



Background information report

Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe

October 2010

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 will investigate the configuration of media policies in the aforementioned countries and will examine 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, will be thoroughly discussed and analysed.

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Introductory note

This collective report examines the principal dimensions of media policy in 14 European countries (Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK), probing into the historical forces, national traditions and distinct political and socio-economic contexts in which media policies have emerged and developed. The analysis explores the main instruments for media regulation in the countries under study, and assesses the implications of the established media policy strategies for democratic politics.

The country chapters follow a similar structure. Following a brief introduction, the analysis focuses on the media landscape of the countries under review, offering an overview of the national media market (the press, broadcast media, online media and news agencies), as well as a discussion of the status of the journalistic profession and media literacy. The third section presents the major actors involved in media policy-making and proceeds with a succinct presentation and explanation of the national regulatory framework for the media, focusing mainly on structural and content regulation. The final section provides a critical assessment of the principal issues and trends that characterise the media policies of the countries under study, together with an assessment of the degree to which they enable the media to feed the democratic process. The report also contains a chapter discussing the media-related initiatives of the European Union and the Council of Europe, focusing on the interventions that are of relevance and importance to the protection and promotion of media freedom and independence.

Athens, 29 October 2010
The Mediadem Consortium

The case of Belgium

Bart Van Besien (under the scientific supervision of Pierre-François Docquir, Benoît Frydman and Emmanuelle Bribosia)*

1. Introduction

Although the principle of freedom of the press was enshrined in the Dutch constitution of 1815, this principle remained dead letter during the fifteen years of Dutch rule.¹ When the Belgian revolutionists drafted the constitution of 7 February 1831, they made sure it expressly safeguarded the freedom of the press as one of the main “freedoms” that the Belgians were henceforth to enjoy.

After Belgium’s independence, the competition between various political groupings (at first Liberals and Catholics, later on also Socialists, Regionalists and other parties) translated into the gradual emergence of a compartmentalised society, where people went to different schools, read different newspapers and organised their lives in separated and opposing compartments or “pillars”.² Although only few newspapers were directly owned by political parties, most of them were linked to political parties and openly supported their policies.³ As such, one can speak about a media landscape where the press was traditionally “free” in the sense that the press was not directly owned or controlled by the state, but not necessarily “independent”, in the sense that the press was subject to interference by political actors and served as a means to influence public opinion and politics.

One of the turning points in the evolution of the Belgian press was the abolition in 1848 of the stamp duty on newspapers. This led to the emergence of an affordable and therefore more widely spread opinion press.⁴ However, even though newspapers became more affordable, and even if they were often available at public places where they could be read aloud,⁵ they remained to a large degree a privilege of the few who could read and receive them. Also, the limited democratisation level and the fact that newspapers were for some time available in French only⁶ meant that not everybody was equally interested in reading newspapers.

The period in between the two World Wars saw the emergence of a mass press, due to the introduction of universal voting rights and compulsory education, but also mere technical improvements in press techniques, cheaper paper and an increasing focus on sports, advertisements and regional news.⁷

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¹ Article 227 of the Constitution of 24 August 1815 and Royal Decree of 20 April 1815.

² D.C. Hallin and P. Mancini, *Comparing media systems: Three models of media and politics* (2009), at p. 153.

³ Indirect links existed between the Liberal and the Catholic Parties and their supportive newspapers, and more direct links between the Socialist and Communist Parties and their newspapers.

⁴ E. De Bens and K. Raeymaeckers, *De pers in België: het verhaal van de Belgische dagbladpers gisteren, vandaag en morgen* (2010), at p. 33.

⁵ E. Witte, *La Construction de la Belgique 1828 – 1847* (2010), at pp. 45-46.

⁶ Flemish newspapers emerged only a couple of decades after French newspapers. See J. Gol, *Le Monde de la Presse en Belgique* (1970) at p. 19.

⁷ *Ibid.*, p. 19.

In the period after the Second World War, ideological clashes between opposing political parties gradually diminished. The press followed this evolution by cutting its most obvious links with political parties and by orientating itself more towards informing readers, rather than trying to influence its readers' views. This change is also linked to a growing dependence on income from advertisements, which gave rise to a general tendency to voice rather moderate and uncontroversial opinions.⁸ Succeeding concentration waves resulted in a situation where newspapers with traditionally very different views on politics and on society are now owned by the same press groups, as will be discussed further below.

The Belgian authorities' approach towards radio and television was very different from the broad freedom that was granted to the written press. In 1930, the Belgian authorities created a national public broadcasting organisation, INR/NIR, which they granted a monopoly to broadcast nationwide radio programmes, in coexistence with the existing private local and regional radio broadcasters. The arrival of television in the 1950s saw the transformation of INR/NIR to RTB/BRT, which was promptly granted a monopoly to broadcast television signals. The preparatory works of the act of 18 June 1930 on radio broadcasting echo some concerns by members of parliament that the state monopoly would constitute a breach of the press freedom. The parliamentary voting nevertheless concluded in favour of the state monopoly, for technical reasons (i.e., only three international frequencies were available), and because the state monopoly was seen as an experimental and temporary solution.⁹ Almost all European governments at the time had serious concerns about the possible effects of these new media on society at large (i.e., their potential to influence the opinion of the population) and hence chose to bring them under direct state control instead of leaving them to the rules of the free market.¹⁰ Fact is that the public broadcasters' monopolies on radio and television broadcasting have always been linked to a public remit which they had to fulfil (culture, sports, information, and "elevation of the people").

The state broadcasters were (and still are) directly owned by the Belgian authorities (at first the Belgian government, later on the Communities), and measures were taken in order to guarantee some degree of political control over the broadcasters, based on a proportional representation of the various political groupings within their representative bodies and personnel, and over the content of the programs, through guaranteed proportional airtime for various philosophical or religious associations. This system of internal pluralism in broadcasting, where various political representations keep each other in balance,¹¹ exists until today within the public broadcasters, but is mostly limited to the broadcasters' board of directors (and not so much their personnel).

These monopolies were challenged as from the 1970s and 1980s on by pirate radios and foreign television broadcasters who reached the Belgian audience via the cable networks. Legislation followed slowly to legalise private radio and television broadcasting. Local commercial radio broadcasting was legalised in 1981 in Flanders and in 1982 in the French Community. In 1987, private (commercial) television broadcasting was legalised in both Communities, and RTL-TVI and VTM became the

⁸ G. Thoveron, "La valeur commerciale de l'objectivité", in G. Thoveron and C. Doutrelepon (eds), *La Presse, Pouvoir en Devenir* (1996) 19.

⁹ See S. Hoebeke and B. Mouffe, *Le droit de la presse* (2005), at p. 90.

¹⁰ R. Otten, *Achter televisie: omroepmarkten en -structuren in West-Europa* (2005), at p. 23.

¹¹ See Hallin and Mancini, *Comparing media systems*, p. 166.

first private television channels in respectively the French and the Flemish Community.¹² Licences for local television broadcasting have been granted since 1987 in the French Community and since 1993 in the Flemish Community. The authorities tried to compensate the written press for foreseeable losses caused by television and radio advertising, by granting subsidies to the written press and – initially – by forcing the private broadcasters to open their shareholding to editors of the written press.

Both radio and television have since the end of the 1990s been confronted with new technical developments (e.g. in the fields of cable, fibreglass, satellite, pay-tv, video-on-demand, the internet and digitalisation), which create challenges and opportunities to the broadcasters in terms of new platforms and room for new players, but also put the role of the state and its control over radio and television in question. All in all, Belgium's authorities have been quite reluctant to lose their grip on radio and television broadcasting. For example, the Flemish government attempted for a long time to close the market for private television broadcasting, by granting a monopoly to broadcast advertisements to the Flemish public to just one player (VTM). This monopoly lasted from 1989 to 1998 and was only abolished after the European Commission forced the Flemish government to do so.¹³ In Flanders, the monopoly granted to VTM was only challenged in 1995 by the Scandinavian SBS group (in order to circumvent Flemish legislation, VT4 was at first broadcast from London). In French-speaking Belgium, it took until 2001 before the (Luxembourg based) RTL group got competition from the (French) AB group.

In sum, the influence from politicians on the media is less apparent today than it used to be, because the links between political groupings and the written press have atrophied, and because the state monopolies for broadcasting have disappeared. However, the Belgian authorities remain directly active in the fields of radio and television broadcasting, through the public broadcasters and through the application of much stricter rules than those applying to other media. Also, the Belgian authorities are interfering in the media through a variety of direct and indirect subsidies. For the written press, the authorities grant mostly indirect subsidies such as a VAT tariff of 0% for newspapers and magazines, reduced tariffs for post and distribution, government advertisements, etc.¹⁴ Unfortunately, there is a lot of uncertainty as to the total amount of these indirect subsidies, and more transparency in this regard is desirable. The Communities also grant direct state aid to the written press.¹⁵ For the audiovisual media, apart from directly sponsoring the public broadcasters, the Communities also grant direct subsidies to e.g. private regional television

¹² In 1987, RTL-TVI became the first private television channel for French speaking Belgium (Decision of the Government of the French Community of 21 December 1987). In 1989, VTM became the first private television channel for Dutch speaking Belgium (Decision of the Government of the Flemish Community of 19 November 1987).

¹³ Commission Decision 97/606/EC of 26 June 1997 pursuant to Article 90 (3) of the EC Treaty on the exclusive right to broadcast television advertising in Flanders, OJ L 244, 6/09/1997, P. 0018–0025.

¹⁴ Until 2008, the French Community forced the television broadcasters to contribute part of their revenue (if this revenue surpassed 15 million euros) to the written press, as a compensation for revenue losses by the written press following the admission of commercial advertisements on television (see old Art. 30 FRBA).

¹⁵ E.g. decision of the French Community's Government of 1 July 2010 and the Act of 31 March 2004 concerning aid to the French-language written daily press and the development of initiatives of such daily press in schools; Protocol between the Flemish Government and the Flemish written press concerning safeguards for a pluralistic, independent and efficient Flemish opinion press.

broadcasters¹⁶ and private local radio broadcasters.¹⁷ Finally, the authorities grant some direct subsidies to specific projects, such as projects supporting newspapers in schools, funds promoting quality journalistic research,¹⁸ and subsidies to professional organisations for journalists.¹⁹

2. The media landscape in Belgium

As a result of the transition of Belgium from a unitary to a federal state, the political and the cultural landscape in Belgium is separated along language barriers. This means that there is a clear separation between the French-language media on the one hand and the Dutch-language or Flemish media on the other hand. In other words, it is more correct to speak about two separate media landscapes, rather than about one general Belgian media landscape. Although these two media landscapes are separate, they present a number of similarities. The following sections will give a detailed overview of the Belgian media landscape.

2.1 Two separate media landscapes

Since the 1970s, Belgium gradually evolved step by step from a unitary state to a complex federal state, where political power is divided between the federal (i.e., Belgian) level, the language-based Communities (i.e., the Flemish Community, the French Community and the German-speaking Community) and the territory-based regions (i.e., the Flemish Region, the Walloon Region and the Brussels-Capital Region). In the field of media, the main competences belong to the Communities – although the detailed picture is actually a more complex one.

As concerns *radio and television*, Belgium's French- and Dutch-language public broadcasters are separated entities (split from formerly one public broadcaster), with different personnel, audiences, public remits, regulations and controlling bodies. RTBF.be, the French-language public broadcaster, is only broadcasting French-language programs, whereas on the other side of the linguistic border, VRT, the Flemish public broadcaster, is only broadcasting Dutch-language programs. The same linguistic separation is true for non-public broadcasters.

As concerns *newspapers*, a small number of media groups control the newspaper market in French-speaking Belgium (i.e., Rossel, IPM and Corelio) and in Flanders (i.e., Corelio, De Persgroep and Concentra). There is no Flemish newspaper with significant sales figures in French-speaking Belgium, and almost no French language newspaper with significant sales figures in Flanders.²⁰ Cross-ownership of newspapers across language borders is mostly limited to specialised press, such as

¹⁶ E.g. decision of the Flemish Government of 23 July 2010 on subsidies to certain private regional television broadcasters.

¹⁷ E.g. based on Art. 161 FRBA, the French Community's authorities force their radiobroadcasters to contribute part of their revenues to a fund supporting radio broadcasting.

¹⁸ E.g. the Flemish Government grants subsidies to the Fund Pascal Decroos for Exceptional Journalistics.

¹⁹ E.g. the Flemish Government grants subsidies to VVJ.

²⁰ La Libre Belgique is the only newspaper that sells relatively well in the other language Community. More than 13% of the paper's readers live in Flanders. See De Bens and Raeymaeckers, *De pers in België*, p. 464.

papers focussing on business and the economy,²¹ and free newspapers.²² The only media group with an important market share for general newspapers in the other language is the Flemish media group Corelio (which publishes the French-language Editions de L’Avenir papers).

As concerns *magazines*, there seem to be more crossings between Belgium’s two major language groups. Although the most popular magazine titles in each language are not available in the other language, other titles are available for both Communities and publishers such as Roularta and Sanoma are very active on both language markets.

Belgian media tend to focus on differences between the Communities, rather than on similarities between them. This is especially the case with political reporting, where journalists often translate the same facts in opposing interpretations and opinions, and where the two Communities are regularly presented as opposite to each other.²³ Also, a recent study shows that French-language politicians get very limited airtime on Flemish television news bulletins,²⁴ and the same seems to be true for Dutch-speaking politicians on French-language television news bulletins.²⁵ It should be noted in this regard that the split of Belgium’s media landscape is closely related to the way its political system is organised. Belgium’s political parties are split upon a linguistic basis, and voters can - generally speaking - only vote for candidates who stand for election in their own region (e.g. a voter based in Wallonia cannot vote for a candidate from Flanders, and vice versa). Political debate takes place within two distinct media fields, and elections take place on the basis of two distinct electorates.

