are asked about the influences on their day-to-day work, the highest scores are awarded to the supervisors, professional conventions and news sources (respectively 3.88/5, 3.70/5 and 3.84/5), although management and the shortage of resources are still important elements of influence (3.36/5 and 3.67/5) (De la Sierra and Mantini, 2011: 39). However, when asked about the origins of these influences, journalists identify publishers, politicians (this trend increases year by year) and advertisers (APM, 2010: 42). In general, professionals do not explicitly assert that they are the victims of direct pressure or attempts to modify agendas in accordance to private interests instead of journalistic criteria.

In Finland, organisational reforms have created leadership oriented newsrooms and narrowed the autonomy of individual journalists (Kuutti, Lauk and Lindgren, 2011: 33). Germany, by contrast, has relatively successfully separated editorial offices from newsroom management (Müller and Gusy, 2011: 42) and thus increased the possibilities of journalists' independent decision-making.

#### **4.4 Self-regulation**

An important component of the professional values of journalism culture is self-regulation that potentially can secure and support journalists' individual autonomy, for example, by supporting journalists' right to refuse writing stories that contradict their ethical principles. As a concept, self-regulation aims at ensuring the quality of journalistic performance in serving the public interest. Ideally, the media organisations formulate and impose professional guidelines and standards (usually in the form of ethical codes) that journalists voluntarily adhere to. The institutions of Press Councils or Ombudsmen are set up to oversee the adherence to the ethical guidelines. The major incentive for self-regulation from the perspective of the media industry, however, is not serving the public interest but avoiding state intervention and securing business interests. Self-regulation, in practice acting with a minimum of coercion and at a maximum voluntary basis, can only be efficient under the circumstances in which media's voluntary conformity to accepted professional rules and standards appears inescapable (Lauk and Denton, 2011: 227). Depending on the general political and journalistic culture as well as the strength of civil society, media self-regulation mechanisms impact differently on journalists' behaviour and autonomy, and consequently, on the quality of journalism. Finland, Germany, Denmark, Belgium and the UK have long traditions of self-regulation as an influential part of the professional culture. Finnish self-regulation practice seems to be one of the most advanced in Europe. Although often criticised within Finland for being 'toothless', it is still respected by all news media (who have joined the Basic Agreement) and the public. The UK's Press Complaints Commission (PCC) is currently under review as part of Lord Justice Leveson's wide-ranging inquiry into 'the culture, practices and ethics of the press' (Leveson Inquiry, 2012).

Several countries where self-regulatory tools are established report about problems concerning the relations between the media industry and self-regulation (e.g. Slovakia, Romania). A prime example of this is Estonia with its two press councils of which one is affiliated to the newspaper association and the other positions itself as more independent in cooperation with the journalists' union. Neither has much impact on journalists' everyday work – the first clearly depending on the owners' organisation and the latter having no recognition among the mainstream media.

It appears from the case study reports that in most of the reviewed countries, in reality, self-regulative mechanisms do not offer enough support for journalists' individual autonomy and integrity.

#### **4.5 The role of professional education**

Taking into consideration the ever-lasting debate about the role and content of journalistic education, some important factors deserve attention: first, the existence of the tradition of special journalism education. The academic tradition of journalism education supports high quality standards of journalism, develops the journalists' ability of critical analysis of society and information, and contributes to their critical self-reflection and moral reasoning. Second, there also seems to be a correlation between strong journalism education and the integrity of the professional community of journalists. The examples of Finland, Germany and Denmark in the Mediadem

project prove that education can provide the necessary basis for independent and critical journalism.

Among the 14 countries compared, the journalistic profession in Denmark has a comparatively high level of professionalism and integrity, which is due to the Danish School of Media and Journalism (*Journalisthøjskolen*). Journalisthøjskolen has offered professional journalism education and training since the late 1950s. From the late 1990s onwards, two universities (Roskilde University and University of Southern Denmark) have also offered degree programmes in journalism (Helles, Søndergaard and Toft, 2011: 49).

In Finland, two thirds of the members of the Journalists' Union have at least a college level education but every fifth has a university degree in journalism. The educational level is higher among younger members of the profession. The educational background of journalists has changed during the 2000s: more than before, they have a journalism degree or media studies from a university or polytechnic. Consequently, the amount of journalists entering the field with other educational backgrounds or from other professions has decreased. Journalism training in specific institutions has shrunk as media employers arrange their own in-house training, especially within the context of newspaper reforms. However, this kind of training has connections only with new requirements and performances of editorial work and does not contain, for instance, critical thinking or self-evaluation of journalistic work (Kuutti, Lauk and Lindgren, 2011: 36).

Germany is similar to the aforementioned countries. In general, journalists obtain a university degree and then undergo additional practical training in a news organisation before assuming a freelance or employed position in the media. Some universities, as well as private journalism schools, provide a tailored education for journalists. These studies usually comprise basic subjects in journalism, political science, ethics and philosophy, economics and legal aspects, followed by practical training and the option for further specialisation. As a result, although specific vocational training is not required to work as journalist, in practice this is very common (Müller and Gusy, 2011: 41).

Estonia has also a long tradition of university level education in journalism. About a quarter of the active journalists are the graduates from the University of Tartu. The long tradition of academic education has a certain impact on the ethos of the profession.

The UK represents another model: a university degree but not in journalism. Special education is quite popular as further education. The NUJ (National Union of Journalists) estimates that currently 80 per cent of all entrants to the profession have a degree, though not necessarily in journalism. It is also generally necessary to have relevant work experience in order to access the profession, which can create an entrance barrier, as the majority of work experience placements are unpaid. Multimedia skills are increasingly a part of journalism training and are valued by employers. Both the NUJ and the PCC offer (mostly short) journalism courses, to keep journalists up to date with developments and to teach them new skills (Craufurd Smith and Stolte, 2011: 39-40).

Slovakia represents the country where the role and quality of professional education are actively discussed. Slovakia has a long-lasting problem with the quality of higher education in general, and in journalism/media in particular.

Journalism/media studies curricula seem to be outdated and too narrowly focused on journalistic issues (e.g. history of journalism) and not on more general (e.g. liberal arts) or specialised (e.g. energy) knowledge. Also, very little practical experience is offered during the studies. Perhaps the most important issue is the general lack of the development of analytical, logical and creative skills including the ability to differentiate between important and unimportant issues. However, the journalists in larger editorial chains and in the capital have various opportunities to educate themselves; specialised courses are often offered by their employers or the journalists' association. Journalists working in distant regions and in small offices are not so fortunate (Školkay, Hong and Kutaš, 2011: 52).

Spain represents a model that has some similarities with Slovakia. In 2008-2010, the number of students in academic journalism courses increased due both to the economic recession (in order to get a degree and therefore have better chances of finding a job) and to the Bologna Education Process, which has implied the introduction of many specialised courses. However, journalists themselves argue that they would not study journalism at the university if they could start again, because academia is not useful for working in the mass media. Contrary to the opinion of these professionals, some academic voices demand a compulsory degree as a prerequisite for accessing the profession and enrolment in a professional association similarly to the lawyers or architects (De la Sierra and Mantini, 2011: 42).

In Croatia, the media-related studies and practical journalism training do not go hand in hand, as the former is provided by universities (Zagreb, Dubrovnik) and the latter by private media ventures (Popović, Bilić, Jelić and Švob-Đokić, 2010).

There is scepticism towards eligibility of university trainees for journalistic jobs also in Romania. Although about 20 university-level journalism programs (both public and private) exist in Romania with an average number of 60 students per class, professionals in the field are sceptical about their practical skills. According to a study, less than 20 per cent of newcomers to the jobs are journalism graduates from the universities (Ghinea & Mungiu-Pippidi, 2010).

Unlike Romanian journalists, the majority of Greek journalists (60 per cent) declare having relevant theoretical training, despite the fact that journalists in Greece, unlike most other qualified occupations, are not required to go through formal studies (Anagnostou, Psychogiopoulou and Kandyla, 2010).

#### **4.6 Journalists' trade unions**

Journalists' trade unions play an important role in the protection of journalistic autonomy, especially by increasing job security and safeguarding the rights and social benefits of journalists. Trade unions may also stand for values protecting professionalism. Thus organisations' moral conduct and quality control may offer the best way to influence individual autonomy irrespective of a journalist's position in the organisational structure or type of media organisation.

The status and power of the unions of journalists reported in the Mediadem case studies reflect different problems and possibilities concerning journalists' professional autonomy. The analysis of unions brings to the surface the questions: who is a journalist and how fragmented is this professional community? Does this community have a critical mass of common incentives? How efficient are journalists' trade unions in safeguarding and protecting journalists' rights and providing

employment security/collective agreements? And finally, how are these different functions of trade unions balanced?

In Spain, journalists' associations are politicised, i.e. supporters of one or another political party, and they seem to work as spokespersons of some political powers (Reig, 2011: 264).

In Greece, traditionally, journalists' associations represented a selective group of professionals, a small and closed elite club, which was difficult to enter. Following the deregulation of the media in the late 1980s, and along with other changes, the profession has transformed into a more diverse, open and accessible environment. Journalists' associations now include journalists of very different status, ranging from well paid, recognisable and privileged members to journalists who are unknown and poorly paid (Psychogiopoulou, Anagnostou and Kandyla, 2011: 51).

The Danish Union of Journalists has a long history of having an active position as a voice for journalists' wider role in society. The 2000s have seen a rapid increase in the communication activities of both private and public organisations, which has led to a boom in the employment of journalists in PR departments and strategic communication units. Along with this development, more and more members from the PR business have joined the Union, which can have a negative influence on the matters concerning journalists' independent behaviour (Helles, Søndergaard and Toft, 2011: 52).

The Estonian Journalists' Union has been weak since the re-establishment of Estonia's independence. Only the public service broadcaster's journalists have been able to achieve a collective job agreement. An interviewee (a former chief editor, also a member of the Journalists' Union) explained the reasons why the Union is not able to fully protect the journalists' integrity and secure the job conditions: 'When looking at the individuals' level – who are the members of the Journalists' Union? Mainly retired or withdrawn journalists. In several cases the employees by default are expected not to join the journalists' union, sometimes the membership has even officially been banned. Some may reject this rule and be a member anyway, but I cannot see much motivation for that... Any journalist would like to eat.' (Harro-Loit and Loit, 2011: 35). During personal salary negotiations journalists pledge not to have ties with the Journalists' Union. Instead, the Estonian Newspaper Association, representing the employers, is doing everything in order to also look like a professional guild.

Journalists' unions in Germany seek to ensure the political and legal framework conditions that engender independent journalism. They endeavour to safeguard the professional standards and the legal as well as economic working conditions of journalists in various ways. The two journalists' unions, the German Journalists Union and the German Journalists Association, went through strikes and fierce negotiations in order to renew the collective agreement for journalists in August 2011. The agreement applies to almost 14,000 journalists in the print media. According to the German case study report, the journalists' unions also possess avenues to negotiate and influence the legal framework, although political circumstances sometimes curtail their influence (Müller and Gusy, 2011: 41).

Finland is a country where the role of the union in defining the professional culture is strong. The Journalists' Union negotiates collective agreements and pleads the common cause of its members. Collective labour agreements between journalists

and media employers are tied to media business and concern all journalists and media organisations. Important propositions in the collective agreement concern journalists' right to refuse any task, which falls outside the professional ethics of journalism, and the right to refuse to incorporate advertising text into their stories. Journalists are committed to follow the company's policy, but this must be clear and in written form and the editorial staff must be informed about any changes in the policy in due time. Individual journalists have personal freedom of expression as private citizens as far as this does not cause harm to their employer (Ollila, 2004: 31-32).

Journalists in Bulgaria have their associations, though in the last decade they have become less visible and their influence has become weaker than that of the other media-related associations. The most influential organisation is the Union of Bulgarian Journalists (UBJ), comprising more than half of the journalists in Bulgaria with 4,400 members. This union is the only organisation providing legal advice and protection of the professional rights of journalists, as well as financial support to its members. Though it is not registered as a trade union, it is a party to the collective labour contracts for the journalists in public broadcasting. In 2010, the Bulgarian section of the Association of European Journalists (AEJ) was established (Smilova, Smilov and Ganev, 2011: 36).

## **5. Conclusions**

The protection of the autonomy of an individual journalist seems to be an all-European problem. The possibilities of individual journalists to make independent decisions differ remarkably in different countries, depending on the overall size of the media market and the number of jobs available, as well as the level of commercialisation and technological advancement. The new digital technologies combined with the pressure of profit interests increase the workload and work intensity of journalists. This, in turn, makes journalists more dependent on their employers, and in case of unfavourable job market conditions, they may give up professional ideals and values to serve the owner's business interests (as many Mediadem country reports demonstrate). The rapid growth and professionalisation of the PR business sector also has a detrimental impact on journalists' work and its quality. Under the circumstances of time pressure in the newsrooms, journalists tend to increasingly rely on the material provided by PR sources, and give up with journalistic filtering or critical evaluation.