As such, the separation of Belgium’s media landscape and of its electorates challenges the country’s democratic system at a federal level, because it impedes the development of a shared public sphere where politicians, journalists, and other members of the two Communities can debate their different opinions and views.²⁶ On the other hand, this problem is not unique to Belgium alone (e.g. one can wonder whether a democratic Europe is possible without a single European media landscape) and was relevant in earlier times as well, when Belgians did not overwhelmingly read each other’s newspapers neither.²⁷

²¹ The group Mediafin, which publishes L’Echo and De Tijd, is a joint-venture between the French-language publisher Rossel and the Dutch-language publisher De Persgroep.

²² Mass Transit Media, which publishes Metro, is a joint-venture between the French-language publisher Rossel and the Dutch-language publisher Concentra.

²³ D. Sinardet, “Direct democracy as a tool to shape a united public opinion in a multilingual society? Some reflections based on the Belgian case”, in D. Sinardet and M. Hooghe (eds), *Is democracy viable without a unified public opinion? The Swiss experience and the Belgian case* (2009), Re-Bel e-book 3, available at: <http://www.rethinkingbelgium.eu/rebel-initiative-ebooks/ebook-3-democracy-without-unified-public-opinion> (last visited on 25/10/2010), at p. 35.

²⁴ J. De Smedt, M. Hooghe and S. Walgrave, “Franstalige politici in het Vlaamse televisienieuws: quantité négligeable?”, ENA – Nieuwsmonitor 1/09/2010, available at: www.nieuwsarchief.be (last visited on 21/10/2010).

²⁵ M. Lits, “Media in Belgium: two separate public opinions”, in D. Sinardet and M. Hooghe (eds), *Is democracy viable without a unified public opinion? The Swiss experience and the Belgian case* (2009), Re-Bel e-book 3, available at: <http://www.rethinkingbelgium.eu/rebel-initiative-ebooks/ebook-3-democracy-without-unified-public-opinion>, at p. 45.

²⁶ Ibid, p. 45 and Sinardet, “Direct democracy as a tool to shape a united public opinion in a multilingual society?”, p. 39.

²⁷ M. Beyen, “The duality of public opinions as a democratic asset’ – Confessions of an historian”, in D. Sinardet and M. Hooghe (eds), *Is democracy viable without a unified public opinion? The Swiss experience and the Belgian case* (2009), Re-Bel e-book 3, available at:

Be it as it may, some initiatives have been taken recently to move the French- and Dutch-language media closer together. Most of these initiatives took root after 13 December 2006, when RTBF.be interrupted its normal broadcasting for a sudden announcement by the anchorman of its regular news bulletins that Flemish politicians were voting for the independence of Flanders. Although this announcement and the news bulletin that followed were fake, surveys showed that 89% of viewers had up to some point believed that the events reported were real. In the following days and weeks, a lively debate developed on the journalistic appropriateness of this program and on the impact that journalists have on public opinion and politics. Following this incident, the media have been paying more attention to events in the other Community.²⁸ Most newspapers now regularly publish articles of opinion makers from the other Community. However, the attempts taken remain limited in scale and impact and are not always very successful. For example, before the June 2010 elections, the public television broadcasters of the two Communities tried to jointly organise a political debate with politicians from both Communities, but the French-language broadcaster's board of directors obstructed this initiative, a decision they justified by divergences in the manners public broadcasters deal with far right political parties.

2.2 Two similar media landscapes

Although the media landscapes of Belgium's main Communities are separate and distinct, they are similar in the sense that they have a similar history, during most of which they discussed the same news topics in the same Belgian context. Newspapers in both languages used to be linked to specific ideological or political trends in society, but have during recent decades cut these links. Another similarity is that media in both languages address relatively small audiences (around 4 million French-speakers and around 6 million Dutch-speakers). Ownership of both French- and Dutch-language media is strongly concentrated in the hands of just a few media groups (e.g., the French- and the Dutch-language newspapers are dominated by 3 media groups, the French- and Dutch-language magazines are dominated by 3 media groups, the French- and Dutch-language radio and television services are dominated by just 2 media groups).

The majority of both the French- and Dutch-language media groups are also becoming active in other domains (e.g., traditional magazine and newspaper publishers are also active in television and radio,²⁹ traditional newspaper publishers are also publishing magazines,³⁰ traditional television broadcasters are also starting to publish magazines³¹ and all of the media players are active on the internet).³² Also,

<http://www.rethinkingbelgium.eu/rebel-initiative-ebooks/ebook-3-democracy-without-unified-public-opinion>, at p. 22.

²⁸ E.g. the initiative of *Le Soir* and *De Standaard*, where each journal sent journalists to the other Community for a certain time, with the purpose of getting to know each other better.

²⁹ E.g. *Audiopresse*, the association of Belgium's French-language and German-language newspapers, participates for 34% in the television and radio broadcaster *RTL Belgium*; magazine publisher *Roularta* owns the television channels *Canal Z* and *Kanaal Z* and owns 50% of the shares of *Vlaamse Mediamaatschappij (VMMa)*. Newspaper publisher *De Persgroep* owns the remaining 50% of *VMMa*. Newspaper publisher *Concentra* broadcasts the digital television channel *Acht*. Newspaper publisher *Corelio* participates in *Radio Nostalgie* and in the television production houses *Woestijnvis* and *Caviar*.

³⁰ E.g. newspaper publisher *De Persgroep* also publishes the magazines *Dag Allemaal*, *Joepie*, etc.

³¹ E.g. television broadcaster *Media Ad Infinitum* also publishes the magazine *Vitaya* (together with *Sanoma*).

media consumers all over the country seem to prefer the same kind of radio and television programmes (i.e., mainly entertainment programmes) and tend to read the same type of newspapers (i.e., mainly popular and regional newspapers). Finally, Belgium is a very open society, and its media – irrespective of their language – are heavily influenced by the international media market, especially by media from neighbouring countries (although the influence of French media on the media of the Belgian French-Community seems stronger than the influence of Dutch media on the media of the Flemish Community (see below). This implies not only that international media groups are quite strong on the Belgian market,³³ it also means that Belgian media groups – irrespective of their language - are surprisingly active abroad, especially in the neighbouring countries.³⁴

2.3 The media market

On the one hand, the Belgian media market is characterised by a relatively wide variety of different media available to the public. On the other hand, ownership of these media is concentrated into the hands of just a limited number of media groups - although no single group dominates the entire media market. Also, media players are trying to diversify their revenue streams and become more and more active in other media domains (cross-media concentration, the Internet, etc.). The following sections attempt to give an overview of the Belgian media market.

2.3.1 The print media

As described in detail below, there is a high concentration in ownership of the Belgian newspaper and magazine publishers. Although the consolidation of the written press is well described in literature, its origins and effects are not always that well described. On the one hand, too much consolidation endangers the pluralistic character of the media. On the other hand, consolidation may have positive effects as well, and it should be noted that several titles were saved from bankruptcy by large media groups. It is of course of great importance that newspapers that merge into a larger group can save their editorial independence.³⁵

Belgium counts six major French-language newspapers. Of these, two can be considered “quality” newspapers,³⁶ two others “regional” newspapers,³⁷ one a “popular” newspaper³⁸ and another one a specialised “economic” newspaper.³⁹ A

³² However, cross media involvement seems to be more prominent among the Dutch-language media than among the French-language media.

³³ E.g. the German Bertelsmann group (RTL) is very prominent on the French language television and radio market. Another German group, ProSiebenSat.1 (SBS), is quite strong on the Flemish television market. The Finnish Sanoma group has a strong presence on the magazine markets of both Communities.

³⁴ E.g. De Persgroep owns the Dutch newspapers *Het Parool*, *Trouw*, *Algemeen Dagblad* and *Volkskrant*. *Roularta* has a strong presence in France, where it owns the titles *L'Express*, *L'Expansion*, *Point de Vue*, etc. *Rosel* is also active in France, with the regional newspapers *La Voix du Nord*, *Nord Éclair*, *Nord Littoral* and *Lille Plus*.

³⁵ E.g. *De Morgen* and *Gazet van Antwerpen* maintained their independent editorial staff. *De Tijd* and *L'Echo* also received guarantees for their editorial independence. See De Bens and Raeymaeckers, *De pers in België*, pp. 76-77.

³⁶ *Le Soir* and *La Libre Belgique*.

³⁷ The titles of *Sud Press* and *Editions de l'Avenir*.

³⁸ *La Dernière Heure / Les Sports*.

similar picture can be drawn of the Flemish side, where there are seven major newspapers, two of which can be considered “quality” newspapers,⁴⁰ two others “regional” newspapers,⁴¹ yet two others “popular” newspapers⁴² and one a specialised “economic” newspaper.⁴³ Belgium has only one major German-language newspaper.⁴⁴ Although the concepts “quality”, “regional”, “popular” and “economic” can have different meanings and connotations, they are used in literature (and even in policy practice) to distinguish different types of newspapers (e.g. these terms are used in the Flemish regulator’s report on media concentration in Flanders).

On the one hand, 6 different newspaper titles for around 4 million French speakers and 7 different titles for a public of 6 million Dutch speakers may be considered a relative wide variety of newspapers. However, if one looks at the available titles per category, Belgian consumers can only choose between 1 or 2 titles in their own language. Also, these figures look pale in comparison with the figures of newspapers published in earlier times. At the German-language side, 1 major newspaper is certainly a low figure, but taking into account the limited number of German-speakers in Belgium (around 75,000), this is not a surprising figure. Compared to other countries, Belgium seems to have a relatively low or averaged level of newspaper readership, which partly explains the high level of concentration.⁴⁵

Free newspapers take a special position in the Belgian newspaper market. Although their popularity is a relatively recent phenomenon, Belgium has had experiences with free newspapers since the 19th century.⁴⁶ Belgium currently counts one major free newspaper (Metro⁴⁷), which is published in separate issues in French and Dutch. The effect of free newspapers on the circulation figures of the classic paid newspapers is yet unclear. According to the Flemish media regulator, there is no proof of a linear relationship between the increase in circulation of Metro and the sales figures of the paying (Flemish) newspapers, and it remains unclear whether the average reader considers Metro as a complement or a substitute to a paid newspaper.⁴⁸

For the French-language newspapers, the most recent figures show that the free newspaper Metro is the most widely spread, followed by the “regional titles” (Sud Press and Editions de l’Avenir), the “quality paper” Le Soir, the “popular title” La Dernière Heure / Les Sports, the “quality paper” La Libre Belgique and the “economic title” L’Echo. At the Flemish side, the most recent figures show that the “popular titles” (Het Laatste Nieuws / De Nieuwe Gazet and Het Nieuwsblad / De Gentenaar) are the best selling Flemish newspapers. These were followed by

³⁹ L’Echo.

⁴⁰ De Standaard and De Morgen.

⁴¹ Gazet van Antwerpen and Het Belang van Limburg.

⁴² Het Laatste Nieuws / De Nieuwe Gazet and Het Nieuwsblad / De Gentenaar.

⁴³ De Tijd.

⁴⁴ Grenz-Echo.

⁴⁵ D. Ward, *A Mapping study of media concentration and ownership in ten European countries* (2004), available at: <http://www.cvdm.nl/dsresource?objectid=421&type=org> (last visited on 22/10/2010), at p. 25. According to De Bens and Raeymakers, newspaper readership in Belgium amounts to 173 readers per 1,000 inhabitants, which is close to the average European figure. See De Bens and Raeymaeckers, *De pers in België*, p. 149.

⁴⁶ Le Soir started as a free advertising newspaper in 1887, but later on evolved to a paying newspaper.

⁴⁷ Metro is published by Mass Transit Media (MTM), a joint-venture between Concentra and Rossel.

⁴⁸ Vlaamse Regulator voor de Media (VRM), “Mediaconcentratie in Vlaanderen Rapport 2009”, available at: <http://www.google.com/search?ie=UTF-8&oe=UTF-8&sourceid=navclient&gfns=1&q=%E2%80%9CMediaconcentratie+in+Vlaanderen%2C+Rapport+2009> (last visited on 22/10/2010), at p. 63.

respectively the free newspapers (Metro), the “regional titles” (Gazet van Antwerpen and Het Belang van Limburg), the “quality papers” (De Standaard and De Morgen) and the “economic paper” De Tijd.⁴⁹ Whereas sales figures for the major French-language papers are in a rather sharp decline, sales figures for the major Dutch-language papers seem to be more stable.⁵⁰

Both the market of the French-language newspapers and the market of the Dutch-language newspapers in Belgium are marked by a high concentration. In fact, both markets are dominated by three major media groups: the groups Rossel,⁵¹ IPM⁵² and Corelio⁵³ for the French-language newspapers, and the groups Corelio,⁵⁴ De Persgroep⁵⁵ and Concentra⁵⁶ for the Dutch-market newspapers. This concentration trend has been going on since the 1950s.⁵⁷ At the same time, Belgium’s oligopolistic market structure makes it virtually impossible to launch new titles (except for the success of Metro almost all new ventures in the sector have failed since the 1950s).⁵⁸ Family ownership is still important for the Belgian media landscape, with most of the major press groups still being under the control of family shareholders.⁵⁹

The newspaper market in Belgium is currently confronted with various challenges, including a move to electronic versions of newspapers on the Internet, the availability of free news online and the success of free newspapers (e.g. the publishers and journalists of French-language newspapers are quite anxious about the recent success of Metro), a decline in sales figures (especially for the French language newspapers), and difficulties in finding alternative ways of funding via advertisements (due to the economic crisis and due to the availability of other advertising platforms, e.g. the websites of other media players). These challenges partly explain a move towards consolidation and towards cross-media involvement (e.g. expansion in other media sectors and on the Internet).

The periodical press in Belgium is also highly concentrated with a couple of media groups controlling the market in both Communities. The most important of them are Roularta,⁶⁰ the Finnish group Sanoma,⁶¹ Editions Ciné Revue,⁶² and De

⁴⁹ See the latest figures of CIM, available at: <http://www.cim.be> (last visited on 22/10/2010).

⁵⁰ Minus 4.14% for the French-language newspapers and minus 0.53 for Dutch-language newspapers for the second quarter of 2010, compared with the second quarter of 2009. See Centre for Information on the Media, available at: <http://www.cim.be/fr/media/presse/authentication/r%C3%A9sultats/r%C3%A9sultats-public> (last visited on 22/10/2010).

⁵¹ Le Soir, the newspapers of Sudpresse and the German-language Grenz-Echo all belong to Rossel. Rossel also participates for 50% in Metro, L’Echo and De Tijd.

⁵² La Libre Belgique and La Dernière Heure belong to the group IPM.

⁵³ The titles of “Editions de l’Avenir” belong to Corelio.

⁵⁴ Corelio also publishes the newspapers De Standaard, Het Nieuwsblad and De Gentenaar.

⁵⁵ De Persgroep owns Het Laatste Nieuws, De Nieuwe Gazet and De Morgen and participates for 50% in L’Echo and De Tijd.

⁵⁶ Concentra publishes Het Belang van Limburg and owns 90% of the shares of De Vlijt, the publisher of Gazet van Antwerpen. Concentra also participates for 50% in Metro.

⁵⁷ See De Bens and Raeymaeckers, *De pers in België*, p. 74.

⁵⁸ M. Kelly, G. Mazzoleni and D. McQuail (eds), *The media in Europe* (2004), at p. 18.

⁵⁹ I.e., the family Rossel-Hurbain for Rossel, the family Le Hodey for IPM, the family Van Thillo for De Persgroep and the family Theelen for Concentra.

⁶⁰ Roularta is the publisher of Belgium’s most important newsweeklies Le Vif/L’Express (in French) and Knack (in Dutch), the economic magazines Trends-Tendances and Bizz (both of which are published separately in French and in Dutch), and a number of television, lifestyle, regional and specialised magazines.

Persgroep.⁶³ Figures for 2008 show that Editions Ciné Revue has 26.7% of the French-language magazines, but no significant part of the Dutch-language market. Similarly, De Persgroep has 31.3% of the market of Dutch-language magazines, but no significant sales in French-speaking Belgium. Roularta has 24.2% of the French-language magazines and 10.6% of the Dutch-language magazines. Sanoma has 23.9% of the market of French-language magazines and no less than 47% of the market of Dutch-language magazines.

As shown above, the market for magazines is a very heterogeneous market, with some magazines focusing on news and general information, and others focusing on more specific audiences or themes. According to figures from CIM,⁶⁴ the most widely sold magazines in Belgium are television magazines and so called “popular” magazines. These are followed by respectively women’s magazines, news magazines and specialised magazines.

Figures show quite a sharp decline in the number of magazines sold.⁶⁵ Like the newspaper market, the market for magazines seems saturated with few new magazines appearing (and even fewer of these surviving).⁶⁶

2.3.2 Radio and television

At both sides of the language border, there is a growing evolution towards digital television and so-called catch-up television services. In Flanders, all analogue terrestrial television services were switched off on 3 November 2008, whereas in the French Community analogue terrestrial broadcast ceased to be on 1 March 2010. Also, the Flemish public broadcaster VRT recently sold its terrestrial digital broadcasting facilities to Norkring Belgium (which is a joint venture between VRT (51%) and the Norwegian Norkring (49%)).⁶⁷ Digital terrestrial switch-over is giving rise to a growing number of television channels (mostly thematic channels), a growing number of non-linear television services such as video-on-demand (which also increases interactivity), and a growing number of distributors of television services on the Belgian market.⁶⁸

Although there are quite a lot of television channels available, there is – once again – a strong concentration in Belgium’s television landscape. At the French-

⁶¹ Sanoma focuses on women’s magazines (e.g. Flair and Libelle), lifestyle magazines (e.g. Feeling), popular magazines (e.g. Story) and television magazines (e.g. TéléMoustique and TeveBlad).

⁶² Editions Ciné Revue publishes the television magazine Ciné Télé Revue, which is the most widely sold magazine in French-speaking Belgium, but is not available in the Dutch-language.

⁶³ Newspaper publisher De Persgroep focuses on popular magazines (e.g. Dag Allemaal), lifestyle magazines (e.g. Genieten), youth magazines (e.g. Joepie) and television magazines (e.g. TV-Familie).

⁶⁴ See Centre for Information on the Media, <http://www.cim.be/fr/media/presse/authentication/r%C3%A9sultats/r%C3%A9sultats-public> (last visited on 22/10/2010). CIM’s main activities concern research about and verification of circulation figures of the Belgian media. As such, CIM has a considerable influence on the flow of advertisement budgets towards media players.

⁶⁵ 173 million magazines sold in 2008, compared to close to 200 million magazines sold in 1999. Ibid.

⁶⁶ Kelly, Mazzoleni and McQuail, *The Media in Europe*, p. 20.

⁶⁷ Norkring belongs to the Norwegian Telenor group.

⁶⁸ For more information for advertisement income for digital television, see K. Berte, “Reclame in een digital medialandschap”, unpublished PhD thesis, Ghent University (2009-2010).

language side, apart from the public broadcaster RTBF.be⁶⁹ and the main private television broadcaster RTL group, other smaller players are BeTV, BTV, SiA (Belgacom), Liberty TV Europe, MCM, Belgian Business Television (Roularta), PPMG, MTV and the twelve local television broadcasters.⁷⁰ At the Flemish side, next to the public broadcaster VRT and the main private broadcaster Vlaamse Media Maatschappij (VMMa),⁷¹ other players are SBS Belgium,⁷² Media Ad Infinitum, SiA (Belgacom), Telenet, Concentra, Alfacam, Actua TV, Belgian Business Television (Roularta), Life!TV, Icon Europe and the ten local or regional television broadcasters.⁷³

At the French-language side, RTL's commercial channel RTL-TVI (23.6%) was the most widely watched channel in 2008, followed by the public broadcaster's channel La Une (14.6%). These two dominant channels are followed by the channels TF1 (13.2%), France 2 (6.6%) and France 3 (6.5%), all of which are French (i.e., not Belgian) channels. Together, these five channels account for more than 63% of the audiences in French-speaking Belgium.⁷⁴ At the Dutch-language side, there is a similar strong concentration, but the public broadcaster has a bigger and ever growing market share than its commercial counterparts. VRT's Eén was the most widely watched channel in 2008 (31.8%), followed by VMMa's VTM (21.3%). Other channels lag behind (Canvas/Ketnet: 8.4%; VT4: 6.5%; 2BE: 5.9%; VijfTV: 4.5%; Vitaya: 3.6%). Together, the different channels of VRT and VMMa accounted for more than 67% of the market. Channels from the Netherlands only accounted for 3.8% of the market share in 2008.⁷⁵

It is worth noting that the main French-language private broadcaster (RTL Belgium) has rejected the competence of the Belgian authorities over its broadcasting services, arguing that its television activities are executed by its mother company, RTL Group, which is subject to the laws of Luxembourg.⁷⁶ In order to solve this problem of a broadcaster based and licensed in one European Member State (Luxembourg), but focusing its television programs on the audiences of a different Member State (Belgium), the government of the French Community of Belgium and the government of Luxembourg in June 2009 signed a cooperation agreement whereby some of the regulations applying in Belgium's French Community (that are more strict than the European Audiovisual Media Services (AVMS) Directive and do not exist in Luxembourg) are henceforth also applied to RTL's channels RTL-TVI,

⁶⁹ In January 2010, RTBF changed its name from RTBF to RTBF.be, to stress its focus on new technologies and in particular the Internet.

⁷⁰ For the detailed overview see Le Conseil supérieur de l'audiovisuel, "L'offre de médias et le pluralisme en Communauté française", available at: <http://www.csa.be/pluralisme> (last visited on 22/10/2010).

⁷¹ VMMa is owned for 50% by De Persgroep and for 50% by Roularta.

⁷² SBS Belgium is owned by the German media group ProSiebenSat.1 Media, Europe's second biggest media group (behind RTL Group).

⁷³ See for a detailed study Vlaamse Regulator voor de Media (VRM), "Mediaconcentratie in Vlaanderen Rapport 2009".

⁷⁴ See figures Communauté française de Belgique Service général de l'Audiovisuel et des Multimédias, "Annuaire de l'Audiovisuel 2009", at p. 72.

⁷⁵ See figures VRT Jaarverslag 2008, 52.

⁷⁶ RTL Group owns 66% of the shares of RTL Belgium. The other 34% of RTL Belgium's shares are owned by Audiopresse, the association of Belgium's French-language and German-language newspapers. RTL Group is a Luxembourg group controlled by the German Bertelsmann-group. With its 45 television channels and 32 radio channels in 11 European countries, RTL Group is one of the major audiovisual groups of Europe.

Club RTL and Plug RTL. The legal validity of the agreement is the object of debate. In a controversial decision of 15 January 2009, the Conseil d'Etat decided that RTL was permitted to rely upon its Luxembourg authorisation to broadcast towards the French Community of Belgium. However, this judgment related to legislation applicable prior to the transposition of the AVMS Directive. In a case that occurred after the transposition of the AVMS Directive, the French Community's regulator (CSA), in a decision of 3 December 2009, sent a reference for preliminary ruling to the European Court of Justice seeking clarification as to which state is allowed to claim jurisdiction upon the services edited by RTL (Case C-517/09).⁷⁷

As regards distribution, Belgium is one of the most widely cabled countries in the European Union. The development of the cable networks started as early as the 1960s.⁷⁸ While the cable operators (mainly Tecteo for the French Community and Telenet for the Flemish Community) are still largely dominating the distribution market of television services, their supremacy is under challenge by other operators, such as for IPTV, satellite and mobile television. Increased competition resulted in consolidation and concentration of the market of television distributors (and in the market of internet access providers).⁷⁹ In Flanders, the main television broadcasters (i.e., VRT, VMMA and SBS Belgium) recently accused the network operators Telenet and Belgacom TV of threatening their revenue streams, by giving too much freedom to viewers of digital television to record television programs. The broadcasters claim that this jeopardises their advertisement income (i.e., because viewers skip commercials) and income from video-on-demand services. It is unclear how this disagreement between broadcasters and operators will be solved and to what extent these actors will have to adapt to new technologies and developments.

Radio signals are still mainly transmitted via analogue means, but there is a transition towards digital radio. Radio programs are mainly accessible via terrestrial broadcasting, cable, satellite and the Internet. The public broadcasters of both Communities have since the 1990s been broadcasting their radio programmes digitally. VRT recently sold its terrestrial analogue and digital broadcasting facilities to Norkring Belgium (see above for television). Digital radio broadcasts are available via different platforms, including the Internet, satellite, terrestrial and mobile broadcasting. There is a lot of uncertainty about the type of format⁸⁰ that should be used for broadcasting digital radio, and given the investments needed to develop digital broadcasting and the extent of the current cable network that needs to be upgraded, Belgium's switch towards digital radio is slower than in other European countries.⁸¹ RTBF.be is suggesting a public-private cooperation in order to finance digital switchover for radio broadcasting. The Flemish government's frequency plan for digital radio dates from 12 October 2007 and the French Community launched a

⁷⁷ See Official Journal C 051, 27/02/2010, 19–20.

⁷⁸ See European Institute for the Media, "Final report of the study on the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen's right to be fully and objectively informed", 31/08/2004, at p. 33.

⁷⁹ MAVISE, "TV market in Belgium", available at: <http://mavise.obs.coe.int/country?id=4> (last visited on 22/10/2010).

⁸⁰ E.g. DAB (Digital Audio Broadcasting), DMB (Digital Multimedia Broadcasting), DVB (Digital Video Broadcasting), DRM (Digital Radio Mondiale), etc.

⁸¹ Communauté française de Belgique Service général de l'Audiovisuel et des Multimédias, "Annuaire de l'Audiovisuel 2009", at p. 479.

plan for the transition to digital radio broadcasting on 9 July 2007.⁸² In contrast to what happened to analogue television broadcasting, the Belgian authorities do not seem to have an official policy to completely switch off analogue radio broadcasting in the near future. An argument often heard is that digital switch over would put the further existence of smaller radio broadcasters (e.g. local radio stations, specialised radio stations, Community type radio stations, etc.) at risk.

Belgium's (terrestrial) radio landscape is similar to its television landscape, insofar that there are quite a lot of radio channels available, but that there is also a strong concentration in the market. At the French-language side, the public broadcaster RTBF.be and the commercial RTL group dominate the market. These main players are followed by the French NRJ group. At the Dutch-language side, the public broadcaster VRT and the commercial broadcaster VMMA dominate the market. At both sides of the language borders, a number of independent local, regional and community-focussed radios⁸³ are operating.⁸⁴ It can be noted that it is only since 2008 that the French Community succeeded in formulating a new frequency plan on terrestrial radio broadcasting, making an end to ten years of legal uncertainty for the private radio broadcasters as to whether or not they needed a licence to broadcast in the French Community.

To conclude the chapter about radio and television broadcasting, there currently is a lively discussion going on about the public remit of the public broadcasters. This discussion is partly fuelled by serious budget reductions that the Communities enforce on the public broadcasters. As such, an important part of the discussion focuses on the funding of the public broadcasters by the authorities – and indirectly by the taxpayers. Also, discussions are currently ongoing on new management contracts between the public broadcasters and the authorities.⁸⁵ Some fundamental questions are raised in this context, notably concerning which specific tasks should fall under the public remit of the public broadcasters, and which tasks they should refrain from performing. For instance, should the focus of the public broadcasters lay on culture, on information, on science, on sports or on entertainment? In what sense should the public broadcasters be allowed to develop into alternative funding and new technologies? As said, there is a lively debate going on about these issues between various stakeholders and many of the questions raised are expected to be addressed in the new management contracts between the public broadcasters and the Communities.

2.3.3 Media online

According to the figures of the International Telecommunication Union (ITU), as per September 2009, Belgium counted 7,292,300 Internet users, i.e., a 70% penetration level. An ESS survey on daily use of the internet per country puts Belgium

⁸² See also a recent consultation, Conseil supérieur de l'audiovisuel, "Consultation publique sur le lancement de services audiovisuels numériques par voie hertzienne et le suivi du Plan stratégique de transition numérique", available at: <http://www.csa.be/consultations/show/13> (last visited on 22/10/2010).

⁸³ E.g. radios for the Turkish community in Belgium, etc.

⁸⁴ See for more details Conseil supérieur de l'audiovisuel, "L'offre de médias et le pluralisme en Communauté française" and VRM, "Mediaconcentratie in Vlaanderen Rapport 2009", p. 18-25.