There are, however, not many examples of the attempts to offer legal support to journalists' individual autonomy or editorial autonomy. Among the Mediadem countries, Belgium reports about legally imposed editorial statutes that regulate the working environment in media organisations.

In the countries, which have strong trade unions and strong educational traditions of professional journalists, journalistic autonomy and integrity are better protected. Strong trade unions (like in Finland, Germany or Denmark) are able to negotiate for journalists' interests and achieve favourable collective agreements, and compensations in case of the loss of the job. Where transparent and stable agreements and employment conditions exist, jobs are better secured and journalists feel more independent in their everyday work. In other countries (like Estonia, Romania, Bulgaria), the trade unions have been unable to overcome the media industry's reluctance to hold social dialogue and journalists have to rely solely on themselves in

salary and job conditions negotiations. Perhaps, media policy makers should consider some policy means for improving trade unions in the media field. Along with digitalisation and the development of the Internet and online media, new problems concerning job protection, employment and working conditions arise.

The comparison of the Mediadem countries provides information for the hypothesis that a critical mass of journalists, who have got special education (either a degree or some kind of further education), can better maintain the accountability and autonomy of the profession. Denmark, Finland, Germany, and to some extent also Estonia, report about an advanced level of special journalism education. Slovakia and Bulgaria, by contrast, report about the quality of higher journalism education as a problem that leads to low quality of journalism.

The question of special education is controversial: on the one hand, the journalistic profession is an 'open access profession' and does not require licensing of competence or accreditation. On the other hand, special education provides the ability of professional self-reflection concerning professional autonomy and ethics, but also specific competences concerning journalistic practices and discourse. These competences become increasingly more important in the Internet and globalisation era and are not easily acquired by 'hands-on' training only.

Therefore, it would be worth considering some kind of licence policy for professional journalists. This kind of accreditation might be a tool for balancing the competitive nature of the job market, and the commercial interests of media organisations to use the growing number of poorly qualified workers in order to cut down on costs. It is a matter of discussion how the different 'levels of excellence' should be evaluated, but as a policy tool this would be a reason to bring together the educators, journalists, public service media and commercial content producers. In addition, the trade unions could be an actor where the professional ethos and opportunities of career models is discussed and the ideas could be disseminated to the public.

Finally, as the definition of the 'journalistic profession' is becoming hazier, the idea of whom the policy instruments need to protect also becomes more blurred. It is therefore necessary to discuss whether the journalism profession should maintain the status of a 'liberal and open access profession' or whether democracy needs a profession, which is similar to 'established' professions with clear qualification requirements, research based education for entrance to the field.

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**Table 1.** Press freedom rankings of the countries involved in the Mediadem project

<b>Country</b>	<b>Reporters Without Borders 2011-2012</b>	<b>Freedom House 2012</b>
<b>Belgium</b>	20-21	4
<b>Bulgaria</b>	80-83	78-79
<b>Croatia</b>	68-69	83-85
<b>Denmark</b>	10-11	5-8
<b>Estonia</b>	3	22-24
<b>Finland</b>	1	1
<b>Germany</b>	16-18	16-21
<b>Greece</b>	70-71	65-66
<b>Italy</b>	61	70-72
<b>Romania</b>	47-49	86-87
<b>Slovakia</b>	25-27	31-36
<b>Spain</b>	39	43-46
<b>Turkey</b>	148	117-121
<b>UK</b>	28	31-36

Source: Reporters without Borders (2012), Freedom House (2012).

## **5. Media freedom and independence: The European judicial approach in fourteen countries**

*Bart Van Besien, Pierre-François Docquir, Sebastian Müller and Christoph Gusy*

### **1. Introduction**

What role do the European courts have in shaping media policies? To answer this question one needs to analyse existing case law thoroughly, evaluate the interaction between the European and domestic courts and probe the implementation and execution of the European courts' judgments within national legal systems. This comparative report thus examines the interaction and interrelatedness of three different, but connected, legal and judicial spheres with regard to media freedom and independence. These are the adjudications of the Council of Europe's European Court of Human Rights (ECtHR), the adjudications of the Court of Justice of the European Union (CJEU) and the legal and judicial systems of the 14 Mediadem countries: Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey, and the United Kingdom.

The focus of this comparative report is on European judicial mechanisms, although domestic case law and legislative processes are also considered to the extent they interact with European rulings. This focus, at both the European level via the ECtHR and the CJEU and at the national level of the 14 Mediadem countries, means this report does not cover all relevant case law on media freedom and independence, but rather covers only those judgments originating in the 14 countries under study. Furthermore, domestic jurisprudence complements the analysis only where necessary, which means the report does not aspire to provide the reader with a full picture of domestic case law throughout the Member States of the European Union (EU) or the contracting states of the Council of Europe. The comparative analysis and legal synthesis enabled by such a methodological approach helps disclose common patterns and problems throughout Europe with regard to media freedom. The analysis also illustrates that litigation before the European courts has resulted in a comprehensive legal framework for the protection of media freedom, and sheds light on different aspects of the European courts' judicial approaches by elucidating relevant judicial developments from various viewpoints.

The research teams in the 14 Mediadem countries under study authored the 'Case study reports' (Mediadem, 2011), which constitute the necessary foundation for this comparative report. These 14 country studies enabled the identification of the main issues pertaining to the case law of the ECtHR and the CJEU and their adjudications on media freedom and independence as well as freedom of expression. Where necessary, the information collected from the reports has been complemented by further research. The analysis is structured as follows. Section 2 addresses the culture of litigation in the 14 countries examined. In other words, it looks at who files complaints and whether this is done strategically to shape media policy or for reasons particular to the circumstances of each case. Section 3 is dedicated to a discussion of the general legal framework of the two European judicial mechanisms. Special attention is given to the status in the domestic legal order of the European Convention on Human Rights (ECHR) and the system for executing European judgments. The overview of leading cases in Section 4 and the analysis of thematic topics in Section 5 provide the necessary factual background of significant European court judgments

and recurring topics addressed in these judgments. A legal synthesis in Section 6 complements the thematic analysis by placing the judgments in the legal context, particularly Article 10 of the ECHR on freedom of expression. This section is structured around the legal questions relating to the scope of protection afforded to freedom of expression and justified interference with this right. The report continues with a comparative overview of the reasons prompting litigants to seek judicial recourse (Section 7), the values served by the European courts (Section 8) and the European courts' approach to new media and Internet-related issues (Section 9). It concludes with Section 10 which explores the execution of the European courts' judgments.

## **2. The culture of litigation: The courts' role in shaping media policy and patterns of litigation**

This section on the culture of litigation seeks to provide an overview of court decisions' role in shaping media policies in the 14 countries under study. Are the ECtHR and the CJEU important actors in shaping the legal structure of the media and, more importantly, media behaviour? Moreover, what is the influence of the national courts in this regard? Another question that arises is whether litigation is pursued strategically or out of the individual litigant's interest in rectifying a particular verdict, as might for example be the case in criminal proceedings. Is it more common to resort to judicial or legislative procedures to influence media policies? This leads to the question: who are those that litigate before the courts?

Within the traditional understanding of the principle of separation of powers, the courts are state actors implementing and enforcing legislation that has been enacted by the legislature. However in practice the courts, especially constitutional courts and courts in legal traditions based on common law, shape binding rules through their case law. Nevertheless, the role of the judiciary is distinct from the legislature. Essentially, the legislature enjoys the legitimacy of the electorate, while the judiciary's competence derives from constitutionally prescribed functions and legal expertise. The legislature addresses future developments and anticipates regulatory necessities while courts generally address single cases after the fact.

In conducting empirical research for the Mediadem project, including interviews with the judiciary, judges pointed out that they implement the law but do not necessarily shape it. However, the analysis of cases stemming from European litigation or litigation before the national courts testifies to the important role the ECtHR and the CJEU as well as the national courts have assumed in shaping media law. Judicial influence on media law varies according to the issues and parties involved in each case. Structural questions concerning the liberalisation of the media market, for instance, or the need for positive legal obligations to safeguard a public communications space leave the responsible legislature with a broad margin of appreciation. European case law in this regard, such as that on broadcast frequencies, is less influential and less frequent, while national courts are more often approached to decide on structural issues. On the other hand, over the last decades the ECtHR has developed a clear legal interpretation of Article 8 (right to respect for private and family life) and Article 10 (freedom of expression) of the ECHR, and has thus influenced national litigation as well as national jurisprudence pertaining to the right to privacy and freedom of speech, especially when balancing the different interests at

stake in libel and defamation cases. In this regard, the courts have acted as actors shaping media law.

European judicial decisions have influenced media law in all countries under study and have done so in different areas. The conflicts and problems pertaining to freedom of expression, the media's role in a democratic society, respect for privacy, libel and defamation, and structural questions concerning the allocation of frequencies and the establishment of an independent public communications space have been addressed by the ECtHR and in some cases also by the CJEU. Not all of these issues were addressed in all 14 countries, but over the decades litigation from all countries has contributed to the case law. The existing ECtHR jurisprudence shows the Court has developed a profound corpus of media law. As the ECHR must be applied in the light of the ECtHR's judgments, the national media law regulators must adhere to the comparable ECtHR case law stemming from other Council of Europe countries (see for general information Breuer, 2010). The ECtHR has thus established overarching European media standards.

One aspect that needs to be highlighted, as it exemplifies the importance of European and national courts in the configuration of media policies, is that the ECtHR and national courts assume a crucial position in all cases in which contradicting rights are at stake and need to be balanced. These encompass libel and defamation cases and cases that raise claims relating to respect of privacy. Here, it is courts that develop the applicable legally binding rules, as statutory law can only define in an abstract manner the scope of protection granted to individuals when it comes to allegedly defamatory media behaviour or when privacy issues are at stake. The unpredictable constellations life offers as well as the need to balance important fundamental rights (respect for privacy and the protection of human dignity on the one hand, and freedom of speech in the media on the other) place courts in an indispensable position, as it is their task to implement and translate the abstract statutory provisions into practice.

The interaction of the ECtHR with the national courts testifies to the important role of European jurisprudence but also illustrates its limits. Generally, national courts, especially the higher courts and constitutional courts, refer in their judgments to the ECHR and the ECtHR's findings. As a result, the national judiciary either implements ECtHR's decisions *directly* (for example in the case of an adverse ECtHR judgment against the country which results in changes to national jurisprudence) or *indirectly*, when applying the legal interpretation of Article 10 of the ECHR stemming from ECtHR cases against other countries in libel cases. Of course, courts can also diverge from the ECtHR's judgments and act to the detriment of freedom of expression. This is the case when national courts simply ignore the Strasbourg court, as has sometimes been the case with Turkey, or when the national judiciary engages in a reluctant implementation of ECtHR judgments and so impedes substantive ECHR influence. As ECtHR judgments cannot override national case law or legislation, it lies in the hands of the domestic judiciary, administration and legislature to implement ECtHR case law by changing judicial, administrative or legislative practice.

It is not possible to ascertain a clear pattern or preference for litigation against political lobbying in shaping media law throughout the countries under study. The reasons for this are manifold and include the political culture in each country, the role of the judiciary in shaping legally applicable standards, the availability of an individual complaint procedure before a constitutional court to influence media

policy, the legal culture in the country and the existing support structures for litigants. Furthermore, the topics of concern also determine whether litigation is sought. If one were to identify a model, it could be suggested that there is one set of countries in which litigation prevails, while in the other set political lobbying is more common. The countries under study are placed somewhere in between. In some cases parliaments only reluctantly enact media regulations, which means those who want to lobby certain ideas have to seek other ways, including litigation. For example, in Belgium, a Court of Appeal decided Google had violated national copyright law with its news services (Van Besien, 2011: 15). However, media policy in Belgium is by no means exclusively left to the courts. Belgian lawmakers are active in other fields of media policy and Belgium can accordingly be considered a mixed model. The United Kingdom, in turn, is a classic example of the strong role of the parliament and governing parties in shaping media regulation, although the courts have gained more influence by means of the Human Rights Act 1998 (Craufurd Smith and Stolte, 2011: 8-9). Germany is also an example of the mixed model, as while the Federal Constitutional Court shapes regulation significantly, so do state parliaments, especially through the Interstate Treaty on Broadcasting (Müller and Gusy, 2011: 12-13).

Similarly, no coherent picture of strategic litigation can be drawn from the existing European case law. While single cases may refer to fundamental questions, such as the protection of information sources or the correct proportionality test for deciding on publishing prominent individuals' pictures, the majority of European cases are triggered by individuals, publishers or other companies seeking to rectify a single judgment. This mirrors the litigants themselves, which consist mainly of journalists, commercial media companies, public service broadcasters and prominent political or societal figures.

### **3. The status of European court decisions in the national legal systems and the execution of European judgments**

Litigation takes place within a multi-level system of legal orders. Each country constitutes a legal order with a constitution as its main reference or, in the case of the United Kingdom, an unwritten constitution, implemented through legal practice. However, the national legal order interacts with the two European systems of legislation and adjudication, one formed by the Council of Europe and the ECtHR and the other by the European Union and the CJEU. Indeed, the national legal order no longer exists as a separately constituted legal realm, but instead forms part of a European legal system in which the ECtHR influences the outcome of court proceedings and legislative acts, while the CJEU shapes the domestic legal order. Thus the legal spheres of the ECtHR and the CJEU play an important role, as they interrelate with the national legal systems.

Before examining the existing case law on media freedom and independence, we will briefly describe the basic rules of the interaction between these three different legal orders. This analysis will address the status of the ECHR and the ECtHR judgments within the national legal systems and the relationship between national courts and European courts with regard to freedom of expression and media freedom and independence.

### 3.1 The legal position of European court decisions in the national legal order

The status of the European court decisions in the national legal order reflects the fact that the ECHR, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are different types of international treaties.

While the ECHR must be incorporated in the national legal systems of the states party to the Council of Europe, the TEU, the TFEU and their predecessors apply directly in the Member States after ratification is completed. The ECHR usually assumes the position of domestic law, sometimes with supra-legislative status, but also with infra-constitutional status. It is only in Austria that the ECHR is considered to have outright constitutional status (Grabewarter, 2009: 16). The ECHR often has considerable influence on domestic law and judicial decisions with regard to fundamental rights. This influence is at times comparable to that of a constitutional legal framework. In the countries under study, it seems indeed that the ECHR generally prevails over domestic legislation, and can assume a quasi-constitutional status. In Spain, the ECHR does not have constitutional value as such, but is often used to interpret rules contained in the Spanish Constitution (De la Sierra and Mantini, 2011: 15-16). The ECHR can be invoked, even before constitutional courts, as is the case in Germany where applicants can refer to the ECHR in conjunction with the corresponding fundamental right of the national Basic Law.<sup>1</sup> Due to the ECHR's direct effect in the national legal order once incorporated or via explicit protection of the ECHR in national constitutions (as in Croatia, see Council of Europe, 2006: 254), constitutional courts regularly have the power to nullify domestic law due to violations of the ECHR. Turning to EU law, this covers even more areas and more comprehensively influences national legislation, or even completely replaces it, as an intended result of European integration. With the entry into force of the Treaty of Lisbon in December 2009, the Charter of Fundamental Rights of the European Union became legally binding on the EU Member States when these implement EU law, albeit with important opt-outs for the United Kingdom, Poland and the Czech Republic. As such it can be expected the Charter will play an important role in the development of national media policy in the future.

The ECHR, in Article 46, requires states to implement and execute ECtHR judgments, but leaves concrete measures of implementation to the discretion of the respondent states. The ECtHR's judgments do not have direct effect in states party to the ECHR, nor does the ECtHR have the legal competence to nullify legal provisions, state authority decisions or domestic courts' judgments. Although the ECtHR might give directions to respondent states concerning implementation measures to adopt in pilot judgments, under Article 46 of the ECHR the ECtHR's competence in this regard is rather limited; the ECtHR can only find a violation of a state's duty to abide by the judgment of the ECtHR. In such cases it will refer the case to the Committee of Ministers for further consideration.

It is the supreme courts or the constitutional courts which in most countries under study have developed the legal understanding of the binding qualities of ECtHR judgments. This means the legislative, executive and judicial branches must adhere to ECtHR judgments. In Belgium, for example, ECtHR decisions have direct effect in the internal legal order. Belgian citizens can invoke the ECHR, as well as decisions made by the ECtHR, in Belgian court trials, and Belgian judges will often disregard

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<sup>1</sup> German Federal Constitutional Court, 14 October 2004, no. 2 BvR 1481/04, para. 63.

national legislation that conflicts with the ECHR or ECtHR decisions. The same can be said about the position of the German Federal Constitutional Court (GFCC), which in 2004 strengthened the position of the ECHR and the ECtHR's judgments by stating that all German courts are obliged to interpret German law, including constitutional law, in accordance with the ECHR and with ECtHR case law. In other words, even though the GFCC stressed the ECHR has only domestic law status in Germany, it strengthened the position of the ECHR by stating that German law should as far as possible be interpreted consistently with the ECHR and the decisions of the ECtHR.<sup>2</sup> A comparable development took place in Italy in 2007, when the Italian Constitutional Court accepted the ECHR as a parameter of constitutionality, offering broader possibilities to judges for directly interpreting Italian law in the light of ECtHR case law, with the important condition that such interpretation, based on the ECHR, must remain consistent with the Italian Constitution. It is noted that before 2007 the ECtHR had very little influence on Italian jurisprudence due to the fact that the Italian legal system lacked the possibility to re-open proceedings to implement ECtHR case law, and the ECHR was only referred to in indirect and implicit ways (see Casarosa and Brogi, 2011: 40). The United Kingdom discloses a peculiarity. The ECHR and the decisions of the ECtHR enjoy a special position in the United Kingdom's legal system. The Human Rights Act 1998 (HRA) had a major effect on United Kingdom law by according domestic effect to key articles of the ECHR. Even though the United Kingdom Parliament, though not the devolved nations, can still legislate contrary to the ECHR, the HRA has created a presumption of Parliament not doing so (Craufurd Smith and Stolte, 2011: 8-9). Under the HRA, courts are expected to take into account ECtHR decisions, although they are not required to actually follow them. In cases of conflicting rulings of the ECtHR and the Supreme Court of the United Kingdom, courts in the United Kingdom must follow the Supreme Court's ruling. As is mentioned in the United Kingdom case study report, this could result in a breach by the United Kingdom of Article 46 of the ECHR. In practice, however, the courts and authorities in the United Kingdom have a good record of following and implementing ECtHR judgments (Craufurd Smith and Stolte, 2011: 10 and 45).

Due to the distinct legal position of the CJEU, most countries seem to accept in practice the direct effect and supremacy of EU law and the decisions taken by the CJEU over national law, even if these principles are sometimes difficult to align with national practices and constitutional principles. The case study reports do not disclose any major controversies concerning the status of the decisions of the CJEU in the national legal orders, and confirm that on some occasions, national courts use the preliminary ruling procedure to ask the CJEU for advice on the interpretation of EU law (see sections 3.2, 4 and 10 of this report).

### **3.2 The relationship of domestic courts and European courts with regard to freedom of the media**

Linked to the obligation to execute ECtHR judgments is the relationship of national courts and European courts pertaining to freedom of opinion and media independence. As mentioned above, the legal spheres partly interact and partly override each other. Wherever interaction is necessary, conflicts can occur. It is not uncommon for tensions to arise between supreme courts or constitutional courts and the European courts, especially the ECtHR. The discussions in the wake of *von Hannover v.*

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<sup>2</sup> German Federal Constitutional Court, 14 October 2004, no. 2 BvR 1481/04, paras. 31 and 62.

*Germany*,<sup>3</sup> in which the ECtHR found a violation of Article 8 of the ECHR, previously denied by the GFCC (Müller and Gusy, 2011: 7), testify to this. German legal scholars as well as some GFCC judges criticised the ECtHR for its judgment, essentially claiming the Court had overstepped its competence, and that its legal interpretation unjustifiably curtailed the work of press photographers (see Prütting and Stern, 2005; and Wildhaber, 2005 for further information). However, after the first discussions cooled down and the ECtHR decided domestic German courts had violated the ECHR in the case of *Görgülü v. Germany*,<sup>4</sup> the relationship between the GFCC and the ECtHR became established in the sense that the important role played by the ECtHR within the German legal order was accepted. Turkish high courts on the other hand have persistently disregarded ECtHR case law, especially in defamation cases and cases deemed to go against the interests of the Turkish state, such as those involving (non-violent) expressions on Kurdish and Armenian issues within Turkey. The statement by the then Council of Europe's Commissioner for Human Rights, Thomas Hammarberg, is evidence of the underlying tension between the ECtHR and the Turkish judicial authorities, as he points out that domestic courts have not assessed journalistic reporting in line with ECtHR case law (Hammarberg, 2011: para. 37).

Interestingly, tensions have only rarely occurred between the CJEU and national courts in cases concerning freedom of expression. In one of the cases studied, a national court in one of the 14 countries at issue requested a preliminary ruling by the CJEU on a structural question regarding television frequencies and broadcasting licences in Italy (Casarosa and Brogi, 2011: 15).<sup>5</sup> This case is important as rather than revealing a tension between the CJEU and the national courts, it shows the different approach the CJEU and the ECtHR might follow for the same case. The ECtHR may decide on human rights issues which the CJEU did not address and which the domestic courts also did not fully consider.<sup>6</sup> This may change with the entering into force of the Charter of Fundamental Rights of the European Union.

#### **4. Do the European courts significantly shape media policies in the 14 countries under study? Leading cases by the ECtHR**

There is evidence that litigation before the European courts has significantly shaped the development of media policy and media regulation in a number of European countries. A number of particularly influential cases have had a major impact on the particular country involved, as well as other countries, in the sense they instigated a change in domestic judicial practices or triggered a change in legislation or interpretation of constitutional provisions. Some important decisions have stemmed from countries that do not come under the scope of the Mediadem project. Attention for example is merited towards the ECtHR's judgments *Informationsverein Lentia v.*

<sup>3</sup> ECtHR, *von Hannover v. Germany* (no. 1) (no. 59320/00), 24 June 2004.

<sup>4</sup> ECtHR, *Görgülü v. Germany* (no. 74969/01), 26 February 2004.

<sup>5</sup> CJEU, C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, [31 January 2008]. Other examples include CJEU, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [18 June 1991]; CJEU, C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis, Ipourgos Epikratias*, [16 December 2008]; and CJEU, C-81/09, *Idryma Typou AE v. Ypourgos Typou kai Meson Mazikis Enimerosis*, [21 October 2010].

<sup>6</sup> ECtHR, *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (no. 38433/09), 7 June 2012.

*Austria* on private broadcasting<sup>7</sup> and *Manole v. Moldova* on the positive obligation of the state to ensure free and independent broadcasting.<sup>8</sup> Influential cases have also originated in cases involving Mediadem countries. Before examining the cases that significantly shaped media policy in the Mediadem countries alongside thematic lines, it is important to examine the role of the European courts in some leading cases.

In *Sunday Times (no. 1) v. UK*,<sup>9</sup> the ECtHR for the first time found a violation of Article 10 of the ECHR. This related to prior restraints on reporting on a court case. The ECtHR afforded a high level of protection to reporting on matters of public interest, which went together with the recognition of the ‘right of the public to be properly informed’ about matters of public interest. This decision was the starting point for the ECtHR’s case law on freedom of expression in the sense that it effectively reduced the margin of appreciation for contracting states to interfere in the freedom of expression of their citizens, particularly in relation to the freedom of the press to report on matters of public interest. Furthermore, it also made clear that Article 10 of the ECHR does not only apply to governments and parliaments, but also to the courts.

Perhaps the most important decision concerning the protection of journalists’ sources was *Goodwin v. UK*.<sup>10</sup> In this decision, and in various decisions afterwards,<sup>11</sup> the ECtHR held that any limitations on the confidentiality of journalists’ sources must be met with the most careful scrutiny. These decisions seem to have led to substantive changes in the national legal systems of the countries involved (Craufurd Smith and Stolte, 2011: 33; Van Besien, 2011: 20). Another important case is *von Hannover v. Germany*,<sup>12</sup> where the ECtHR considered that the decisive factor in balancing the protection of private life against freedom of expression lies in the contribution the publication of photographs and articles make to debates of general interest. This judgment led to considerable improvements in the protection of the privacy of public figures in the German media (Müller and Gusy, 2011: 13). The case *Jersild v. Denmark*<sup>13</sup> was a turning point for Danish law, as it prompted Danish courts to incorporate aspects of the ECtHR case law in their own judgments concerning freedom of expression.<sup>14</sup> Other cases were influential in the sense they triggered public discussion and changes to domestic law, even if these legislative changes were ultimately not successfully implemented. Reference can be made, for example, to *Dink v. Turkey*, which led to an unsatisfying reform of the Turkish Penal Code article on ‘insulting Turkishness’ that did not prevent further condemnations by the ECtHR (Kurban and Sözeri, 2011: 26).