⁸⁵ The current management contracts between the French Community and RTBF.be and between the Flemish Community and VRT run from 2007 to 2011.

somewhere in the middle of the European countries surveyed.⁸⁶ Figures for 2008 show that internet radio or internet television were only used by 14% of the population in Wallonia, 15% of the population in Flanders and 22% of the population in Brussels. These figures are relatively low, compared to the overall figure of 20% for the entire European Union. Internet sites of newspapers or magazines were used by 13% of the population in Wallonia, 24% of the population in Flanders and 27% of the population in Brussels. Again, these figures are relatively low (especially the figure for Wallonia), compared to the overall figure of 25% for the entire European Union.⁸⁷

Where over the last couple of years, the sales figures of newspapers have been declining or at best stabilising, Internet sites of newspapers have at the same time seen a huge increase in popularity. In general, almost all newspapers and magazines have developed a full online version of their product, which is constantly updated. However, many newspapers and magazines only publish a limited number of their articles for free on their website, and ask their readers to subscribe to the paying online or paper version to gain access to all articles. This strategy of a hybrid paying-free model is especially popular with the specialised papers (such as the economic newspapers). Recently, many newspapers have also developed applications for mobile electronic devices, such as mobile phones and iPads. Most newspapers publish a lot of video-content on their websites and some of them even created their own studio to develop further in the direction of video-content. Similarly, almost all television and radio broadcasters have also developed an online version of their channels, where they offer not only information about their programs and a limited number of programs for downloading, but also a type of information that can be classified as “written press” activities. All of this means of course that the borderline between different types of media services (such as between the written press and television) is fading.

The evolution of media players entering into the internet world, together with the newspapers’ struggle to survive and to make their websites profitable through advertisement, has caused the main French-language newspaper publishers (i.e., Rossel, IPM and Corelio-subsiary Editions de l’Avenir) to contest RTBF.be’s offering “written press” activities on its websites. These publishers recently announced they would start legal proceedings against RTBF.be, claiming that the public broadcaster is infringing on its public remit and is guilty of unfair competition by offering certain activities on its Internet sites.⁸⁸ They claim in particular that RTBF.be should not be allowed to offer services of the written press (as opposed to audiovisual services) on its internet sites, especially not if RTBF.be is using taxpayers’ money to offer such services. After the failure of a government-sponsored attempt to reconcile the parties, the newspaper publishers recently threatened to summon RTBF.be to court.

⁸⁶ European Social Survey, “Exploring public attitudes, informing public policy - Selected findings from the first three rounds”, 5, available at: <http://www.europeansocialsurvey.org> (last visited on 22/10/2010).

⁸⁷ “Mediaconcentratie in Vlaanderen Rapport 2009”, p. 69.

⁸⁸ See also Communication 2009/C 257/01 of the European Commission on the application of State aid rules to public service broadcasting, OJ C257, 27/10/2009.

2.3.4 Social media online

Social media online (such as blogs, Facebook, Twitter, etc.) do not seem to have conquered a prominent place in the Belgian media landscape. Although most media players are active on social media such as Facebook through e.g. fan clubs for and links to newspapers, and although journalists often have a Facebook or Twitter account, they do not overwhelmingly use these new media for their reporting. Private media blogs exist, but most of these blogs are initiatives of established journalists.⁸⁹ Citizens also provide news items through social media, but such information is not always trustworthy.⁹⁰

As concerns content production methods for media online, it seems that the Internet sites of most traditional media players are provided with content by professional journalists and traditional press agencies. User-generated content for online versions of traditional media services are mostly limited to readers' sections and comments on forums.

All in all, social media are developing in Belgium (and in theory, they have the capacity to divert advertisement income away from traditional media players), but for the moment their influence seems rather limited.

2.3.5 News agencies

Belga News Agency is the most important news agency for Belgium. Other news agencies are the big international news agencies and specialised Belgian news agencies. Given Belga's position as the only major Belgian news agency, its organisation (i.e., its main shareholders are in fact the same media groups that are its main clients) and influence on the Belgian press (i.e., in terms of structural pluralism and content-wise) is sometimes seen as controversial.⁹¹ Also, there is a lack of scientific data on the extent to which Belgian media rely on information from Belga. All in all, it can be said that there is a very strong concentration in the market of press agencies in Belgium. Given the importance of press agencies for the proper functioning of the media, it is surprising that there is no legislation that guarantees pluralism in the sector and that there is almost no literature on press agencies in Belgium.

2.4 Journalists' background and education

Belgium counts a wide variety of different types of journalists, depending on the type of media they work for, the kind of work they do, the type of contract they have with a media group, etc. Some but not all journalists have the legally protected status of "professional journalist" under the act of 30 December 1963. This act regulates the

⁸⁹ Some examples of social media are www.apache.be; www.dewereldmorgen.be; www.politics.be; www.mediakritiek.be, etc.

⁹⁰ One of the most noteworthy 'accidents' with civic journalism was the case where the press agency Belga wrongly reported that Belgium's queen Fabiola had passed away. Belga picked this "news item" up from its website Ihavenews.be, where citizens can report news items. For unknown reasons, the message was not checked by Belga, and other media players published Belga's "news item" as breaking news.

⁹¹ See T. Cochez, "Belga, waar de klant koning én aandeelhouder is", available at: <http://www.apache.be/2010/01/belga-waar-de-klant-koning-en-aandeelhouder-is> (last visited on 22/10/2010).

recognition and protection of the title of professional journalist for those journalists who meet the conditions laid down in the act,⁹² and who have applied for the recognition of their status of professional journalist. The act also grants certain benefits to recognised professional journalists, such as the deliverance of certain professional identification documents (e.g. press passes, admission tickets, etc.). However, the act of 30 December 1963 does not monopolise the title of journalist, and in principle everybody is free to call himself or herself a “journalist”. No special education or examination is needed to obtain the titles of “journalist” or “professional journalist”, and journalists have a wide variety of different educational and professional backgrounds.

It is worth noting that a study from the Artevelde Hogeschool showed that no less than 10% of the Flemish journalists fight with a burn-out. Compared to an overall figure of 4% in general for the entire population, this seems a high figure. On top of this, 21% of the Flemish journalists have an increased risk of burn-out. Apparently, the main reasons behind these alarming figures are related to the increased commercialisation and digitisation (with increasingly short deadlines) of the profession of journalist.⁹³ A study conducted among French-speaking journalists shows that almost half of them is unhappy about their working conditions and almost 80% sees a negative evolution over the last years.⁹⁴

2.5 Media literacy and media status in society

Belgium generally has an average score when it comes to media literacy. A recent study commissioned by the European Commission estimates Belgium’s media literacy level as the exact average level of the European Union as a whole.⁹⁵

Some small-scale initiatives have been taken by the Communities to improve the media literacy level in Belgium (e.g. the disposition of free newspapers or visits by journalists to secondary schools). Other initiatives have a more structural character, for instance, the compulsory integration since September 2010 of media education in the school curriculum in Flemish schools (meaning that all students graduating from secondary school should be able to work with computers and the internet, and to critically judge information to which they are exposed) or the re-launch of a dedicated committee on media education by the French Community (“Conseil supérieur de l’Education aux Médias”).

⁹² E.g. in order to be recognized as a professional journalist, one should – as a primary professional activity and against remuneration - contribute to the redaction of the daily or periodic press, of radio- or television news bulletins, film journals or press agencies; One should have exercised this activity during the last two years at the minimum; etc.

⁹³ See Arteveldehogeschool, “Journalist”, available at: <http://www.arteveldehs.be/emc.asp?pageId=1848> (last visited on 22/10/2010).

⁹⁴ See Association Générale des Journalistes Professionnels de Belgique, “Dossier Enquête sur le moral des journalistes”, 96 La lettre de l’AJP, September 2008.

⁹⁵ European Commission, “Study on assessment criteria for media literacy levels”, available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 22/10/2010).

3. The media policy in Belgium

Belgium's constitution and other fundamental legislation safeguards the freedom of expression and information of its citizens. Belgium scores relatively high in international rankings of media freedom. Nonetheless, there have been particular cases where the application of the freedom of the press by the Belgian courts has given rise to controversy. The following section gives an overview of the media regulatory framework in Belgium.

3.1 Actors of media regulation and policy

The authorities competent for regulating the media in Belgium are organised at the level of the Communities. On a policy-level, the competent authorities are the governments and legislative assemblies of the French Community, the Flemish Community and the German-speaking Community. On a regulatory level, the competent authorities are the "Conseil Supérieur de l'Audiovisuel" (CSA) for the French Community,⁹⁶ the "Vlaamse Mediaraad" (VRM) for the Flemish Community⁹⁷ and the "Medienrat" for the German-speaking Community⁹⁸.

It should be noted, however, that Belgian law makes a basic distinction between telecommunications (which falls under federal law) and broadcasting (which falls under Community law).⁹⁹ Although it is not always easy to make such a clear distinction in practice, the case law of the Constitutional Court gave the Communities quite broad powers to regulate everything that is related to broadcasting, resulting in radio, television and cable distribution all falling under the authority of the Communities. Telecommunications (including satellite reception and ground networks) is subject to federal legislation. Overall, legislation on the media is scattered between different levels of government, but the various governments and regulators try to work together through cooperation agreements.¹⁰⁰ For instance, CSA, VRM and Medienrat are working together with the IBPT (the Belgian Institute for Postal and Telecommunication Services) in a Conference of Regulators for the sector of Electronic Communications (CRC).¹⁰¹

In general, the press in Belgium was given a broad freedom to organise itself without too much interference from the authorities (as described above, the situation is different for the audiovisual media, where government interference is more strongly felt). Journalists used this freedom to organise themselves in professional organisations where deontological codes were developed for all associated journalists to comply with. The most important of these self-regulatory organisations are CDJ¹⁰²

⁹⁶ See Conseil Supérieur de l'Audiovisuel de la Communauté française official website, available at: www.csa.be (last visited on 22/10/2010).

⁹⁷ See Vlaamse Mediaraad official website, available at: www.vlaamseregulatormedia.be (last visited on 22/10/2010).

⁹⁸ See Medienrat der Deutschsprachigen Gemeinschaft Belgiens official website, available at: www.medienrat.be (last visited on 22/10/2010).

⁹⁹ Article 4, 6° of the Special Act of 8 August 1980, as amended by the Special Act of 8 August 1988.

¹⁰⁰ J. De Wachter and L. Parret, "Belgium" in de M. Avillez Perreira, *Antitrust and new media* (2000) 95.

¹⁰¹ See cooperation agreement of 17 November 2006, *Moniteur belge*, 28 December 2006, 75371.

¹⁰² See Conseil de Déontologie journalistique official website, available at: www.deontologiejournalistique.be (last visited on 22/10/2010). It must be noted that the CDJ is partly funded by the French Community (see the Decree of 30 April 2009).

and RVDJ¹⁰³, the independent self-regulatory organisations of respectively the French- and German-language media and the Flemish media. The main representative organisations for journalists are AGJPB/AVBB¹⁰⁴ and AJPP/VJPP.¹⁰⁵ The most influential media industry organisations are the organisations of newspaper publishers (JFB¹⁰⁶ and VDP¹⁰⁷), the periodic press (THE PPRESS¹⁰⁸ and UPP¹⁰⁹) and the advertisement sector (JEP¹¹⁰).

There is a limited number of civil society organisations and NGOs with influential advocacy activity in the field of media policy in Belgium. Most of the universities have created important media research institutes.

3.2 The media regulatory framework

3.2.1 Freedom of expression and information

The main legal norms about freedom of expression and information in Belgium are incorporated in the Belgian Constitution. Article 19 of the Belgian Constitution is a general provision safeguarding the freedom of expression, except for the repression of offences committed when using this freedom. Article 25 specifically safeguards the freedom of the press and prohibits censorship. It also sets a principle of stepped liability for both criminal prosecutions and civil liability, whereby in principle only one person can be prosecuted: in the first place, the author, provided that he is known and resident in Belgium, in second instance, the publisher, then, the printer, and finally the distributor. This stepped liability replaces one actor by the next actor if the preceding one is missing in the chain, and was established as a mechanism to prevent private censorship by publishers, printers or distributors (i.e., since in principle the author alone will be prosecuted for a published work, publishers, printers and distributors do not have to fear for prosecution).¹¹¹ Article 150 of the Belgian Constitution submits all press offences to the jurisdiction of a jury (with the exception of press offences inspired by racism or xenophobia which are tried by professional judges). By submitting press offences to a jury (i.e., representatives of the people), the Belgian Constitution meant to install a special judicial protection for authors, journalists and editors: in practice, the cost of trials by jury has led criminal authorities to a general attitude of not bringing proceedings against the press (which means that the press is de facto only subject to civil proceedings). Article 32 of the Constitution provides that everyone has the right to consult any administrative

¹⁰³ See Raad voor de Journalistiek official website, available at: www.rvdj.be (last visited on 22/10/2010).

¹⁰⁴ See General Association of Professional Journalists in Belgium official website (available at: www.agjpb.be and www.avbb.be). This organisation consists of a French-German wing, AJP, and a Flemish wing, VVJ.

¹⁰⁵ See Association of Journalists of the Periodic Press official website, available at: www.ajpp-vjpp.be (last visited on 22/10/2010).

¹⁰⁶ For the French-language newspapers see JFB official website, available at: www.jfb.be (last visited on 22/10/2010).

¹⁰⁷ For the Dutch-language newspapers see VDP official website, available at: www.dagbladpers.org (last visited on 22/10/2010).

¹⁰⁸ See Organisation of publishers of the periodic press, official website, available at: www.theppress.be (last visited on 22/10/2010).

¹⁰⁹ See Union of publishers of the periodic press, official website, available at: www.upp.be (last visited on 22/10/2010).

¹¹⁰ See Jury for Ethics and Publicity, available at: www.jep.be (last visited on 22/10/2010).