In other instances, the ECtHR developed case law that considerably influenced the legal framework and judicial practices in the countries under study. A good example is the ECtHR case law on defamation, in which the ECtHR has stressed that the freedom to criticise government forms part of the freedom to impart information,

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<sup>7</sup> ECtHR, *Informationsverein Lentia and others v. Austria* (no. 13914/88 et al.), 24 November 1993.

<sup>8</sup> ECtHR, *Manole and others v. Moldova* (no. 13936/02), 17 September 2009.

<sup>9</sup> ECtHR, *Sunday Times (no. 1) v. UK* (no. 6538/74), 26 April 1979.

<sup>10</sup> ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996.

<sup>11</sup> For instance, ECtHR, *Ernst and Others v. Belgium* (no. 33400/96), 15 July 2003; ECtHR, *Tillack v. Belgium* (no. 20477/05), 27 November 2007; and ECtHR, *Financial Times Ltd and Others v. UK* (no. 821/03), 15 December 2009.

<sup>12</sup> ECtHR, *von Hannover v. Germany (no. 1)* (no. 59320/00), 24 June 2004.

<sup>13</sup> ECtHR, *Jersild v. Denmark* (no. 15890/89), 23 September 1994.

<sup>14</sup> I.e., in general, even though the *Jersild* case considered *in concreto* the conviction of a journalist by the Danish courts for assisting in the dissemination of racist remarks by another person in an interview.

thus emphasising the role of the press as a public watchdog. The ECtHR commonly makes a basic distinction between facts and value judgments or opinions, stressing that the latter cannot be proven and should not be subject to a proof requirement.<sup>15</sup> As is shown in the case study reports, the ECtHR in various libel and defamation cases originating in Belgium, Denmark and Greece has affirmed this distinction, but also added that value judgments must have a sufficient factual basis.<sup>16</sup>

Matters relating to broadcasting have also been dealt with by the CJEU. With CJEU cases one should keep in mind the limited competences of the EU institutions in the field of media policy. As a result, the CJEU case law has centered not so much on freedom of expression, but rather on the liberalisation of the media market. The influence of the CJEU has been especially palpable in the field of audiovisual broadcasting, which was brought under the competence of the CJEU because it was considered to be an economic service,<sup>17</sup> with a special focus on issues of freedom of movement, competition law and media pluralism. Although there has been an ongoing debate concerning the lack of EU competences in the field of media pluralism, media pluralism has been accepted by the CJEU as a requirement in the public interest that may justify restrictions on the free movement of services. The case study reports are mostly silent on the case law of the CJEU, especially as regards possible implementation problems. The cases mentioned concern the liberalisation of broadcasting (in particular, with regard to television monopolies in light of the EU free movement and competition rules as well as protection of fundamental rights, especially freedom of expression),<sup>18</sup> and the compatibility with EU law of national rules on the allocation of broadcasting licences and the ownership of audiovisual media (which stresses the need for criteria that are objective, transparent, non-discriminatory and proportional).<sup>19</sup> Otherwise, various case study reports indicate a lack of significant impact of the EU Charter of Fundamental Rights on domestic media policy or the case law of the national courts – at least so far (e.g. Psychogiopoulou, Anagnostou and Kandyla, 2011: 14; Školkay, Hong and Kutaš, 2011: 19; and Craufurd Smith and Stolte, 2011: 9). Of special importance are some recent preliminary rulings by the CJEU, two stemming from Belgium, where it was decided that Internet service providers and social networks cannot be ordered to install general filtering systems to identify or block content that infringes intellectual property rights,<sup>20</sup> although individual measures against intermediaries to prevent actual or further infringement may be allowed.<sup>21</sup> Interestingly, the CJEU engaged in a fundamental rights reasoning in these rulings.

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<sup>15</sup> See in particular ECtHR, *Lingens v. Austria* (no. 9815/82), 8 July 1986.

<sup>16</sup> E.g. ECtHR, *De Haes and Gijssels v Belgium* (no. 19983/92), 24 February 1997 and ECtHR, *Pedersen and Baadsgaard v. Denmark* (no. 49017/99), 17 December 2004.

<sup>17</sup> See CJEU, C-155/73, *Giuseppe Sacchi* [30 April 1974]; and CJEU, C-52/79, *Procureur du Roi v Marc J.V.C. Debaube and others* [18 March 1980].

<sup>18</sup> Psychogiopoulou, Anagnostou and Kandyla, 2011: 15: reference to CJEU, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [18 June 1991].

<sup>19</sup> Casarosa and Brogi, 2011: 15: CJEU, C-380/05, *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*, [31 January 2008].

<sup>20</sup> CJEU, C-360/10, *Sabam v. Netlog*, [16 February 2012]; and CJEU, C-70/10, *Scarlet Extended v. Sabam*, [24 November 2011].

<sup>21</sup> CJEU, C-324/09, *L'Oréal and others v. eBay International and others*, [12 July 2011].

## **5. Thematic overview of the case law: A comparative approach**

With regard to media freedom and independence, the ECtHR has dealt with a broad range of topics, especially in light of possible restrictions on freedom of expression. This thematic overview seeks to group together single cases originating in the 14 countries under study around the prevailing topics. The most important topics for media freedom and independence are the following:

### **5.1 Privacy protection**

The protection of an individual's privacy is one of the principal issues the ECtHR has had to decide upon. The ECtHR considers the right to respect for one's private life (Article 8 ECHR) to be included in the notion of 'the rights of others' in Article 10(2) ECHR. As such, limitations to freedom of expression with a view to protecting an individual's privacy may be justified. The tension between the protection of privacy and freedom of expression becomes a particularly difficult balancing exercise when public persons, such as politicians, are concerned. The ECtHR has stressed that public persons also have a legitimate expectation to respect of their private life, especially in cases that do not contribute to a debate on matters of public interest (Müller and Gusy, 2011: 35; Van Besien, 2011: 18).<sup>22</sup> In cases that do concern matters of public interest, the protection of the private life of a public person may to a certain degree give way to the freedom of the press to impart information.

The ECtHR's case law on the relationship between freedom of expression and the protection of privacy quite often appears problematic with regard to its implementation in the countries covered by the case study reports. For instance, Finnish courts tend to give relatively strong protection to privacy rights (and less protection to freedom of expression rights), which has given rise to at least seven findings before the ECtHR that Finland has breached the requirements of the ECHR (Kuutti, Lauk and Lindgren, 2011: 14). While Finnish courts may be inclined to over-protect privacy entitlements, Greek courts on the contrary seem to disregard the ECtHR's case law on minimum levels of privacy protection for public persons (Psychogiopoulou, Anagnostou and Kandyla, 2011: 39). In other countries, such as Denmark, Germany and the United Kingdom, the ECtHR decisions balancing privacy protection with the freedom of the press seem to have had more of an impact on domestic law and judicial attitudes (Helles, Søndergaard and Toft, 2011: 10; Müller and Gusy, 2011: 35-36; Craufurd Smith and Stolte, 2011: 10).

### **5.2 Protection of reputation: Libel and defamation cases**

The case study reports show the ECtHR's case law is often most influential and controversial in libel and defamation cases. For instance, the Bulgarian case study report mentions two recent ECtHR judgments<sup>23</sup> in which the Bulgarian state was found to have breached the ECHR in its handling of defamation cases against journalists. Libel and defamation are important triggers of self-censorship in Bulgaria

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<sup>22</sup> See ECtHR, *von Hannover v. Germany* (no. 1) (no. 59320/00), 24 June 2004. See also ECtHR, *Leempoel and S.A. Ciné Revue v. Belgium* (No. 64772/01), 9 November 2006 (on the breach of the private life of a member of the judiciary).

<sup>23</sup> ECtHR, *Kasabova v. Bulgaria* (no. 22385/03), 19 April 2011, and ECtHR, *Bozhkov v. Bulgaria* (no. 3316/04), 19 April 2011.

and the ECtHR decisions in this regard are expected to produce positive effects on judicial practices (Smilova, Smilov and Ganev, 2011: 13). The ECtHR has also decided in several instances against prison sentences and other criminal sanctions on journalists in libel cases concerning Romania. Following the ECtHR's judgments, such sanctions ceased to be applied and a legal reform process was initiated, though the situation remains somewhat unclear after the Romanian Constitutional Court declared the new act unconstitutional (Ghinea and Avădani, 2011: 12). In contrast, there does not seem to have been a meaningful influence of the ECtHR on the jurisprudence of the lower courts in Slovakia. Many of these lower courts appear to attach insufficient value to public interest concerns and good faith on the part of the media, and to overprotect the dignity and honour of public persons, though compliance with ECtHR judgments seems better in the higher courts (Školokay, Hong and Kutaš, 2011: 12).

The protection of the reputation of others is often invoked by national authorities to restrict freedom of expression by the media, especially with regard to public figures such as politicians and civil servants. The ECtHR has developed a vast jurisprudence in this respect, affording a high level of protection to freedom of expression rights enjoyed by the media in cases that concern matters of public interest. The ECtHR accepts there are wider limits of acceptable criticism with regard to public figures such as politicians.<sup>24</sup> According to the ECtHR's well-established case law, the limits of criticism are also wider with regard to governments and public servants such as judges, public prosecutors, police officers and members of the military.<sup>25</sup> Journalistic protection is subject to the condition that the information divulged concerns matters of public interest and that journalists 'are acting in good faith and on an accurate factual basis and [that they] provide reliable and precise information in accordance with the ethics of journalism'.<sup>26</sup> For example, in a case involving a journalist who had insulted a politician's wife and former assistant by mentioning facts related to her private life, the ECtHR decided the subsequent conviction of the journalist for insult did not violate Article 10 of the ECHR, since the journalist's statements did not concern the public interest or matters of general concern. The ECtHR also stressed that the journalist could have used less offensive language to express his opinion (Harro-Loit and Loit, 2011: 11).<sup>27</sup> In another case in which a publisher had not properly verified defamatory statements regarding a government minister, the ECtHR judged that the publisher was liable for the lack of truthfulness of the statements, which had been published as facts, rather than as value judgments (Švob-Đokić and Bilić, 2011: 31).<sup>28</sup>

### 5.3 National security and counter-terrorism measures

National security is listed among the possible legitimate aims for restricting freedom of expression in Article 10(2) of the ECHR. In practice, this public policy concern is often closely connected to the fight against terrorism. The ECtHR considers that the contracting states have a relatively wide margin of appreciation to limit freedom of expression where national security is concerned. However, the ECtHR is also of the

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<sup>24</sup> E.g. ECtHR, *Lingens v. Austria* (no. 9815/82), 8 July 1986, and ECtHR, *Turhan v. Turkey* (no. 48176/99), 19 May 2005.

<sup>25</sup> E.g. ECtHR, *De Haes and Gijssels v Belgium* (no. 19983/92), 24 February 1997.

<sup>26</sup> ECtHR, *Fressoz and Roire v France* (no. 29183/95), 21 January 1999, para. 54.

<sup>27</sup> ECtHR, *Tammer v. Estonia* (no. 41205/98), 6 February 2001.

<sup>28</sup> ECtHR, *Europapress Holding d.o.o. v. Croatia* (no. 25333/06), 22 October 2009.

opinion that, once the information on national security is already in the public arena, the information may no longer be restricted and the authors of further dissemination may no longer be punished.<sup>29</sup> Also, the ECtHR considers that the public may have an interest in knowing certain information; this entails that the state cannot unconditionally define as classified and restrict access to all information on national security.<sup>30</sup>

The ECtHR does not consider hate speech, including incitement to violence or terrorism, as covered by the protection of Article 10(1) of the ECHR. A significant number of the cases handled by the ECtHR where counter-terrorism was the stated aim behind restrictions on freedom of expression concerned Turkey (Kurban and Sözeri, 2011: 38). These restrictions took the form of various measures, including prison sentences for journalists and restraints on publication. In many of these cases, the ECtHR held the restricted expressions had not incited hatred, violence or terrorism, and concluded they were disproportionate and in conflict with Article 10 ECHR.<sup>31</sup> In other cases, the ECtHR decided the publications had in fact incited violence, so no violation of Article 10 ECHR was pronounced.<sup>32</sup>

The cases mentioned in the case study reports also show that Spain was found to have breached Article 10 of the ECHR in a case before the ECtHR relating counter-terrorism. The circumstances of this case were somewhat different in the sense that the aim invoked by the Spanish state under Article 10(2) of the ECHR was insult to the government, rather than the fight against terrorism. The case concerned a politician who in an article had criticised the counter-terrorist policy of the Spanish government in the Basque Country (De la Sierra and Mantini, 2011: 30).<sup>33</sup>

#### 5.4 Protection of journalists' sources

The case study reports show that ECtHR decisions on the protection of journalists' sources have been especially relevant for the United Kingdom and Belgium. There is evidence that the ECtHR decisions have exerted substantive influence on the internal legal order of these countries. Both countries have enacted new legislation on the protection of journalists' sources in line with ECtHR standards (Craufurd Smith and Stolte, 2011: 33; Van Besien, 2011: 20).