¹¹¹ Note that article 25 of the Constitution has recently been declared subject to revision (see below).

document and to have a copy made of such document, except in limited cases as specified by secondary legislation.¹¹²

Although there is no legal registration or notification obligation in Belgium for publishing a newspaper, a magazine or a book, Article 299 of the Penal Code stipulates that publishing or distributing a printed matter without mentioning the real name and address of the writer or the printer is punishable. This is not However, this is This considered a major obstacle to free publishing. The Penal Code also contains specific language on the punishment of libel (articles 443 – 452).

The main broadcasting acts for the French Community are the Act of 27 February 2003 on audiovisual media services¹¹³ (hereafter “FRBA”) and the Act of 14 July 1997 on the Belgian radio and television of the French Community (hereafter “RTBF-Act”). The main broadcasting act for the Flemish Community is the Act of 27 March 2009 on radio and television broadcasting (hereafter “FLBA”). For the German-speaking Community, the main acts are the Act of 27 June 2005 on audiovisual media services and film showings (hereafter “GBA”) and the Act of 27 June 1986 on the Belgian radio and television centre of the German-speaking Community (hereafter “BRF-Act”). For the region of Brussels, the main act is the Act of 30 March 1995 on electronic communication networks, electronic services and broadcasting activities in the bilingual region of Brussels-Capital. Other important documents for the public broadcasters are the management contracts between the public broadcasters and the Communities (i.e., management contract of 13 October 2006 between RTBF.be and the French Community for the period 2007-2011 and the management contract of 20 July 2006 between VRT and the Flemish Community for the period 2007-2011).

Other relevant legislation are the different anti-discrimination acts of 10 May 2007 which limit the freedom of expression if this amounts to unlawful discrimination¹¹⁴ and the Holocaust Denial Act of 23 March 1995 which makes it illegal to publicly “deny, grossly minimise, justify or approve the genocide committed by the German National Socialist regime during the Second World War”.

Article 10 of the European Convention on Human Rights (ECHR) and article 19 of the International Covenant on Civil and Political Rights (ICCPR) are directly applicable by Belgian judges and, as such, are of main importance in Belgium’s case law on media freedom and independence.

¹¹² The exception referred to in article 32 has been laid out in different legislative acts, such as the Act of 11 April 1994 (federal level), the Decree of 26 March 2004 (Flemish level) and the Act of 12 November 1997 (provincial and municipal level). Exceptions mainly relate to sensitive personal information, public security or abusive requests.

¹¹³ Coordinated on July 24, 2009, following the transposition of the AVMS Directive.

¹¹⁴ The Racial Equality Act of 10 May 2007 implements the EU Racial Equality Directive and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, and prohibits discrimination on grounds of alleged race, color, descent, national or ethnic origin, and nationality. The Gender Equality Act of 10 May 2007 fights discrimination related to sex and assimilated grounds (i.e. maternity, pregnancy and transsexualism). The General Anti-discrimination Act of 10 May 2007 implements Directive 2000/78/EC of 27 November 2000 and prohibits discrimination on all other grounds (i.e., age, sexual orientation, civil status, birth, wealth/income, religious or philosophical belief, state of health, disability, physical characteristics, political opinion, language, genetic characteristic, social origin). This Act also contains language that incitement to hatred, discrimination or violence is punishable (see art. 22 of the Act and art. 444 Penal Code).

Important case law for the principle of freedom of the press includes the decision of 24 February 1997 of the European Court of Human Rights (the “ECtHR”) in the case of *De Haes and Gijssels v. Belgium*. In this case, the ECtHR blamed Belgium for the conviction of two journalists of the Flemish magazine *Humo*, for their critical remarks towards judges. The ECtHR ruled that it was unnecessary to convict these journalists (even if they were only convicted to a symbolic sum of 1 Belgian Franc), and concluded to a breach of Articles 10 and 6 ECHR. The ECtHR noted that the articles published by the journalists contributed to an important public debate,¹¹⁵ and were based on relevant sources and information. The ECtHR expressly stated that “*freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the Community*” and that “*journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation*” (paragraph 46).¹¹⁶

Also, the Belgian Court of Cassation - Belgium’s court of last resort - interprets Article 25 of the Constitution on the freedom of the press and the prohibition of censorship as applying only to the written press, and not to e.g. radio or television.¹¹⁷ This interpretation of Article 25 of the Belgian Constitution is based on a restrictive interpretation of the concept of “the press”, as meaning the “printing press” only and not the media in general, as this was the only form of press or media existing at the time the Constitution was drafted. Furthermore, the Belgian Court of Cassation interprets Article 25 of the Constitution as applying only to prior censorship, which means in practice that the prohibition of censorship applies only if there has not yet been any dissemination and that this prohibition does not apply from the moment there has been some kind of dissemination.¹¹⁸

However, these interpretations of Article 25 of the Constitution are subject to controversy and are not shared by all scholars or lower courts. Some of the courts¹¹⁹ have granted injunctions for taking newspapers or magazines out of distribution, based on the argument that, since the papers and magazines were already available for sale, their judicial ruling did not constitute prior censorship. These cases covered a range of different facts and allegations, going from defamation to breach of privacy, breach of the presumption of innocence and breach of confidentiality of parliamentary inquiries.

One of these cases (*Leempoel & Ciné Revue v. Belgium*)¹²⁰ was ultimately brought before the ECtHR, which found no violation of freedom of expression in the way the Belgian court had ordered the magazine *Ciné Revue* to be withdrawn from sale and banned from further distribution. The ECtHR found that the publication of the article in *Ciné Revue* - which included a copy of strictly confidential correspondence of a judge - breached the private life of the judge, and did not contribute to the general interest of society. The ECtHR ruled that the grounds¹²¹ given by the Belgian court to justify the provisional ban on further sale and

¹¹⁵ On incest, violence within families, criticism of the judicial system, etc.

¹¹⁶ ECtHR, *De Haes and Gijssels v. Belgium* (no. 7/1996/626/809), 24 February 1997.

¹¹⁷ Cassation, 9 December 1981 and Cassation, 2 June 2006.

¹¹⁸ Cassation, 29 June 2000. See B. Frydman and J. Englebort, “Le contrôle judiciaire de la presse”, 6 *Auteurs & Médias*, 2002.

¹¹⁹ See case law cited by D. Voorhoof, *Handboek Mediarecht* (2003), pp. 63-75.

¹²⁰ ECtHR, *Leempoel & S.A. Ed. Ciné Revue v. Belgium* (no. 64772/01), 9 November 2006.

¹²¹ I.e., limitation of the extent of damage caused to a person’s private life.

distribution were relevant and sufficient and that the limitation of the publisher's right to freedom of expression could *in casu* be seen as necessary in a democratic society and proportionate to the aim pursued.

Nevertheless, Belgian case law and literature remain divided about the exact implications of this case law of the Court of Cassation and of the ECtHR. In scholarly literature, one of the recurring issues is the unilateral character of some of the judicial decisions where newspapers or magazines were taken out of circulation. These decisions are often taken on the basis of a special procedure for urgent applications,¹²² where a claimant starts a unilateral proceeding before a judge, claiming that his case is too urgent to convene the publisher, and where the judge "provisionally" (i.e., pending a definitive decision) orders the paper or magazine to be taken out of circulation, in order to prevent further harm to the claimant, without hearing the publisher.¹²³

All in all, one can conclude that, where the general rule of prohibition of censorship does still stand in Belgium, there is a lack of legal security whether this rule applies also to judicial decisions. The distinction made by the Court of Cassation and some other courts between media of the written press and other media does not seem supportive of the press freedom in Belgium. However, things may change soon since Article 25 of the Constitution has recently been declared subject to revision, and it is generally expected that its scope will be extended to other forms of media, such as radio, television and the Internet.¹²⁴

Belgium scores 11 points on Freedom House's "Freedom of the Press 2008" ranking, putting the country on a shared fifth place with Sweden in the global press freedom ranking (only Finland, Iceland, Denmark and Norway score better). Belgium occupies an eleventh place on Reporters Without Borders' global "Press Freedom Index 2009" (after Denmark, Finland, Ireland, Norway, Sweden, Estonia, the Netherlands, Switzerland, Iceland and Lithuania).

3.2.2 Structural regulation

As a general rule, radio and television broadcasters need to obtain a licence if they want to broadcast in Flanders. In the French Community, editors of terrestrial radio services (FM) need to obtain a licence (which entitles them to broadcast using a

¹²² Articles 584, 588-589, 1025-1034 and 1035-1041 of the Belgian Judicial Code.

¹²³ Several problems are identified with these decisions. First, it can be argued that these decisions are not proportionate, because the judge could as well suffice with ordering a rectification to be published together with the article or a reference that the article is the subject of a judicial proceeding, instead of prohibiting the further circulation of the entire paper or magazine. Also, it is often difficult for a judge to assess the urgency of the case and the balance between the rights of the publishers on the one hand and the possible harm that may be caused to the applicant by postponing the hearing in order to convene the publisher on the other hand. Furthermore, such unilateral proceedings are supposed to only bring about "provisional" measures, but a provisional measure of further publication in fact means that the publisher must defend himself before a judge - often the same judge that ordered the provisional measure - in order to have his article published. Some courts even ordered a prohibition on broadcasting a television program (i.e., even before there was any kind of dissemination), following a unilateral request by a claimant, based on the Court of Cassation's interpretation of article 25 of the Constitution as applying only to the written press, and not to audiovisual media. See for instance Pres. Tr. Brussels, 24 October 2001, A&M 2002/2, 177 and case law cited by D. Voorhoof, *Handboek Mediarecht*, 63-75.

¹²⁴ Declaration of revision of the Constitution, *Moniteur belge*, 7 May 2010, 25762.

designated frequency). Radio services transmitted by other means (cable, internet) are only required to make a declaration to the CSA. Editors of television services generally only need to make a declaration to the competent authorities if they intend to broadcast in the French Community.¹²⁵ Broadcasters in both Communities need to comply with a set of rules that are applicable to their broadcasting activities. Publishers of newspapers or magazines and owners of Internet sites, etc. do not need to obtain such licence or make such declaration.

The general competition rules of the federal Act of 15 September 2006 on the protection of economic competition (hereafter “Competition Act”) and relevant EU laws apply to the media sector. There are no media-specific competition rules, except the rules for television and radio broadcasters described below. There are no special rules for newspapers or magazines concerning ownership, concentration or protection of pluralism, nor are there obligations for newspapers or magazines to provide transparency about their capital structure, shareholders or owners. So far, the Belgian authorities have prohibited no merger of media companies.¹²⁶ In theory, the Belgian federal government has the power to overrule a decision of the Belgian competition watchdog, and can declare a concentration admissible for general interest reasons, overriding the competition related risk on the Belgian market (or part of it) (Art. 60 Competition Act). There are no rules prohibiting foreign ownership of media in Belgium.

For radio and television broadcasters, the following competition and ownership rules apply:

For the *French Community*, the regulator (CSA) monitors whether editors or distributors with a “significant position” in the audiovisual sector are not threatening the access of the public to a pluralistic offer of broadcasting services (Art. 7 FRBA). A presumption of significant position exists in the following situations: 1. a natural or legal person holds more than 24% of the capital of 2 editors of television services (directly or indirectly); 2. Same rule for radio services; 3. several editors of television services, directly or indirectly controlled by the same natural or legal person, have an audience share of 20%; 4. Same rule for radio services. If the CSA concludes that a threat to pluralism exists, it will start negotiations with the people or companies concerned with a view to reaching a solution to this threat. If negotiations do not lead to an agreement within six months time, or if such agreement is violated, a range of sanctions may be applied, ranging from fines to revocation of licences. Article 6 FRBA contains specific requirements for audiovisual broadcasting companies to make available to the public some basic information about their companies. This article also contains some specific transparency requirements for media players to obtain a licence from the authorities (e.g. requirements to identify the persons or legal entities that participate in the company’s capital, the amount of such participation, participations in other media players and service providers, etc). The CSA runs a website dedicated to all this transparency-related information.¹²⁷

¹²⁵ For an explanation to the creation of a merely declarative regime, see the preparatory works of the current Decree (Parlement de la Communauté française, dossier 634 (2008-2009)). If they wish to use terrestrial broadcast (analogue or digital), the editors of television services still need to apply for an authorisation.

¹²⁶ But certain conditions were imposed to safeguard pluralism e.g. when Tecteo acquired BeTV.

¹²⁷ See Conseil supérieur de l'audiovisuel, “L'offre de médias et le pluralisme en Communauté française”, available at: <http://www.csa.be/pluralisme> (last visited on 22/10/2010).

For the *Flemish Community*, a similar regulation applies where the Flemish Regulator (VRM) has the task to monitor concentrations in the Flemish media sector (Art. 218 FLBA) and to apply sanctions in case a company has significant market power. Significant market power exists if a company has, alone or together with other companies, an economic power that enables it to act in a significant way independently from its competitors, clients or consumers (Art. 190 FLBA). The sanctions are rather “soft” sanctions, ranging from obligations to provide additional transparency to obligations to grant access or interconnection to networks, etc. (Art. 192 FLBA). It is unclear if VRM can also apply harder sanctions (fines and revocation of licences) in case pluralism is in danger. Every year, VRM publishes a report on the concentration in different media sectors in Flanders. VRM also developed a “media database”, which can be used for the annual reports and for ad hoc reports in response to specific questions.¹²⁸

Cross media: Rules on the limitation of cross-media ownership in Belgium are not so much targeted to media companies as such, but rather to persons combining different functions and mandates in various media companies (the underlying rationale is to limit evasions of the rules through setting up structures with various subsidiaries and connected companies). For instance, in the French Community, one cannot be a director to RTBF.be and at the same time hold a function or have interests in a competitor of RTBF.be (Art. 12 RTBF-Act). Also, a person cannot be a member of the board of directors of a local television station and at the same time hold the position of director or executive of other service providers, press companies or organisations with similar activities, if such other position may cause a conflict of interest with the local television station (Art. 72 FRBA). In Flanders, a director to VRT can not have a function or a mandate in another media company (Art. 12 FLBA). A director to a Flemish Community-wide or regional radio broadcaster can not have a political mandate and can not be a director to a public broadcaster or another local or regional radio broadcaster (Art. 138 and 141 FLBA). Only one fifth of the directors of a Flemish regional television broadcaster may be a director or have a leading role in another media company, an advertisement company, VRT or a private broadcaster that targets the entire Flemish Community (Art. 172 FLBA). Finally, when the first commercial television and radio broadcasters appeared in Belgium, the Belgian authorities required that newspaper and magazine editors had to participate in the commercial broadcasters (amounting to 31% in RTL-TVI¹²⁹ and to 51% in VTM¹³⁰), but these rules did not survive. These compulsory concentration rules were meant to secure the survival of the written press, by guaranteeing that advertisement revenues lost to the commercial radio and television broadcasting would in fact flow back to the written press.