In *Goodwin v. UK* and various subsequent decisions, the ECtHR stressed the importance of protecting journalists' sources as a basic condition for press freedom: 'Having regard to the importance of the protection of journalists' sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in

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<sup>29</sup> ECtHR, *The Observer and Guardian Newspapers Ltd v. the United Kingdom* (no. 13585/88), 26 November 1991.

<sup>30</sup> ECtHR, *Sürek and Özdemir v. Turkey* (nos. 23927/94 and 24277/94), 8 July 1999 and ECtHR, *Demirel and Ates (no. 3) v. Turkey* (no. 11976/03), 9 December 2008.

<sup>31</sup> E.g. ECtHR, *Varli and others v. Turkey* (no. 57299/00), 27 April 2006; ECtHR, *Günes v. Turkey* (no. 53916/00), 27 September 2005; ECtHR, *Karakoç v. Turkey* (no. 53919/00), 1 January 2006; ECtHR, *Yildiz and others v. Turkey* (no. 60608/00), 11 April 2006 and ECtHR, *Erbakan v. Turkey* (no. 59405/00), 6 July 2006.

<sup>32</sup> E.g. ECtHR, *Sürek v. Turkey (No. 1)* (no. 26682/95), 8 July 1999 and ECtHR, *Sürek v. Turkey (No. 3)* (no.24735/94), 8 July 1999.

<sup>33</sup> E.g. ECtHR, *Castells v. Spain* (no. 11798/85), 23 April 1992.

the public interest.’<sup>34</sup> The ECtHR thus concluded that ‘limitations on the confidentiality of journalists’ sources call for the most careful scrutiny by the Court’.<sup>35</sup>

Two distinct types of cases on the protection of journalists’ sources can be identified. The first type concerns cases where journalists were forced to disclose their sources. For instance, in *Goodwin v. UK*, the ECtHR found an order served on a journalist to disclose the identity of his source was excessive and a violation of Article 10 of the ECHR.<sup>36</sup> The second type concerns cases in which journalists had their homes or workplaces searched, material seized, or both. For instance, in *Ernst and Others v. Belgium* and in *Tillack v. Belgium* (as well as on several other occasions), the ECtHR decided such searches should be considered even more serious than orders to disclose journalists’ sources, due to the measures’ surprise nature and wide scope, often giving access to all documentation of a journalist.<sup>37</sup>

## 6. Legal synthesis: Judicial approaches to media freedom

This section on the judicial approaches to media freedom focuses on the legal structure underlying the jurisprudence. While the preceding presentation of the leading cases and the thematic overview shed some light on the topics dealt with by the European courts, the core legal aspects shall be set out here. This synthesis is based mainly on the case study reports and complemented, where necessary, with additional case law from the European courts. The focus is on the European judicial mechanisms, the ECtHR and the CJEU, as well as the relationship between the European courts’ judgments and national legal systems.

### 6.1 Scope of protection of freedom of expression

While a basic understanding prevails among the countries under study on the necessary role of print media, broadcasting and audiovisual services from online outlets in democratic societies, the scope of protection varies. What are the differences and similarities or common approaches in the interpretation of relevant fundamental rights provisions (ECHR, EU Charter and national provisions) by the CJEU, the ECtHR, and, if available, the national constitutional or supreme courts?

Essentially, the constitutions of the countries examined (and the common law in the United Kingdom) enshrine the protection of the print media in light of its necessary role as watchdog in modern democracies. The courts and thus the judiciary, in line with the legal provisions, reiterate this basic function. The protection of the print media, as stressed by the ECtHR and repeated in many judgments, is twofold: the freedom of expression assigned to the particular journalist at issue and the protection afforded to the print media in general as a constitutive element of democracy.<sup>38</sup> In broad terms, the same applies to broadcasting.<sup>39</sup> The ECtHR stresses

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<sup>34</sup> ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996, para. 39.

<sup>35</sup> ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996, para. 40.

<sup>36</sup> See above. See also ECtHR, *Financial Times Ltd and Others v. UK* (no. 821/03), 15 December 2009.

<sup>37</sup> ECtHR, *Roemen and Schmit v. Luxembourg* (no. 51772/99), 25 February 2003; ECtHR, *Ernst and Others v. Belgium* (no. 33400/96), 15 July 2003; ECtHR, *Tillack v. Belgium* (no. 20477/05), 27 November 2007.

<sup>38</sup> See only ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996, para. 39; ECtHR, *Sanoma Uitgevers B.V. v. The Netherlands* (no. 38224/03), 14 September 2010, para. 50.

the need for free and independent broadcasting, which may require the state to act and provide the necessary funding and conditions for the independence of broadcasting stations.<sup>40</sup> This resembles the adjudication of the GFCC, according to which the state is obliged to create an independent public communicative sphere.<sup>41</sup>

The question of what is covered by the scope of fundamental rights concerning new media services is pressing. Currently, new media services in the form of news websites, blogs, online activities of public service broadcasters and the online services offered by print media outlets challenge the legislature and judiciary in all the countries under study. Questions circle around the following topics: When does online news become a broadcast, or a linear audiovisual media service within the wording of the Audiovisual Media Services (AVMS) Directive,<sup>42</sup> and thus become subject to the generally much stricter broadcasting regulation? What should public service broadcasters provide online? When does a blog become a journalistic publication and thus attract specific protections but also legal obligations applicable to journalists? The phenomenon of single-author blogs that can reach large audiences through the information channel of the Internet was not anticipated by legislators and remains an open question.

The print media and broadcasting are embedded within large organisational structures, which are best exemplified in the editorial offices. This structure is seen to guarantee professionalism, as it is not only one person, but a group, that produces media content. The legislature had this structure in mind when it created legal privileges for journalists but also specific obligations, such as those that relate to truthful reporting, accuracy, and impartiality. Blogs, however, established a new form of public communication, as a single person can potentially reach a large audience once reserved only for traditional media outlets. As blogs can transfer solely personal information as well as information that is directed to a large audience and with potential political influence, the question has arisen as to under which conditions journalists' rights and obligations should also apply to bloggers. In the case of Germany, the legislature has sought to address this question with a new legal form, 'journalistic editorial online content', and left it to the courts to define this more precisely. As 'journalistic editorial online content' enjoys some of the privileges applicable to journalists, its definition is crucial (see for the definition Held, 2008: para 38). The ECHR does not explicitly distinguish between print media and broadcasting and the individual freedom of expression, which means it is open to the ECtHR to include new media services within the scope of Article 10 of the ECHR. The national constitutions that do proclaim such a distinction, such as the Belgian Constitution and the German Basic Law, need to seek legal solutions if they are to guarantee the same protection currently granted to traditional media services to comparable media services in the online world, such as blogs with journalistic content.

Besides these basic observations, some particular aspects merit attention as they illustrate how the jurisprudence of the ECtHR has shaped national properties. The ECtHR has broadened the scope of protection afforded against prior censorship (i.e. before publication) to audiovisual media. The Belgian Constitution, as

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<sup>39</sup> See only ECtHR, *RTBF v. Belgium* (no. 50084/06), 29 March 2011.

<sup>40</sup> ECtHR, *Manole and others v. Moldova* (no. 13936/02), 17 September 2009, paras 98-99.

<sup>41</sup> German Federal Constitutional Court, 16 June 1981, no. 1 BvL 89/87, in BVerfGE 57, 295 at p. 321f.

<sup>42</sup> Directive 2010/13/EU, Official Journal of the EU, L 95 of 15 April 2010, p. 1.

traditionally interpreted by the Court of Cassation, distinguishes between print media outlets and other media services such as broadcasting (Van Besien, 2011: 17). While the Constitution in Article 25 is interpreted as explicitly prohibiting prior censorship of print media outlets, this is not the case with broadcasters. The ECtHR found this in *RTBF v. Belgium* to be a violation of Article 10 of the ECHR, meaning in effect that audiovisual content must come within the scope of the prohibition of prior censorship in Article 25 of the Belgian Constitution (Van Besien, 2011: 18).<sup>43</sup> Meanwhile the Belgian Court of Cassation, in two recent decisions,<sup>44</sup> decided that digital communication via the Internet should be considered a ‘press offence’ within the meaning of Article 150 of the Belgian Constitution. It can therefore be expected that the Court of Cassation will henceforth consider Internet publications to fall within the scope of Article 25 of the Belgian Constitution and thus benefit from the prohibition on prior censorship.

The European jurisprudence pertaining to the protection of information sources discloses tensions in the countries under study between journalists’ use of secret sources and the law enforcement authorities. Even though in most of the countries studied, protection of sources is respected, the ECtHR has had to decide upon concrete measures of law enforcement authorities and their proper balance with the protection of informants necessary in democratic states.<sup>45</sup> While national legislation generally protects journalists’ premises and editorial offices from search, and journalistic material from seizure, this protection is not absolute. Journalists’ right to withhold the identity of their informants constitutes a core element of the protection granted by the applicable fundamental right in the countries under study as well as Article 10 of the ECHR. However, the national legal orders provide different restrictions in this regard. Journalists are commonly required to disclose their sources’ information when this is the only way to prevent a serious crime.

Furthermore, the ECtHR protects both value judgment and fact in publications under Article 10 of the ECHR. The wording of Article 10 of the ECHR allows for the protection of both these aspects, which enables the Court to cover almost all forms of written or oral communication. The distinction between fact and value judgment is important, as national judges as well as the ECtHR have developed distinct lines of reasoning which differentiate between these two forms of communication. Interestingly, the Greek judiciary has until now mostly ignored the European court’s interpretation, which has resulted in a curtailment of the protection of journalists’ work (Psychogiopoulou, Anagnostou and Kandyla, 2011: 41).<sup>46</sup>

The ECtHR does not clearly extend the scope of protection of Article 10 ECHR to a right of access to public documents, important for journalistic work. However, since 2009, the ECtHR has broadened its interpretation of the notion ‘freedom to receive information’ to a certain degree. In two important judgments, the ECtHR found that the refusal by public authorities to give the media or civil society organisations access to documents that were needed for public debate violated *in these*

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<sup>43</sup> ECtHR, *RTBF v. Belgium* (no. 50084/06), 29 March 2011, para. 116.

<sup>44</sup> Court of Cassation, Nr. P.11.1374.N, 6 March 2012 and Court of Cassation, Nr. P.11.0855.N, 6 March 2012.

<sup>45</sup> ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996; ECtHR, *Sanoma Uitgevers B.V v. The Netherlands* (no. 38224/03), 14 September 2010; ECtHR, *Nordisk Film & TV A/S v. Denmark* (no. 40485/02), 8 December 2005.

<sup>46</sup> ECtHR, *Avgi Publishing and Press Agency S.A and Karis v. Greece* (no. 15909/06), 5 June 2008, para. 33.

*particular cases* Article 10 ECHR.<sup>47</sup> The Strasbourg Court did not declare that Article 10 ECHR protects *in general* the access to public documents. It only pointed out that governments have an obligation not to impede the flow of information on matters of public concern and that, depending on the circumstances of each case, certain refusals to provide access to public documents may constitute a violation of Article 10 ECHR. It is to be noted that various national laws also cover the right to access to public documents,<sup>48</sup> and that the EU Charter on Fundamental Rights in its Article 42 recognises a right of access to documents of the European Union institutions.<sup>49</sup>

The CJEU has had so far only limited opportunities to develop its own reasoning on Article 11 of the EU Charter of Fundamental Rights in relation to the countries under study. Although it clearly states in cases from other EU member states that maintenance of pluralism in the media is crucial (with reference to Article 10 of the ECHR), the case law is different to the jurisprudence of the ECtHR.<sup>50</sup> Accounting for this are primarily two reasons: firstly, the EU Charter of Fundamental Rights only came into force in December 2009<sup>51</sup> and secondly, the EU has a clear economic focus on media matters. Although fundamental rights protection in the EU, stemming from the ECHR and the constitutional traditions common to the Member States, was (and still is) a general principle of EU law, this did not change the reasoning of the CJEU. Simply put, the CJEU draws its reasoning on the applicable provisions in the EU treaties for media services (such as Article 56 of the TFEU on the freedom to provide services) as well as the adopted directives (such as the AVMS Directive). In the CJEU's judgment in *United Pan-Europe Communications*, for instance, the question was not whether there was a justified interference with Article 10 of the ECHR, but whether the freedom to provide services in the TFEU itself could be restricted based on the ECHR. The CJEU reiterated that the maintenance of pluralism of television programmes, as part of a cultural policy and as such protected by Article 10 of the ECHR, can restrict the freedom to provide services.<sup>52</sup>

## 6.2 Limitations of freedom of expression

Limitations of freedom of expression may stem from different sources and have different objectives. Based on the analysis carried out in the countries of this project, the predominant rights and public interest objectives in freedom of expression cases are protection of personal privacy, criminal provisions to prevent libel and defamation, anti-terror legislation, legal protection for companies, and the protection of the honour of public figures. Legal disputes surrounding these rights frequently reoccur in national as well as European litigation. In cases brought to the European

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<sup>47</sup> ECtHR, *Társaság A Szabadságjogokért (TASZ) v. Hungary* (no. 37374/05), 14 April 2009 and ECtHR, *Kenedi v. Hungary* (no. 31475/05), 26 May 2009.