Specific rules exist regarding interaction between *politicians and the media*. In general terms, there is interaction rather than separation between the political world and the public radio and television broadcasters. This system can be described as a system of internal pluralism, whereby different political parties have a proportionate representation in the public broadcasters’ governing bodies. This system is tempered with legal safeguards regarding the content of the public broadcasters’ programming

¹²⁸ See Vlaamse Regulator voor de Media, “Persberichten 2010”, available at: <http://www.vlaamseregulatormedia.be/nl/documentatie.aspx> (last visited on 2/10/2010).

¹²⁹ Decision of the Government of the French Community of 21 December 1987.

¹³⁰ See art. 8 Act of the Flemish Community of 28 January 1987.

(see below). In this sense, Belgium is a clear example of the “Democratic Corporatist” model described by Hallin and Mancini.¹³¹

Public broadcasters are subject to a system where influence from politicians, at least on the level of their boards of directors, is institutionalised, although in a proportionate manner. The underlying rationale of this system is aimed at safeguarding a sufficient degree of internal pluralism within the public broadcasters. For example, in the French Community, the board of directors of the public broadcaster (RTBF.be) must be composed, in a proportionate manner, of representatives of the various recognised political groupings in the Parliament of the French Community.¹³² In the Flemish Community, the directors of the public broadcaster (VRT) are appointed by the Flemish government, in proportion to their representation in the Flemish Parliament.¹³³ In the German-speaking Community, the board of directors of the public broadcaster (BRF) must be composed of representatives of the various political parties in the Parliament of the German-speaking Community, in a proportionate manner.¹³⁴ In all three Communities, the position of director at the public broadcaster is incompatible with several political mandates (e.g., in a government or in a parliament).¹³⁵

A special regime applies to regional and local broadcasters, which are also subject to influence from politicians, but where this influence is more limited (and also proportionate). For example, in the French Community, maximum half of the directors of a local television station may have a political mandate. Those directors that have a political mandate should represent in a proportionate manner the political parties in the councils of the municipalities located within the emission region of the local television (in Brussels-Capital: proportionate representation of the political parties in the Parliament of the French Community).¹³⁶ In the Flemish Community, the boards of directors of regional television broadcasters must be composed in a proportionate way, and only 1/5th of their directors may have a political mandate (they should not have an executive mandate).¹³⁷ Also, the general assembly of the Flemish regional television stations must be composed in a representative way as regards political, social, cultural, ideological and regional criteria.¹³⁸

3.2.3 Content regulation

All Communities have issued specific and detailed legislation on content regulation, such as on cultural matters (e.g. in order to promote their own language) and on specific requirements for news programs (e.g. in order to ensure quality and impartiality of such programs). Other examples are rules regarding access to airtime for various philosophical or religious associations.¹³⁹ Specific rules and quota exist on compulsory investments in content production. Although most of these rules are a

¹³¹ Hallin and Mancini, *Comparing media systems*, p. 166.

¹³² Art. 11, § 1 RTBF-Act and Art. 19 Act of 16 July 1973 on the protection of ideological and philosophical convictions (hereafter “Culture Pact Act”).

¹³³ Art. 12, §1 FLBA and Art. 19 Culture Pact Act.

¹³⁴ Art. 8, § 1 BRF-Act and Art. 19 Culture Pact Act.

¹³⁵ Art. 12 RTBF-Act; Art. 12 § 2 FLBA; and Art. 9, § 2 BRF-Act.

¹³⁶ Art. 70 FRBA.

¹³⁷ Art. 172 FLBA.

¹³⁸ Art. 171 FLBA.

¹³⁹ E.g. Art. 7, § 3-4 RTBF-Act and art. 35-36 FLBA provide that various “representative associations” are entitled to broadcast on the radio and television channels of the public broadcasters.

mere translation into Belgian law of the European directives,¹⁴⁰ some of them are specific to the Belgian case.¹⁴¹

In general, programming and content of both private and public broadcasters should stay clear from political, philosophical and ideological influences. Also, some provisions specifically restrict politicians' control over private, regional and local broadcasters. For example, the French Community's FRBA stipulates that all "editors of broadcasting services" (both radio and television services) should be independent of government, political parties, employers' organisations and labour associations.¹⁴² Specifically for local television broadcasters, the FRBA stipulates that their programming should remain independent from governments, municipal and provincial authorities, political parties, employers' and labour organisations, philosophical or religious movements, etc.¹⁴³ RTBF.be, every editor of audiovisual services who uses a closed distribution platform and each local television broadcaster should recognise a committee of journalists which it should consult at various occasions e.g. for the organisation of the editorial staff for informative programmes, for the establishment of the internal rules relating to information processing, and in general for all decisions that fundamentally change the editorial line of the broadcaster.¹⁴⁴ Similarly, in Flanders, all information programs must respect a spirit of political and ideological impartiality.¹⁴⁵ Also, all editors of private television services, all regional television broadcasters and all linear radio broadcasters in Flanders must be independent from political parties.¹⁴⁶ Directors of Community-wide and regional radio broadcasters must not have a political mandate.¹⁴⁷ For all its informative programs, the Flemish public broadcaster (VRT) must respect a deontological code and an editorial statute that safeguards the independency of the editorial staff.¹⁴⁸ Flemish private and regional television broadcasters that broadcast news bulletins and other informative programmes should also have their own editorial staff and an editorial statute that safeguards the independency of their editorial staff (although it is unclear to what extent the obligation to have an editorial statute is complied with).¹⁴⁹

Newspapers and magazines do not have such legal obligations to have an editorial statute. However, a tradition exists of foundations within newspapers that take care of the editorial principles and the values of the newspapers. The statutes of these foundations mostly contain specific safeguards with regard to the editorial staff's independence (e.g. in case of take-overs or in case a chief editor is appointed or dismissed). It is also worth noting that there is a recent initiative of the Flemish government to make press subsidies dependent on the presence of an editorial statute or on other factors ensuring the independence of the editorial staff. Also, some

¹⁴⁰ Belgium was one of the first countries to implement the AVMS Directive into national law.

¹⁴¹ E.g. French-language television broadcasters should reserve 20% of their airtime (excl. airtime for informative programs, sport events, etc.) for audiovisual works whose original version was made in the French language (Art. 42, 2° FRBA), and should ensure that the majority of their programs (except for music programmes) are offered in the French language (Art. 42, 3° FRBA).

¹⁴² Art. 35, § 1, 5° FRBA.

¹⁴³ art. 66, § 1, 10° FRBA.

¹⁴⁴ Art. 19bis RTBF-Act and art. 35 and 66 FRBA.

¹⁴⁵ Art. 39 FLBA.

¹⁴⁶ Art. 163, 3°, 174, 2°, 169, 4° and 130 FLBA.

¹⁴⁷ Art. 138 and 141 FLBA.

¹⁴⁸ Art. 29, §1 FLBA.

¹⁴⁹ Art. 164 and 169, 9° FLBA.

newspapers have recently taken other initiatives to improve their accountability towards their readers' public (e.g. the Flemish newspaper De Standaard recently appointed an independent ombudsman).

All of the Communities have issued specific and detailed legislation on advertising (e.g. rules regarding advertisement in children's programs, prohibition of advertising or sponsoring in news and other informative programs, prohibition for news journalists to mislead the public by promoting a product or service in an advertising spot, prohibition for sponsors to influence editorial content, prohibition to limit advertising to certain groups, product or services, etc.).

The Act of 23 June 1961 on the Right of Reply grants a broad right of reply to any individual or corporation named or implicitly referred to in a newspaper or a magazine, and a more limited right of reply to any individual or corporation named or implicitly referred to in an audiovisual broadcasting (i.e., radio or television). In the case of audiovisual broadcasts,¹⁵⁰ the claimant must prove a personal interest in the reply and the right of reply consists only in the right to rectify incorrect facts relating to the claimant and to reply to facts or declarations that touch the honour of the claimant. The right of reply should always be free of charge and refusal of the right of reply may lead to penal sanctions. The Act on the right of reply of 1961 does not apply to electronic versions of newspapers.¹⁵¹ Several legislative proposals aimed at applying similar rules to electronic media have failed so far, but self-regulation exists in this field.

The Act of 7 April 2005 on the Protection of Journalistic Sources protects journalists from investigative measures (such as the interception of communication, surveillance and judicial home search and seizure) if this could breach the secrecy of their sources. Following a decision of the Belgian Constitutional Court of 7 June 2006, this protection of journalistic sources covers everybody who exercises an informative activity whether or not they are professional journalists (for instance, the protection includes bloggers).¹⁵²

The Belgian Ethical Code for Journalists of 1982 is the most important code of conduct for journalists. This code has been approved by the main journalists' organisation AGJPB/AVBB and by some of the main publishers' organisations.¹⁵³ Another important code is the Declaration of the Rights and Duties of Journalists, approved at a meeting of the Journalists' Unions of the (then) six countries of the European Community in Munich in 1971. The 1990s saw a surge of complaints about journalists' compliance with ethical principles, but more recently, monitoring by CDJ and RVDJ (see above) seem to have led to a more positive evolution.¹⁵⁴ In September 2010, RVDJ published a new code for journalistic ethics, which is based on previous

¹⁵⁰ For Flanders, the right of reply for audiovisual broadcasts is also covered by Art. 103-112 FLBA.

¹⁵¹ P.-F. Docquir, "Le droit de réponse 2.0 ou la tentation d'un droit subjectif d'accès à la tribune médiatique" in *Les propos qui heurtent, choquent ou inquiètent*, Revue de la Faculté de Droit, Université Libre de Bruxelles (2008) 303.

¹⁵² For more information see e.g. D. Voorhoof, *Het journalistiek bronnengeheim onthuld* (2008), and J. Englebert, "Le statut de la presse: du droit de la presse au droit de l'information", 35 *Revue de la Faculté de Droit de l'Université Libre de Bruxelles (Les propos qui heurtent, choquent ou inquiètent)* (2007), 231.

¹⁵³ For an English version of this code See EthicNet, "Code of journalistic principles, Belgium", available at: http://ethicnet.uta.fi/belgium/code_of_journalistic_principles (last visited on 22/10/2010).

¹⁵⁴ De Bens and Raeymaeckers, *De pers in België*, pp. 230-232.

texts, but takes into account recent developments such as the digitalisation of the media and the increasing use of images in news coverage.

Finally, although search-engines play an increasingly important role as “gateways” to information, the Belgian legislators have not taken any major initiatives to regulate search-engines. However, in 2007, the Court of First Instance of Brussels rendered an important judicial decision whereby Google was condemned for violating Belgian copyright law by publishing links to and abstracts of articles from Belgian newspapers on its Google News site and through its catch function, without the permission of the newspaper publishers.¹⁵⁵ The Court ruled that Google had to pay a sum of 25,000 Euros for each day it continued to display content from the plaintiff’s¹⁵⁶ publications in violation of copyright. This is an important decision in so far that it limits search engines’ possibilities to use and display content that is protected by copyright. An appeal against this decision is still pending.

4. Assessment of Belgian media policy and democratic politics

The most obvious conclusion from the overview provided in this report is that Belgium has two major different media landscapes (French-language and Dutch-language media). This separation is partly due to differences in language and culture between the two Communities and partly to a division on the policy and regulation level where the two Communities have their own policies, rules and institutions. This separation of the media presents the country with various challenges. It is first of all uncertain whether a good understanding and cooperation between the various Communities is possible in the absence of a shared public sphere in Belgium. A second challenge posed by Belgium’s linguistic separation of the media concerns the scattering of legal and regulatory competences among different levels of government, which need to cooperate on some specific issues (such as the convergence of telecommunication and media regulations).

All in all, it is correct to say that there is an adequate level of uniformity in Belgium’s media policy. This is partly due to the shared common heritage from pre-federalisation times and the fact that Communities’ regulations are based on European directives and are largely influenced by the interpretations of the European Commission and the European Court of Justice. Also, on an institutional level, the regulators established by the Communities are almost mirror-like. When it is necessary, these regulators work together with the federal institutions. At the same time, the Communities have a broad autonomy as concerns media policy (e.g. radio, television, cable, subsidies to the written press, etc.) and different legal texts apply in each Community. As such, Belgium’s media policy has a mixed character – uniform and separate at the same time – and it is expected that, though the core of its regulations will remain commonly shared, differences will probably increase.

The Belgian authorities have, in principle, granted quite a lot of freedom to the media. As such, the freedom of the press has always been protected under the Constitution and the written press has never been under direct state control. Also, the authorities opted to stay out of the field of journalists’ ethics and have encouraged self-regulation rather than government regulation. However, with the arrival of radio

¹⁵⁵ Court of First Instance of Brussels, *Google, Inc. vs. SCRL Copiepresse*, 13 February 2007.

¹⁵⁶ The plaintiff was Copiepresse, an association managing the copyrights of the main French-language Belgian newspapers.

and television, a radically different path was chosen whereby these new media were brought under direct state control. Over the last decades, radio and television monopolies have been abolished and political influences in the public broadcasters have decreased significantly. Nevertheless, one can say that the Belgian authorities have been quite reluctant in opening the markets for radio and television broadcasting, and that a certain degree of pressure from the European level was needed to open the market. Ironically, with the arrival of the Internet, the most recent forms of new media seem to escape any form of control by the authorities.

The freedom granted to the media in Belgium goes together with a moderate “laissez faire” policy on behalf of its authorities. As such, the Belgian authorities are not very keen to develop ground-breaking media policies and prefer to leave room for self-regulatory initiatives from the media sector (in some cases, authorities intervene to encourage or fund self-regulation initiatives). Also, many regulations on the media were in fact instigated by the media sector, and one can say that Belgium’s policy makers have an open attitude towards demands - and pressure - from the media sector (e.g. as regards subsidies to the press). At the same time, at certain occasions, Belgium has taken legal and regulatory initiatives that were innovative (e.g. the Flemish regulations on the use of a ‘PP’ symbol for product placement), and, at several instances, Belgium has adopted European directives more stringently than strictly required by European law (e.g. as concerns rules on advertisement).

The major principles on the freedom and independence of the media are well enshrined in Belgium’s constitution and its main legislation. However, some evolutions in the case law of the Belgian courts have limited the scope of these principles. For instance, according to the case law of the Court of Cassation, the constitutionally protected freedom of the press applies only to the written press and the constitutional prohibition of censorship applies only to prior censorship. Also, based upon unilateral requests in libel and defamation cases, some of the lower courts ordered magazines to be taken out of circulation and television programs to be prohibited from broadcasting. In specific circumstances, the European Court of Human Rights has judged that this Belgian case law does not violate freedom of expression. It is generally expected that Belgium will in the near future extend its constitutional freedom of the press to other forms of media, such as radio, television and the Internet through a revision of article 25 of its Constitution. In the meantime, the above cited evolution in Belgian case law does not prevent the country from scoring well in international rankings on media freedom.

There are many different newspapers, magazines, television channels, radio channels and Internet media available to the Belgian public, but ownership of these different media is highly concentrated in the hands of just a few media groups. However, no single media group dominates the entire media market. In recent times, concentration seems to have increased, with existing media players becoming active in other media domains (cross-media concentration). On the other hand, it seems that new types of media (such as digital television, video-on-demand, different types of media-on-line, etc) are to a certain degree bringing more diversity in the existing media landscape. All in all, the national market for classical types of media outlets seems to be saturated and to leave little room for new titles or even for further consolidation. This is especially the case for the written press. It is expected that the Belgian media groups will continue to increase their presence in other media outlets, and probably will continue to develop towards further integration at the international level, or that international players will increase their presence in Belgium.

Belgium's authorities have not taken many significant measures against this increasing concentration in the media sector. No specific anti-trust legislation has been adopted for the media, and although general anti-trust rules apply, no media-specific legislation safeguards an adequate degree of diversity in media outlets (i.e., external pluralism). In the past, the Belgian authorities have taken some attempts to support the survival of certain media outlets, for instance by granting direct and indirect subsidies to the written press or by forcing the first commercial television broadcasters to admit newspaper and magazine editors amid their shareholders in order to grant these a part of the television advertisement income. However, direct subsidies have largely disappeared since, and neither did the compulsory cross-concentration rules between the written press and the commercial broadcasters survive. All in all, these attempts to support external pluralism in the media show not only that policy makers are convinced of the importance of the media for our democratic system, but also that the measures that have been taken were in fact not very effective. Internal media pluralism (i.e., diversity of content within the media) is more effectively protected by Belgian legislation (see rules for content regulation above), albeit that these rules are mainly focussed on radio and television broadcasting and not on other forms of media.

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The case of Bulgaria

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1. Introduction

Over the last twenty years, Bulgaria has gone through a series of radical reforms of its public institutions and regulatory framework. The transition from a communist society towards liberal democracy, market economy, and EU membership, had a profound impact on the media environment of the country. Following the fall of the communist regime in November 1989, the Bulgarian media, comprising the state-owned press, radio and television underwent rapid transformation in terms of ownership and organisation, initially in the print press and radio broadcasting, and at the end of the 1990s in the television as well. The combined processes of democratisation and economic liberalisation generally created conditions for reducing state intervention in the media and for enhancing its diversity and independence.

At the start, the public radio and television were released from the comprehensive direct control of the Communist party and its state apparatus – they were “de-ideologised” and “de-politicised”. They nevertheless remained under the indirect control of the state. Even today, state bodies (still) appoint the members of an independent Council on Electronic Media-CEM (prior to 1998 called National Council for the Radio and Television), which selects the directors of the public electronic media. Since the majority of the members of this Council are nominated with the support of the parliamentary majority (though nominally these members - and the whole body - are to be politically neutral media experts), CEM has been criticised as an indirect channel for exercising political control in the public electronic media. This political control over the electronic media has been enhanced by the fact that the state finances the public radio and television channels through a direct state subsidy, and has limited the flow of commercial money into them. Thus, it becomes clear that following the democratic transition, state intervention in the media has declined, yet, it is far from eliminated.

The post-communist state legally removed the monopoly of the state electronic media already in 1991,¹ and the pro-reform government of the Union of Democratic Forces in October 1992 gave the first private licence for broadcasting in the capital Sofia (Radio FM+). In 1993 the first private radio started operating outside the capital. By mid-1997, there were more than 150 private radio stations (though only 50 of them had valid licences). The private TV cable channels proliferated with a similar intensity. The first cable networks were developed in 1992/1993, and by mid-1997 there were more than 400 cable TV operators. The regulation and the process of licences lagged considerably behind: here as well less than ¼ of the operators had the required licence.

While the end of censorship made the press more diverse and independent, its diversity and independence were qualified by the fact that many newspapers (especially during the first years of the transition) served as the mouthpiece of particular political parties. The media, in general, took an active part in the framing of the Bulgarian political spectrum in the early 1990s: they were both shaped by and

¹ Postanovlenie [Executive Order] № 114 of the Council of Ministers from 1991, *State Gazette* № 51/1991. This state act authorised the Committee on the Postal and Communications Services to issue licences for radio broadcasting and for use of the state cable system.

shaping the political forces in the country. This peculiar interaction created numerous constitutional and political controversies around the issue of media independence from governmental intervention. The focus has, however, been on the public electronic media.

The end of the 1990s marked a new era of developments in Bulgarian politics. The processes of privatisation and restitution of property² had been finalised, the print media were exclusively private, while there were major private TV channels, and cable networks covering the country. The possibilities for direct political control in such an environment decreased, or, as it will be argued below, changed their focus. These developments coincided with profound changes in the political landscape in the country: the parties of the first ten years of the transition – the Bulgarian Socialist Party (BSP) and the Union of Democratic Forces (UDF) – started to lose ground to ever new political players, who relied massively on media exposure for party-building purposes. These developments created a new dynamic, which we will address in more detail in the final section of the report.

The report starts with an overview of the Bulgarian media landscape. Then it explores the normative framework, the regulatory bodies and the constitutional debates on media independence in the country. The goal is to place Bulgarian media policy in a political and social context and assess its relevance for democratic politics.

2. The media landscape in Bulgaria

The Bulgarian press market is characterised by a high number of dailies per capita and low newspaper circulation. Despite the decline in circulation figures in the last years, Bulgaria still has a large number of newspapers, totalling 436 in 2009 with an overall circulation of 355 million copies. The peak in the number of newspapers and circulation was 2000, with around 550 newspapers and circulation over 450 million. The lowest point was in 2003, when the titles dropped below 400 with a total circulation of 300 million. In 2009 there were 67 dailies (3 less than in 2008), with a decreased circulation by 6.6% compared to 2008. The number of weeklies was 183 (around 10 less than in the previous year) and that of magazines 603. Around ½ of the newspapers are published in the capital Sofia, which enjoys 88% of the total circulation of newspapers in the country.³ The tabloids “Weekend” and “Treta Vuzrast” currently have the highest circulation figures among the weekly editions.

With the exception of a few local newspapers and the official *State Gazette*, all print media in Bulgaria are privately owned, including foreign ownership. The two highest circulation dailies were until recently owned by the German group Westdeutsche Allgemeine Zeitung (WAZ). Currently, a new player entered the print media market, the New Bulgarian Media Group, whose hold on the media market as a whole is growing. Even the biggest, in terms of circulation, dailies and weeklies do not enjoy vary large market shares and cannot exercise significant influence by

² The process of restitution of property to its pre-socialist-era owners/their inheritors started in 1991 with the restitution of agricultural land, and continued from the mid-90s with the restitution of urban property. The restitution was a long and controversial process, which took more than a decade to complete.

³ National Statistical Institute of Bulgaria, “Development of book publishing and press in the Republic of Bulgaria in 2009”, available at: <http://www.nsi.bg/publikacia.php?n=239&r=%7C3%7C&P=65&SP=113&PSP=3> (last visited on 22/10/2010).

themselves on public opinion. The level of rivalry and competition among different titles is relatively high, which guarantees that readers have a broad selection of information sources and points of view.

Free newspapers entered the print press market in 2008.⁴ They were generally met with hostility by the traditional press – as potential killers of the circulation of the print press, and as “truth killers” because of their perceived inferior journalistic quality.

The revenues from advertising in the print media in the country have also declined at a fast speed. Thus in 2009 these amounted to 163.8 million leva, which according to official data is 9% less than in 2008.⁵ Many newspapers are sustained through funds from other economic activities of their owners. According to analyses, published in rival print media outlets, the aim of the publishers of such unprofitable titles is to keep the channels open for influencing public opinion, and in this way to exercise political pressure for the benefit of their other business interests.⁶

There are no direct or indirect state subsidies for the Bulgarian print media: there are no reductions in value added tax, no preferential rates for telecommunications services and no lower social security contributions for the sector. This renders the sustainability of the smaller circulation newspapers under constant threat. So is media pluralism in the country. State advertising⁷ and the state subsidy for the political parties⁸ are the only source of indirect state finance for Bulgarian media.⁹ State advertising is subject to the general procurement requirements, yet to

⁴ In September 2008 the first free daily “19 minutes” started with 100,000 circulation. It was followed by “Gradski vestnik” published by the influential Economedia group (publisher of the most serious daily in the country “Dnevnik” and the most influential weekly – “Capital”). “Gradski vestnik” had 100,000 circulation (yet was read by some 230,000) and was of good journalistic quality. Because of financial difficulties Economedia group stopped publishing it in March 2009, waiting for better times. “Anons” weekly and “Novinite dnes” are among the other titles of free newspapers in the country. See S. Tzankova, “Безплатните вестници – заплаха или стимул за вестникарския пазар в България?” [“Free newspapers: A threat or a stimulus for the print media market in Bulgaria”], in *Медии и публична комуникация [Media and public communication]*, no. 4/2010, available at: <http://media-journal.info/?p=item&aid=80> (last visited on 22/10/2010).

⁵ Unofficially, the drop in advertisement revenues is much bigger - between 35% and 50%, if the enormous discounts (which are a commercial secret) - usually between 25% and 50% - are taken into account.

⁶ These publications were part of the media war in 2009/2010 between Economedia group and the New Bulgarian Media group. The most representative of these publications is “Петата власт: Цветан Василев и Делян Пеевски превърнаха търговията с влияние в норма за медиите” [The Fifth Power: Tzvetan Vassilev and Delyan Peevski turned trading with influence into a norm for the media], *Capital weekly*, 16/10/2010.

⁷ State advertising increased dramatically in the last couple of years because of the structural funds of the EU, in which there are strict requirements for publicity of the EU-funded projects. Thus with each EU funded project goes a “communications” budget. Additionally, most state institutions also run their communications campaigns, yet because of non-transparent procedures and inadequate requirements, these bids are often taken by smaller players in the field of the PR and advertisement markets, arguably connected to the governing parties. See “Най-големият и вреден клиент” [The biggest and most damaging client], *Pari daily*, 21/09/2010.

⁸ According to the Law on Political Parties (*State Gazette* № 28/1.04.2005), the political parties and coalitions with elected MPs in the last elections receive state subsidy, amounting to 5% of the minimal salary for the country per vote received (Articles 25 and 27 of the Law on Political Parties).

⁹ Some analysts claim that the print media commercials market especially regarding the dailies did not collapse to the levels expected for the crisis-stricken 2009 primarily because of the huge amounts of state subsidy money spent by the political parties during the EP and general elections campaigns in this year. See “Затегнете коланите” [Fasten the belts], *Capital weekly*, 19/02/2010. For example, only the

this point spending has rarely been run under transparent and competitive procedures. This has provided certain market players that are connected to the government with a significant advantage.

Since the de-monopolisation of the electronic media sector in Bulgaria in 1991, commercial broadcasting co-exists with the public radio and television channels. There are currently 2 public national TV channels: BNT1 and the world-wide satellite channel TV Bulgaria. Starting from 2000, there are also private commercial TV channels that are broadcasted terrestrially nation-wide: BTV, NovaTV and Pro.BG (BTV being the first to receive a licence). The public Bulgarian national television has also 4 regional channels in Varna, Rousse, Plovdiv and Blagoevgrad. In 2006 the cable and satellite TV programmes amounted to 196. 42 towns had local TV operators and private TV channels.

In 2009, implementing changes in the licensing and registration requirements envisaged in a 2008 amendment to the Law on Radio and Television, CEM, the electronic media regulatory body, re-registered a number of radio and television programmes. As of December 2009, CEM registers indicate that there are 136 television programmes (11 using air broadcast and 125 cable and satellite). In addition, Bulgarian citizens have access through air, cable and satellite to numerous foreign programmes.¹⁰ Despite the large number of registered programmes, however, the national market for both radio and television is relatively concentrated in the programmes with national air broadcasting licence. However, in recent years data on advertising revenues indicate that these national media are facing increasing competition from electronic media broadcast through cable or satellite, or on a local basis. In this respect, a major stumbling block for free competition is the sizeable annual government subsidy for the state-owned radio and television, which strongly enhances their competitive position in terms of attracting advertisers relative to other electronic media.

Concerning radio broadcasting, in 2006 there were 143 licensed radio programmes. Three of them had national coverage: the two public radio programmes Horizont and Hristo Botev of the public radio operator Bulgarian National Radio (BNR) and the private Darik radio. In 42 of the 240 towns in the country there are local radio programmes, and in 9 towns with a population above 100,000 there are 115 local radio programmes. There is considerable concentration of radio broadcasting in the bigger towns and hyper-concentration in the capital Sofia. There are also 18 radio networks which broadcast in the major towns. As of December 2009, CEM registers indicate that there are 311 radio programmes (288 using air broadcast and 23 cable and satellite).