<sup>48</sup> See for instance Article 32 of the Belgian Constitution.

<sup>49</sup> See also the European Convention on Access to Official Documents of 27 November 2008. However, although this convention was signed by a number of countries (including some countries covered by Mediadem), it has not yet entered into force due to an insufficient number of ratifications.

<sup>50</sup> CJEU, C-288/89, *Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, [25 July 1991], para. 23; CJEU, C-148/91, *Veronica Omroep Organisatie v. Commissariaat voor de Media*, [3 February 1993], para. 10; CJEU, C-250/06, *United Pan-Europe Communications Belgium SA v. Belgium*, [13 December 2007], para. 41.

<sup>51</sup> It is noteworthy that the United Kingdom and Poland have restricted the applicability of the EU Charter on Fundamental Rights through a special protocol to the Lisbon Treaty.

<sup>52</sup> CJEU, C-250/06, *United Pan-Europe Communications Belgium SA v. Belgium*, [13 December 2007], para. 41.

courts, it is mainly the ECtHR that examines whether a state has acted within its margin of appreciation, and whether the interference was necessary in a democratic society in line with Article 10(2) of the ECHR. The ECtHR's overarching reasoning is to allow restrictions of freedom of expression when these are based on law, have a legitimate aim and are necessary in a democratic society, the latter only being the case if the restriction is proportionate to the aim pursued.<sup>53</sup>

It can be observed that national courts follow a comparable legal technique. They also have to decide what right – such as freedom of expression or privacy – prevails when balancing the different interests at stake on a case-by-case basis and with regard to the particular circumstances. This rather vague legal prerequisite opens the space for country-specific interpretations of the rights that might curtail or even prohibit freedom of expression. Countries that strongly value privacy, such as Finland (Kuutti, Lauk and Lindgren, 2011: 14), or state institutions, as can be observed in Turkey with regard to prosecutors and judges (Hammarberg, 2011: para. 39; Kurban and Sözeri, 2011: 27), will presumably decide in favour of the rights protecting those groups and against the right of freedom of expression. It is through the ECtHR that the various approaches in these cases form one commonly applicable legal understanding. This is outlined below.

### **6.2.1 Relationship with other fundamental rights: The protection of privacy**

It is common practice to balance the protection of privacy with freedom of expression, taking into account the public interest. Protection of privacy is not a static notion. It has to be seen in conjunction with the specific public interest in the particular case that is then balanced against the right to respect for privacy.<sup>54</sup> Because the ECtHR must gauge the different interests at stake and the particular circumstances of the case, it is not surprising that it has concluded differently from some of the national courts. In some countries under study, such as Denmark and Finland, the ECtHR's stance of seeing the press and thus freedom of expression as constitutive for democracy has altered the national adjudication towards a greater degree of protection afforded to freedom of expression (Helles, Søndergaard and Toft, 2011: 10; Kuutti, Lauk and Lindgren, 2011: 13f). The ECtHR has carved out some basic principles that are commonly applied to determine which right prevails.

Firstly, the differentiation the ECtHR has drawn between fact and value judgments, with different requirements to justify publication in each case, merits attention. According to the ECtHR, a value judgment enjoys much broader protection than a description of facts.<sup>55</sup> However, the ECtHR has established a clear legal framework to protect journalists' work when it comes to facts. Journalists are required to carry out their research based on journalistic principles, including critical assessment of sources and double-checking with other sources, and can then not be held accountable after publication should the facts be false. In doing so, the ECtHR prescribes obligations for journalists in such a way that they have the right – and even the duty – to impart information on matters of public interest 'in a manner consistent

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<sup>53</sup> ECtHR, *Avgi Publishing and Press Agency S.A. and Karis v. Greece* (no. 15909/2006), 5 June 2008, para. 24.

<sup>54</sup> See for instance ECtHR, *von Hannover v. Germany (no. 1)* (no. 59320/00), 24 June 2004.

<sup>55</sup> ECtHR, *Avgi Publishing and Press Agency S.A. and Karis v. Greece* (no. 15909/2006), 5 June 2008, para. 26.

with [the press's] obligations and responsibilities'<sup>56</sup> (see Van Besien, 2011: 35). In other words, if a journalist's sources are reliable and other sources confirm the information conveyed, the journalist cannot be held accountable afterwards if the information turns out to be false. Even though the degree of proof may vary according to the facts published and the interest of the public in being informed, this legal interpretation obliges journalists to work accurately, but simultaneously excludes them from pecuniary damages.

Secondly, the ECtHR has laid down basic guidelines to which publishers, journalists (be they for magazines, newspapers or new media services) and bloggers must adhere when they publish photographs depicting public figures. In a 2004 judgment concerning the German media law on publishing photographs, the Court stated that public figures or persons of public life, such as politicians, actors, or members of royal families, also enjoy the protection of private life. Until the ECtHR's judgment, the German legislation allowed the publication of pictures of public figures without the need to justify publication or connect it to a debate of public interest, and thus conceded the press a broader spectrum within which to manoeuvre. It was only necessary that the person depicted did not clearly demonstrate that he or she intended to act privately, as might be the case when in a secluded place. But the ECtHR shifted the focus and declared that pictures taken of public figures can only be published when the photographs and articles contribute '(...) to a debate of general interest,'<sup>57</sup> and not when they satisfy mere sensation.

### **6.2.2 Limits stemming from the protection of human dignity: Libel and defamation**

Criminal proceedings and civil claims for the payment of non-pecuniary damages against journalists due to alleged libel or defamation are common among all countries under study. However, the legal prerequisites for the protection of the individual's honour and the possible repercussions in the form of imprisonment and payment of damages vary, as do the cases. While the legal protection of human dignity is essential to societies, prosecution for libel and defamation and legal action in civil courts may have a chilling effect on journalistic work. State authorities, such as courts and public prosecutors, and legislators enjoy a margin of appreciation when they implement libel and defamation provisions or adopt relevant legislation. These state acts can, however, unjustifiably impede freedom of expression and undermine the function of the media in a democratic society. The ECtHR has received claims concerning alleged violations of Article 10 ECHR and has developed case law which legislatures, courts, and public prosecutors must take into account. As a general rule, the ECtHR weighs the competing interests of the press and the person concerned differently from the national courts. This is exemplified in the case *Avgi Publishing and Press Agency S.A. and Karis v. Greece* in which the ECtHR found '(...) the role of national courts in defamation cases is not to tell the journalist the tolerable terms and characterisations that should be used, when in the frame of the journalist profession one exercises the right to articulate criticisms, including sharp ones. Instead, national courts are called to examine whether in the context of a case, the public's interest and the motive of the

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<sup>56</sup> ECtHR, *De Haes and Gijssels v. Belgium* (no. 19983/92), 24 February 1997, para. 37.

<sup>57</sup> ECtHR, *von Hannover v. Germany (no. 1)* (no. 59320/00), 24 June 2004, para. 76.

journalist justify resorting to a dose of provocation or even exaggeration.<sup>58</sup>

### **6.2.3 Limits stemming from the protection of collective values or state institutions**

The ECtHR's stance in cases pertaining to freedom of expression on the one hand and the protection of collective values or state institutions on the other concedes journalists a broader spectrum to act than originally anticipated by the state legislatures or national judiciaries. The ECtHR seeks to rectify the restrictive interpretation and implementation of existing legislation, thus providing ample protection to freedom of expression. While the ECtHR sees the necessity of protecting individual human dignity through respect of privacy or by means of defamation legislation, the ECtHR curtails the state's margin of appreciation much more when it comes to the protection of collective values, which usually amount to the protection of state institutions. The situation in Turkey where insult to the Turkish nation, state, parliament, government or the courts is a criminal offence illustrates this in a drastic manner. The domestic legislation provides rather vague wording which could potentially restrict almost any kind of criticism of the Turkish state (Kurban and Sözeri, 2011: 26).<sup>59</sup> Consequently, the ECtHR has found that this domestic legislation and its implementation violate Article 10 of the ECHR.<sup>60</sup>

### **6.2.4 Protection of information sources**

Although protection of information sources is a common legal standard in the countries under study, legislation requiring journalists to disclose their sources or to submit data that might disclose their sources and the applicable procedures in such cases vary. Domestic legislation lays down which state authority can issue an administrative order for disclosure or submission of data and to which procedural safeguards the journalists can turn to protect their informants. The ECtHR has established a common *acquis* concerning requirements that law enforcement authorities in particular, must respect. Firstly, the decision to search journalists' premises or editorial offices must be reviewed by an independent body.<sup>61</sup> This can be a judge or another independent and impartial decision-making body that is separate from the executive. The ECtHR then requires respect for the proportionality principle. This means the authorities must respect the essential and indispensable right of journalists in democratic societies to maintain relationships with secret sources and to publish information when this concerns a public affair. The role of the press weighs heavily, as the Court puts it, when determining 'whether the restriction was proportionate to the legitimate aim pursued'.<sup>62</sup> The Court also extends the proportionality test to the actual means used, which is of practical importance when state authorities decide to search a journalist's premises and seize data that might

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<sup>58</sup> ECtHR, *Avgi Publishing and Press Agency S.A. and Karis v. Greece* (no. 15909/2006), 5 June 2008, para. 33. Translation provided by Psychogiopoulou, Anagnostou and Kandyla (2011: 41).

<sup>59</sup> The ECtHR has also rectified the Spanish's courts approach to protect the government of criticism in finding a violation of Article 10 ECHR. See only ECtHR, *Castells v. Spain* (no. 11798/85), 23 April 1992 and de la Sierra and Mantini (2011), p. 30 for further information.

<sup>60</sup> ECtHR, *Taner Akçam v. Turkey* (no. 27520/07), 25 October 2011, para. 94.

<sup>61</sup> ECtHR, *Sanoma Uitgevers B.V. v. The Netherlands* (no. 38224/03), 14 September 2010, para. 90.

<sup>62</sup> ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996, para. 40.

reveal the source of information.<sup>63</sup> This means that if – as a first step – a disclosure is justified and – as a second step – the seizure itself is proportionate, the seizure is not legal if other means would have led to the same result.

## **7. Motivation for litigation: Comparison and synthesis of reasons and circumstances leading to legal action**

Respect of private life is based on the principle of human dignity, which is a common value in all countries under study and a value shared by the ECtHR. There is no differentiation between the countries examined concerning the basic principle that every person has the right to decide what is said about him or her; and that he or she consequently has the right to prevent journalists or civic journalists from publishing false information about him or her, degrading value judgments or information about his or her private life. While this fundamental idea is respected in all countries under study, it opens the field for curtailing the freedom of the media. Societal, legal and political traditions prevail, influencing the reasoning of national courts to the detriment of media freedom, which prompts litigants to bring their cases to the Strasbourg court. Libel and defamation regulation, in turn, is premised on the right to protect the honour of a person, which is also linked to protection of human dignity. The chilling effect that legal processes in the national civil and criminal courts and disproportionately restrictive legal measures can have on freedom of expression have triggered comprehensive ECtHR case law (for cases stemming from Finland see Kuutti, Lauk, Lindgren, 2011: 13; for cases stemming from Greece see Psychogiopoulou, Anagnostou and Kandyla, 2011: 41). Due to the adverse effect on the media and the threat of criminal conviction in some of the countries under study, as is the case in Finland (Kuutti, Lauk, Lindgren, 2011: 14), media representatives have sought to rectify the situation by litigation before the ECtHR.

This phenomenon is linked to another observation: respect for private life and protection against libel are important for individuals when their personal dignity is at stake. However, they become critical when the focus is shifted to the function of the person concerned. When the function is deemed worthy of protection, this raises the question of what the legitimate aim being pursued actually is and what its impact is on the curtailment of freedom of expression. A function or a state position can have dignity, but this is not to be confused with human dignity. The lack of this differentiation can lead to unjustified verdicts against journalists. Throughout Europe, courts tend to curtail journalistic freedom when critical reporting or comments against the judiciary are made in the press. The restrictive measures prohibiting, or at least deterring, journalists from researching and publishing on prosecutors' wrongdoings illustrate another sensitive field. Measures against journalists based on protection of privacy or libel and defamation of public or state figures has prompted individuals to seek recourse to the ECtHR to seek to rectify the national courts' strict approach (see only De la Sierra and Mantini, 2011: 30). In other cases the ECtHR has influenced national constitutional or supreme court decisions, as these have referred explicitly to the ECtHR case law. The Italian Supreme Court has stated for example: '(...) the fundamental role played by the press in the democratic debate does not allow to exclude that it could criticise the judiciary, newspapers being 'watchdogs' of democracy and institutions, including the judiciary, as already affirmed by the ECtHR.' (quoted after Casarosa and Brogi, 2011: 40).

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<sup>63</sup> See ECtHR, *Tillack v. Belgium* (no. 20477/05), 27 November 2007, para. 65-68.

Another comparable shortcoming concerning freedom of the media that has led to litigation before the ECtHR concerns the protection of sources and the publication of confidential information.<sup>64</sup> Here the imbalanced assessment of the rights and interests at stake by domestic courts has prompted media representatives to challenge the national judicial findings. The ECtHR has stressed in those cases that free and independent media in democratic societies rely on secret sources and that without them they would not be able to perform their work as public watchdogs.<sup>65</sup>

Structural regulation pertaining to the media is another subject that has led to litigation, both before the CJEU and the ECtHR. What were the reasons for this? Firstly, the question of how to create a free and independent public communicative sphere had to be addressed. While it is clear that democratic societies rely on free and independent media, different concepts exist on how to achieve this objective. One way is through positive obligations imposed on the state. This is done in many European countries through media anti-concentration measures and the establishment of public service broadcasting. The ECtHR judgment in *Manole and others v. Moldova*<sup>66</sup> (Craufurd Smith and Stolte, 2011: 13) and the case law of the GFCC (Müller and Gusy, 2011: 21) illustrate this. The reasoning of the two courts is similar: free and independent media without domination from single societal groups are a cornerstone and thus constitutive for democratic societies. If media pluralism and freedom of expression is at risk, state intervention may be required, as the ECtHR correctly states: ‘Genuine, effective exercise of freedom of expression does not depend merely on the State’s duty not to interfere, but may require it to take positive measures of protection, through its law or practice (...). Given the importance of what is at stake under Article 10, the State must be the ultimate guarantor of pluralism (...).’<sup>67</sup> The Mediadem’s United Kingdom report refers to the need to act, as the *Manole* case obliges contracting states of the Council of Europe to adopt positive measures to protect media pluralism (Craufurd Smith and Stolte, 2011: 13). It is of course also possible that the state might be inclined to curtail the independence and pluralism of the media by ignoring its positive obligations or enact other reform agendas. The CJEU also had the opportunity to decide on positive structural obligations regarding the allocation of broadcast channels in a private cable network.<sup>68</sup> German legislation requires cable broadcasting networks to transmit channels in order to provide the audience with a pluralistic choice (these are the so-called ‘must carry’ rules). A private cable network company unsuccessfully contested these requirements before the CJEU. The Luxemburg Court found that the general interest in maintaining pluralism in broadcasting channels transmitted via cable justified the restrictions imposed on the cable company.

Shortcomings in the allocation of terrestrial broadcasting frequencies in Italy have also prompted litigants to approach the ECtHR and the CJEU (Casarosa and Brogi 2011:15). In this case a broadcasting operator – Centro Europa 7 – had been granted an analogue terrestrial television licence. However, this was not accompanied

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<sup>64</sup> ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996; ECtHR, *Tillack v. Belgium* (no. 20477/05), 27 November 2007.

<sup>65</sup> See only ECtHR, *Goodwin v. UK* (no. 17488/90), 27 March 1996, para. 39.

<sup>66</sup> ECtHR, *Manole and others v. Moldova* (no. 13936/02), 17 September 2009.

<sup>67</sup> ECtHR, *Manole and others v. Moldova* (no. 13936/02), 17 September 2009, para. 99.

<sup>68</sup> CJEU, C-336/07, *Kabel Deutschland Vertrieb und Service GmbH & Co. KG v. Niedersächsische Landesmedienanstalt für privaten Rundfunk*, [22 December 2008].

by the necessary allocation of frequencies, which had to be allocated separately.<sup>69</sup> This meant national legislation had effectively excluded the holder of the licence from obtaining a frequency and thus from enjoying the rights granted in the licence, namely to broadcast. The CJEU came to the conclusion that EU legislation precluded national legislation that allocated frequencies in a non-objective and discriminatory manner.<sup>70</sup> When the same case was brought before the Strasbourg Court, the ECtHR held that there had been a violation of Article 10 of the ECHR. It found the Italian legislative framework did not satisfy the foreseeability requirement under the ECHR and had deprived Centro Europa 7 of the measure of protection against arbitrariness required by the rule of law in a democratic society. The ECtHR added that the Italian State had failed to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.<sup>71</sup>

While it is common to seek recourse against the judgments of domestic courts, less frequent is litigation before the ECtHR or the CJEU to contest decisions by national media authorities or self-regulatory bodies. However, unjustified restrictions imposed by national regulatory or self-regulatory authorities have occasionally prompted litigation before the ECtHR<sup>72</sup> or, in some of the countries under study, have led the responsible national courts to take the ECHR into account (see Kurban and Sözeri, 2011: 26; Craufurd Smith and Stolte 2011, 12; Školkay, Hong and Kutaš, 2011, 45). Warnings and licence suspensions by the Turkish regulatory authority RTÜK were contested successfully before the ECtHR, while British courts found that advertising restrictions imposed by the Advertising Standards Authority, a British co-regulatory authority which scrutinises the legality of advertising in the media, violated Article 10 of the ECHR.

## 8. Values served by the European courts

Free and independent media allowing for democratic discourse constitutes a core element of the Council of Europe's strategy on democratic values and the ECtHR's case law pertaining to Article 10 of the ECHR. As its applicable provisions, such as the freedoms of the TFEU (freedom to provide services, Article 56 of the TFEU, or freedom of establishment, Article 49 of the TFEU) show, the EU focuses more on economic issues, although democratic rights have gained more importance and the Council of Europe's and European Union's remits have begun to overlap. Examples of this are the Fundamental Rights Charter, the accession negotiations of the EU with the Council of Europe for the EU to join the ECHR, and the establishment of the Fundamental Rights Agency in Vienna.

It is not surprising that the ECtHR and CJEU case law mirror the applicable legislation and basic orientation of the Council of Europe and the European Union. The analysis of the ECtHR case law in this report has shown that freedom of opinion

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<sup>69</sup> CJEU, C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, [31 January 2008].

<sup>70</sup> CJEU, C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, [31 January 2008], para. 120.

<sup>71</sup> ECtHR, *Centro Europa 7 S.r.l. and Di Stefano v. Italy* (no. 38433/09), 7 June 2012, para. 156.

<sup>72</sup> ECtHR, *Özguör Radyo-Ses Radyo Televizyon Yayın Yapım ve Tanıtım A.Ş. v. Turkey* (no. 64178/00, 64179/00, 64181/00, 64183/00, 64184/00), 30 March 2006.

and democracy are the main topics of the ECtHR rulings. The ECtHR has paved the way for European standards pertaining to the role of the media in democratic societies, the protection of information sources and the framework for a proportionality test to balance the public interest against the right to privacy. The CJEU for its part has focussed on market-related issues, concerning for example state aid for public service broadcasting (Denmark),<sup>73</sup> allocation of frequencies (Italy),<sup>74</sup> advertising regulation (Spain)<sup>75</sup> or broadcasting market liberalisation (Greece; see Psychogiopoulou, Anagnostou and Kandyla, 2011: 15).<sup>76</sup> The CJEU might now change its orientation due to the fact the EU Charter of Fundamental Rights came into force in December 2009. The recent judgments of the CJEU on whether host providers (be it an Internet service provider or an online social networking platform) should monitor traffic on possible copyright infringements are evidence of this new development.<sup>77</sup> The Court concluded in both cases that Article 15(1) of Directive 2000/31 prohibits a general obligation for a filtering mechanism to block data that may infringe copyrights of films or music. However, the CJEU also assessed whether such an obligation would be consistent with the fundamental rights of the host provider and Internet users, and ultimately found it would not (see only Montero and Van Enis, 2011).

## 9. European courts and new media

The technical developments and the legal questions that have arisen with the advent of Internet-based new media services have also reached the European courts. Both courts started to deliver judgments on legal questions related to new media several years ago (see analysis of the ECtHR: Council of Europe, European Court of Human Rights, 2011). In 2009 the ECtHR issued its first judgment on freedom of expression in the Internet.<sup>78</sup> The case concerned the online version of *The Times* and a libel action against two articles initiated after their publication. A defamation cause of action was time-barred, but the domestic courts in the United Kingdom argued that each access of an online article constituted a new publication. This reasoning amounts to an indefinite liability of online news services with archives, which was questioned before the ECtHR. The Court concluded that news websites' Internet archives play an important role in the public's access to information and news and are part of the ambit of Article 10 of the ECHR. As for the libel action, the Court said: '(...) while individuals who are defamed must have a real opportunity to defend their reputations, libel proceedings brought against a newspaper after too long a period might well give rise to a disproportionate interference with the freedom of the press under Article 10

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<sup>73</sup> European Court, T-309/04, T-317/04, T-329/04 and T-336/04, *TV 2/Danmark A/S v. European Commission*, [22 October 2008].

<sup>74</sup> CJEU, C-380/05, *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, [31 January 2008].

<sup>75</sup> CJEU, C-281/09, *European Commission v. Spain*, [24 November 2011].

<sup>76</sup> CJEU, C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, [18 June 1991].

<sup>77</sup> CJEU, C-70/10, *Scarlet Extended v. Sabam*, [24 November 2011]; CJEU, C-360/10, *Sabam v. Netlog*, [16 February 2012].

<sup>78</sup> ECHR, *Times Newspapers Limited (Nos. 1 and 2) v. United Kingdom* (no. 3002/03 and 23676/03), 10 March 2009.

of the Convention.<sup>79</sup> The Court could not find a violation of Article 10 of the ECHR in the case due to the relatively short time between publication and legal action. However, it emphasised that taking legal action against an online news site if a long period of time has passed since initial publication may infringe the rights of the media. In doing so, the ECtHR addressed a characteristic feature of the Internet: the information is always present. This was only the beginning of Internet-related cases, and it can be predicted that many more legal questions pertaining to online services will be brought to the ECtHR and the CJEU in the future. A current important example still to be decided is the issue of block lists in Turkey. Here the ECtHR might address another important aspect of an overarching fundamental communication right pertaining to the access to information on the Internet. Applicants have approached the ECtHR alleging Turkey has violated the ECHR, as Turkish authorities enjoy the power to block websites, including YouTube videos and Google search results, (Akdeniz, 2010: 25). These cases are still pending, but show that the fundamental question of state interception of online information has triggered litigation with the ECtHR. Another example is the currently debated ‘right to be forgotten’ in the Internet.<sup>80</sup> The ECtHR has so far not specifically addressed this concept. The CJEU, however, will soon have to decide on this right in a preliminary ruling.<sup>81</sup> The question has arisen as to whether secondary European Union law, in the form of the Data Protection Directive 95/46/EC,<sup>82</sup> could be interpreted in a way that obliges search engines to delete specific search results. The case is still pending.

The CJEU has already developed case law relating to service provider accountability. It decided in 2011 in two judgments that Internet service providers are not legally accountable for content that may violate copyright provisions.<sup>83</sup> In a third case from 2012 the CJEU also ruled that a hosting provider of a social network Internet site should not be obliged to filter all uploaded content in order to identify possible copyright violations.<sup>84</sup> This decision concerns social media sites and thus a widespread form of new media services. A Belgian domestic court referred the question to the CJEU for a preliminary ruling, asking whether EU law permits a filter system requiring the social network provider, Netlog, to install a mechanism that monitors its users and blocks incriminated content. The court decided such a general measure was prohibited according to EU secondary law (Article 15 of Directive 2000/31/EC) and was also not proportionate under the EU Charter of Fundamental Rights. However, the fundamental rights-related reasoning of the Court illustrates its strong inclination towards economic considerations. The Court referred in the first place to Article 16 of the EU Charter, which protects the freedom to conduct business. Only after considering this, did it refer to the fundamental rights of the users, namely freedom of information and protection of personal data (Article 8 and Article 11 of the EU Charter), without taking a firm position on the issue. The wording in the judgment is telling. While the Court clearly stated a filtering system did not respect

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<sup>79</sup> ECtHR, *Times Newspapers Limited (Nos. 1 and 2) v. United Kingdom* (no. 3002/03 and 23676/03), 10 March 2009, para. 48.

<sup>80</sup> See European Commission, Proposal for a regulation of the European Parliament and of the Council of Europe on the protection of individuals with regard to the processing of personal data and on the free movement of such data, COM 2012(11) final, 25/1/2012.

<sup>81</sup> CJEU, C-131/12, *Google Spain v. Agencia Española de Protección de Datos (AEPD)*.

<sup>82</sup> Official Journal of the EC, L 281 of 23 November 1995, p. 31.

<sup>83</sup> CJEU, C-324/09, *L'Oréal i.a. v. eBay*, [12 July 2011]; CJEU, C-70/10, *Scarlet Extended v. Sabam*, [24 November 2011].

<sup>84</sup> CJEU, C-360/10, *Sabam v. Netlog*, [16 February 2012].

the freedom to conduct business, it noted that it ‘(...) may also infringe the fundamental rights of the (...) users.’<sup>85</sup> Nevertheless, general filtering requirements are prohibited and the CJEU has addressed a key element of new media.

## 10. Implementation of European Courts’ decisions

It is still an open question as to what degree litigation before the European courts has actually changed the regulatory regime in the countries under study. Article 46 of the ECHR obliges states party to the ECHR to execute the judgments of the ECtHR. However, this does not mean the implementation of ECtHR decisions is without controversy in the various countries party to the ECHR. Also, the choice of implementing measures ultimately lies with the states themselves. The question that then arises is how effectively domestic actors are implementing the ECtHR’s judgments. The ECtHR’s judgments may require the change of a single decision issued by an authority (usually referred to as individual measures) or the amendment of legislation, legal practice or a long tradition of legal interpretation by the domestic courts (usually referred to as general measures).

With regard to the freedom of expression cases relevant for this comparative report, it can be derived from the existing case study reports concerning the 14 Mediadem countries that the ECtHR’s judgments are implemented in most cases, but not all. The states at issue usually fulfill the obligations stemming from the judgments regarding the adoption of individual measures. General measures, however, are adopted more reluctantly, especially when they concern long-standing legal traditions. In such cases the state authorities may incrementally implement the required alterations. This was evidenced in the case of Denmark where the ECtHR’s decisions have in practice superseded Danish law on freedom of expression, and courts are effectively incorporating ECtHR case law into their rulings (especially with regard to defamation cases; see Helles, Søndergaard and Toft, 2011: 10-11). Another example is Finland, which was found to have breached the ECtHR for favouring protection of privacy and dignity at the expense of freedom of expression several times (Kuutti, Lauk and Lindgren, 2011: 14). Recently the Finnish Supreme Court has demonstrated an improvement in compliance with ECtHR rulings, in the sense that it better justifies its decisions and gives more consideration to freedom of expression aspects (Kuutti, Lauk and Lindgren, 2011: 6 and 15). The case study reports are remarkably silent on whether ECtHR judgments against other states are sufficiently taken into account. Only the Belgian case study report explicitly confirms this is regularly the case (Van Besien, 2011: 17). Other reports do not mention any specific problems in this regard. The case study reports also do not mention any specific problems with regard to the influence of CJEU judgments against other member states. Based on the case study reports, it remains an open question as to whether the implementation of ECtHR and CJEU judgments against other states is more or less problematic than judgments against the state at issue itself.

The case study reports also disclose that execution by national authorities is sometimes ambiguous or problematic. A number of countries with well-established traditions of protecting freedom of expression and freedom of the press have their own tensions with the ECtHR, due to the fact they are seeking to defend their national systems against international influence via the ECHR (see for example the United

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<sup>85</sup> CJEU, C-360/10, *Sabam v. Netlog*, [16 February 2012], para. 48.

Kingdom, Germany and Italy). Three cases exemplify the difficulties domestic courts face when executing adverse ECtHR judgments. In Greece, domestic courts have tended to ignore the ECtHR's differentiation between reporting facts and value judgments (Psychogiopoulou, Anagnostou and Kandyla, 2011: 41). In Slovakia, although the ECHR has priority over national law and civil courts are legally bound to take relevant ECtHR decisions into account, in practice they will often ignore ECtHR case law. In fact, the obligation to take into account ECtHR case law *de facto* applies only to civil courts and not to criminal courts (Školka, Hong and Kutaš, 2011: 15 and 18). Slovakian courts have a somewhat ambiguous relationship with freedom of expression and of the press. Not all Slovakian courts take account of ECtHR case law, and those courts that do often have an erroneous interpretation of it. However, the Slovakian Constitutional Court generally adheres to ECtHR case law. Implementation of ECtHR case law has proved especially problematic in Turkey, where there are 'dozens of ECtHR judgments regarding freedom of expression and freedom of the press waiting to be executed by the Turkish state' (Kurban and Sözeri, 2011: 5; see for a general overview of ECtHR's judgments in Turkey Council of Europe, Committee of Ministers, 2011: 58).<sup>86</sup> Although national legislation has been amended, this has not prevented the ECtHR from finding new violations of Article 10 of the ECHR. This has been the case for instance regarding the amendment of Article 301 of the Turkish Penal Code on insulting 'Turkishness' (based on this amendment, the Turkish Minister of Justice has to give his or her authorisation before a prosecution under Article 301 is started).<sup>87</sup> On other occasions, the Turkish Constitutional Court has overturned legal reforms by parliament that would have brought legislation more in line with ECHR standards. This was the case on time limits for prosecutors for filing cases against newspapers and periodicals (Kurban and Sözeri, 2011: 24).

## 11. Conclusion

What is the role of European courts in shaping media policies? On the basis of the 14 Mediadem case study reports, one can conclude that the effective impact of European case law on national media policy and protection of media freedom and independence, and thus the role of European courts in shaping media policy, **differs strongly from country to country**. This is especially so with the case law of the ECtHR and less so with the case law of the CJEU. At the same time, it is also clear that the ECtHR in particular has developed over the decades a comprehensive European legal framework pertaining to media freedom and independence. This accounts, for example, for the clear prerequisites in the cases of protection of sources, the understanding of the role of the media as a public watchdog in modern democracies, and the legal distinction between facts and value judgments in defamation cases.

Concerning the importance of the ECtHR and the CJEU in the field of media freedom and independence, the case study reports **disclose the influence of ECtHR** case law on national media policies, whereas the CJEU appears to play only a minor role with regard to a limited set of mainly structural questions such as broadcasting licences. However, as evidenced by the recent CJEU case law on the liability of hosting providers, the CJEU is in the process of broadening its approach. This might be explained by the potential offered by the EU Charter of Fundamental Rights.

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<sup>86</sup> This is also confirmed in other literature: see e.g. Keller and Stone, 2008: 707.

<sup>87</sup> ECtHR, *Taner Akçam v. Turkey* (no. 27520/07), 25 October 2011.

Differences also exist when comparing the basic values of both European courts. Overall, one can say that the basic values supported by the ECtHR and the CJEU differ; the ECtHR adheres more to a democratic approach and the CJEU more to an economic approach.

A number of case study reports have mentioned that the ECtHR jurisprudence and the ECHR have had an overall **positive influence** on media freedom and independence, especially with regard to libel and defamation cases, restrictions to publishing, protection of private life and protection of sources. This positive influence is most obvious in those countries where the ECtHR case law has direct effect in the national legal order. In other countries this positive influence often depends on the willingness of individual policy makers to effectively adhere to ECtHR decisions and ECHR standards. Progress in this regard is often made on a case-by-case basis and in incremental steps. As a rule, individual measures imposed by the ECtHR are usually implemented well, whereas general measures pose more problems, especially when confronted with well-established national traditions. However, even for general measures, there seems to be an overall improvement in implementation.

On the other hand, it follows from the case study reports that **all 14 countries have had problems and tensions** as regards the effective implementation of ECtHR case law. This is also true for countries with well-established democratic systems and a relatively high level of media freedom and independence, although most of the systematic problems in this regard concern countries with less well-established democratic systems and limited protection afforded to media freedom (Turkey is a prime example). Where ineffective implementation of ECtHR case law is systematic, other initiatives are needed to bring domestic case law or legislation in line with European standards. A reference can be made in this regard to the recent ‘Human Rights Trust Fund 22’ initiative of the Council of Europe, which seeks to develop closer cooperation with the Turkish authorities in order to enhance implementation of the ECHR in the field of freedom of expression and the media. This initiative provides support to help change certain practices of the Turkish courts regarding the interpretation of Turkish law in line with ECHR requirements and to prepare the ground for legislative changes aligning Turkish law with ECHR standards. It includes provision for study visits for Turkish judges and prosecutors to other Council of Europe member States, roundtables for judges and prosecutors on freedom of expression and media freedom and the publication of a compendium of relevant ECtHR judgments against Turkey.<sup>88</sup>

The reasons for the tensions regarding implementation vary and can be found in the problematic relationship that has developed between domestic courts and the European courts in relation to sensitive national issues which affect media legislation and domestic judicial reasoning or when long-standing legal domestic traditions have been questioned. **Problems of execution** occur in aligning domestic judicial practice to European standards, and are often related to divergences between European courts and national **higher courts** such as supreme courts or constitutional courts on the position of the ECHR (and to a lesser degree the EU Treaties) in the national legal order. These divergences often crystallise on concrete issues such as the distinction

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<sup>88</sup> See Council of Europe, ‘Supervision of the execution of judgments and decisions of the European Court of Human Rights - Annual report 2011’, April 2012, p. 29 [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2011\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2011_en.pdf) (date accessed 15/07/2012).

between value judgments and facts in defamation cases (for instance in Estonia and Greece), or the preference given to privacy protection over freedom of expression (for instance in Finland). Such tensions are prevalent to a smaller or lesser degree in most countries, but at the same time there is an overall tendency for national higher courts to increasingly accept the adjudication of the ECtHR (see the effects of the *von Hannover* and *Görgülü* decisions in Germany and the *Jersild* decision in Denmark). In some countries, it is mostly the **lower courts** that tend to disregard ECtHR case law, while higher courts to some extent remedy this situation by adhering to ECtHR standards and jurisprudence (for example in Slovakia). Yet in other countries, the legal system was for a long time not adapted to effectively implementing ECtHR decisions (see for example the lack of a legal basis in Italian legislation to re-open proceedings following ECtHR decisions; see also the case law of the Italian Constitutional Court since 2007 that strengthens the position of the ECtHR).

Where tensions occur between national courts or legislatures and European courts (especially the ECtHR), these are often related to specific national concerns on **sensitive socio-cultural topics** (such as the Kurdish and Armenian questions in Turkey, the Basque question and the role of the monarchy in Spain or the high importance of privacy protection in the Finnish legal system).

Tensions also arise regarding specific legal interpretations, as evidenced in cases related to the protection of **privacy** and the protection of **honour or reputation**, which are essentially libel and defamation cases. The ECtHR case law on privacy protection has been influential on media policy in the 14 countries under study mainly as regards the balancing of privacy rights (in particular of public figures such as politicians and public servants) with the right to freedom of expression of the media (especially in cases on matters of public concern). As regards the protection of honour and reputation in libel and defamation cases, the ECtHR's case law has proved to be both controversial and influential in imposing a distinction between facts and value judgments in national legal orders. Another area where the ECtHR case law has had concrete effects on national media policy concerns the protection of **journalists' sources** (although this seems somewhat limited to the UK and Belgium). A final category of cases involves restrictions to freedom of expression in order to protect **national security** or fight **terrorism**. This category concerns mainly Turkey and, to a lesser degree, the United Kingdom, although it needs to be said that the concrete effects of the ECtHR's decisions on Turkish media policy seem limited. This is evidenced by the number of repetitive cases in which Turkey has been found to have breached the ECHR and the problems with regard to the implementation of ECtHR case law in Turkey.

In sum, the European courts play an indispensable role in shaping media policy and disclosing single or systematic deficits. Although the ECtHR has established a comprehensive legal framework concerning freedom of expression and media freedom, new legal questions will continue to arise due to further technological developments, especially arising from the Internet, and the possible impact of the EU Charter of Fundamental Rights on media policy. Furthermore, it may be expected that European court decisions will continue to influence national policies on media freedom and independence, although the road to implementation of European court decisions may at times resemble more a bumpy trail than a smooth highway.

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