The national commercial terrestrial TV programmes have a polythematic profile, yet most of the private radio programmes and the cable TV channels are entertainment-oriented.

Blue coalition (a coalition of right-wing parties with an electoral support of around 7%) has spent 1,300,000 million leva for political advertisements in the media, while the Socialist party – 230,000 leva just for ads in the print media alone. See: “Партиите харчили до дупка за изборите” [The parties were spending as if it is the end of the world during the last elections], mediapool.bg, 14/08/2009.

¹⁰ Data from the Council for Electronic Media (CEM), “The public register of media service”, available at: http://cem.bg/public_reg.php?action=1 (last visited on 22/10/2010).

The public electronic media - Bulgarian National Radio (BNR) and Bulgarian National Television (BNT) - are at present separate legal entities.¹¹ They receive significant state subsidy, yet have funding from advertising as well. BNT and BNR have distinct Boards of Directors and General Directors, appointed by CEM. The political control over the public electronic media is a feature of the Bulgarian post-communist mediascape; from 1989 to 1993 with each new government a change in their governance ensued and journalists were fired for criticising the government. To this date each new government introduces changes in the electronic media law and/or in CEM, in order to have tighter control over the public electronic media in the country. In this report we will discuss multiple examples of political interference with the regulation of the media, which brought uncertainty in the electronic media market and stalled reform.

Bulgaria, as an EU member state, has to switch from analogue to digital broadcasting by the end of 2012. The legal framework for the switchover was finally adopted in 2009 after a series of political scandals involving the major partners in the then governing coalition, who allegedly tried to push through a legislation favourable to their friendly business circles. The unprincipled, *ad hoc* provisions in the Law on Digital Communications, aimed at eliminating some of the competitors for national digital operators, prompted the Bulgarian Constitutional Court (BCC) to intervene and invalidate the most outrageously unjust ones. Currently, the European Commission (EC) is checking the compatibility of the Bulgarian legal framework for the switchover with EU legislation, as well as the practice of hurriedly issuing temporary licences for TV programmes, which guarantee them advantages after the digital switchover in 2012. If the legal framework or the licensing policies are found wanting, this will most likely make it impossible for the country to meet the 2012 deadline.

The importance of internet¹² has grown in the domestic media market. Most print media outlets provide some or all of their content on the internet free of charge and many also offer breaking news in a timelier manner. Even the popular “Trud” daily and the “24 Chasa” daily that resisted this drive and kept a limited online profile, went online in March 2009, offering most of their print content for free. While the sales figures of national newspapers have been declining (though at a lower rate, as shown above), web traffic reports reveal that their online versions are becoming extremely popular among Bulgarian internet users.¹³

¹¹ In the crisis-stricken 2010 the cabinet and the parliamentary majority are seriously considering merging the two legal entities: this could be one of the changes in the currently widely discussed entirely new Law on the Media.

¹² There are different data on the internet penetration among the Bulgarian population. Thus Internet World Stats in 2010 give 47.5% penetration (compared to Romania (35.5%), Cyprus (39.3%) and Greece (46.2%), a level which still leaves the country well behind the average 67.6% for the EU countries. Source: Internet World Stats, “Internet usage in Europe”, available at: <http://www.internetworldstats.com/stats4.htm> (last visited on 22/10/2010). However, the data for 2009 from Eurostat show that just 30% of the households in the country have internet access. See Eurostat, *Internet usage in 2009 – Households and Individuals*, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-09-046/EN/KS-QA-09-046-EN.PDF (last visited on 22/10/2010).

¹³ See the website of the people-metric company Gemius, available at: <http://www.audience.bg> (last visited on 20/10/2010) for ratings according to different criteria (reach, real visitors and share) of the most popular web-sites in the country.

The major national newspapers' websites are mainly built upon their print versions and offer relatively low levels of interactivity to their users, yet they are very popular.¹⁴ There are notable exceptions to this trend, however. The content on the websites of the elitist "Capital" weekly and "Dnevnik" daily (issued by the Economedia group) is much richer than the print-versions of the same titles, and offer enormous possibilities for interactive exchange with the public. They contain special sections for blogs and many interactive online games with diverse content – from political to entertainment. The popularity of their electronic versions far outgrows that of their print counterparts.¹⁵ There are also many news portals that do not have a print counterpart.¹⁶ Additionally, all major national private television channels and radio programmes as well as the public radio and TV programmes offer free audiovisual and text news services on their websites. It is indicative that the website of the major private TV programme BTV is the 3rd most popular website in the country, with some 706,466 visitors in August 2010. The website of the major national private radio programme Darik Radio ranked 13 with 414,485 visitors.¹⁷

The importance of social media services is also growing.¹⁸ Facebook is by far the most popular e-service in 2010 and is gaining popularity at a fast speed. There are no reliable data on the blog users in the country.¹⁹ In the beginning of 2009 the registered blogs were over 35,000.

The internet space in the country is relatively free of interference, but there are proposals on the part of the Ministry of the Interior to significantly increase the access of police and investigators to servers and data without court permission. All such proposals have been blocked in Parliament so far.

The Bulgarian media landscape is further characterised by a plethora of private news agencies alongside the public Bulgarian Telegraph Agency (BTA), which receives a state subsidy for its operation, yet is mainly financed through subscription fees for its services. It is an independent²⁰ news agency, whose subscription services are used by all major newspapers and the electronic media in the country. It is also the most authoritative news voice of the country abroad. Yet the

¹⁴ The web-sites of *24 chasa* daily and of *Trud* daily are ranked 17th and 20th in the country in terms of e-visitors for August 2010, respectively.

¹⁵ www.dnevnik.bg is the 12th most popular site in Bulgaria for August 2010 (with 438,951 visitors), and [Capital.bg](http://www.Capital.bg) - the 35th (with 180,387). Ibid.

¹⁶ The major ones – Information Agency Focus, available at: www.focus-news.net, and [mediapool.bg](http://www.mediapool.bg), available at: www.mediapool.bg, are among the important private news agencies. Interestingly, the most popular among the news portals are not the ones belonging to the prominent publishing groups.

¹⁷ Ibid.

¹⁸ According to publications in the media, over 1 mln Bulgarians used Facebook in the beginning of 2010, which is 10 times more than just a year before. 1/3 of all internet users in the country are registered in this social media service alone (and more than 80% of these are aged 18-40). See: "Nad 1 milion Bulgari polzvat Facebook" [Over 1 million Bulgarians use facebook], BNR Radio Bulgaria, 07/05/2010. According to another source, Facebook users in the country (by mid-June 2010) are already 1,5 mln (1,458,640). This shows that the growth rate is still high - 50% in less than half year. The penetration by mid-June of this social media service is 20%, which is over 1/3 of all internet users in the country. See "Чакам те във Facebook" [Waiting for you at facebook], *Capital*, 18/06/2010, available at: http://www.capital.bg/biznes/tehnologii_i_nauka/2010/06/18/919427_chakam_te_vuv_facebook/ (last visited on 20/10/2010).

¹⁹ The political blogosphere in the country is analyzed by the media monitoring laboratory of the Media Democracy foundation. The monthly analyses for the electoral 2009 can be found at the foundation's website, available at: <http://www.fmd.bg/?cat=7> (last visited on 20/10/2010).

²⁰ The General Director of BTA is appointed by the Bulgarian Parliament.

national and regional print and electronic media use the services of many more news agencies – national²¹ and regional²² ones.

The role of professional organisations and NGO activity in the development of the Bulgarian media is important. Among Bulgaria's most important journalistic associations are the Media Coalition and the Free Speech Civil Forum Association. Another, the Journalists Union, is a holdover from the Communist era currently attempting to reform its image. More than half of the journalists in Bulgaria are women. The publishers of the biggest newspapers are united in their own organisations, such as the Union of Newspaper Publishers. Of the few NGOs that work on media issues, the most important is the Media Development Center, which provides journalists with training and legal advice.

The Bulgarian media code of ethics, drafted within the framework of the PHARE project “Technical Support for Improving the Professional Standards of Bulgarian Journalism” was signed in 2004²³ and is a major step towards media self-regulation. It includes standards for the use of information by unidentified sources, preliminary nondisclosure of a source's identity, respect of personal information, and non-publication of children's personal pictures. Two media ethics bodies (one for the print and one for the electronic media) have established themselves as respected self-regulatory mechanisms. The major functions of the two commissions include promoting adherence to the code, resolving arguments between media outlets and audiences, and encouraging public debate on journalistic ethics.

The Bulgarian media space has been covered by foreign observers, such as the International Research & Exchanges Board, which publishes the Media Sustainability Index. The main conclusion of the 2009 report on Bulgaria²⁴ was that developments in Bulgaria with respect to each of the five objectives, measured by the Index,²⁵ indicate approaching the levels of “actual and irrevocable” sustainability, though this stage has not been reached yet. “Reporters without Borders”²⁶ also reports a rather uneven path with relatively sharp improvements and deteriorations in the last 5 years in terms of media independence,²⁷ but a constant downward trend relative to other countries. However, in 2009, in contrast to the previous two years, there have been no major reported cases of violence or undue procedures against journalists.

The media in Bulgaria is among the most trusted societal institutions, with some 76% of the population declaring in 2008 that they rather trust the media.²⁸ Yet

²¹ The biggest players are БГНЕК, Focus, Dnes+, Bulgarian news network etc.

²² Sofia News Agency, Globus News, Kurdjali info, etc.

²³ The first signatories were the Union of Bulgarian Journalists, the Association of Bulgarian TV and Radio Operators, the Bulgarian Media Coalition, The Union of Print Media Publishers in Bulgaria and the Bulgarian Association of Regional Media. Most of the organisations in the field of the media in the country are signatories to this Code, with the notable exception of the New Bulgarian Media Group.

²⁴ See International Research and Exchanges Board, “Media sustainability index 2009”, available at: http://www.irex.org/programmes/MSI_EUR/2009/bulgria.asp (last visited on 20/10/2010).

²⁵ These objectives are: free speech, professional journalism, plurality of new sources, business management and supporting institutions.

²⁶ For their ranking, see Reporters Without Borders, “Press freedom index 2009”, available at: http://en.rsf.org/spip.php?page=classement&id_rubrique=1001 (last visited on 20/10/2010).

²⁷ The fluctuations have been significantly larger than the observable trend, which makes it difficult to draw definitive inferences.

²⁸ The data are from a representative survey of the sociological agency Alpha Research, conducted in April 2008, quoted in “Медиите функционират при сравнително благоприятен обществен климат-76% им вярват, но не безусловно. Доверието в четвъртата власт” [The media work in a relatively

recently the credibility of the journalistic profession and of the so-called “fourth power” in the country has been undermined.²⁹ The main problems are the lack of transparency in the ownership of the print media and its concentration in the hands of political party affiliates, who allegedly pressure their journalists to publish materials that damage the interests of their political and/or business adversaries. Generally, the pressure over the journalists has been growing, especially during the last two years of the economic crisis, which saw the shrinking of circulation and the closing down of many jobs in the sector. Judging from the large numbers of media outlets and from the absence of any licensing restrictions for practising journalism one could infer that the number of journalists in Bulgaria is considerable, yet no official data on this are available. The major trade unions in the sector (the Union of Bulgarian Journalists and the Union of the Journalists in Bulgaria) do not disclose information on their membership, and in any case many of the journalists do not hold any such membership.

Despite the 20-year history of relatively free media in the country, the level of media literacy in Bulgaria is low: it is the second lowest in the EU (together with 4 other EU member states that fall below the 70 points threshold of basic media literacy), according to a 2009 study commissioned by the EC.³⁰ There are a couple of actors in the field of promoting media literacy in the country, funded by the EU: the Bulgarian branch of the organisation Safenet, some NGOs specialising in this field, as well as a public council on safe internet. However, their activities are campaign-oriented and almost invisible.

3. Media policy in Bulgaria

Since its liberalisation in the early 90s, the media market in Bulgaria has gone through a series of legislative regulatory efforts. It should be mentioned that the early post-communist governments in the country were weary of imposing too strict and detailed regulations, especially with regard to the print media and radio broadcasting. The general understanding was that the democratisation process needed free media, which was interpreted as “less regulated” media.

3.1 The media regulatory framework

3.1.1 Constitutional provisions

The processes of media liberalisation started immediately after the break-down of the communist regime in the country on November 10, 1989. On November Article 271

beneficial atmosphere – 76% have trust in them, yet not unconditionally. Trust in the fourth power], Capital weekly, 30/04/2008, available at: http://www.capital.bg/politika_i_ikonomika/redakcionni_komentari/2008/04/30/491626_doverieto_v_c_hetvurtata_vlast/ (last visited on 20/10/2010).

²⁹ A publication in the Capital weekly is indicative of the mood in society against the media, blaming it for its dependency on the economic and political interests of the media private owners. See “Предателството на медиите” [The treason of the media], Capital weekly, 9/10/2009, available at: http://www.capital.bg/biznes/media_i_reklama/2009/10/09/797531_predatelstvoto_na_mediite/ (last visited on 20/10/2010).

³⁰ European Commission, Directorate General Information Society and Media, “Study on assessment criteria for media literacy levels”, available at: http://ec.europa.eu/culture/media/literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 20/10/2010).

of the socialist Penal Code, which prohibited any critique against the socialist regime, was abolished. A month later Article 1 of the socialist Constitution, which guaranteed the leading role of the Communist party in the country was also repealed. Independent newspapers – both commercial and affiliated with the newly established political parties - were appearing overnight and were spreading their influence, to reach unimaginable for non-sponsored by the state apparatus circulations of 300,000-350,000 copies. Such was the circulation in 1992/1993 of the most popular at the time “24 hours” daily. The legal framework for the free press was provided by the newly adopted in 1991 Constitution.

The most relevant articles in the Constitution are Articles 39, 40 and 41. Article 39 guarantees to everyone the freedom to express and publicise her opinion, which right, however, may not be used against the rights or to the detriment of others, nor for challenging the constitutional order, for encouraging violence or perpetrating crime. Article 40 guarantees freedom from censorship to all media. A confiscation or an injunction on any media is allowed only following judicial decision in cases of violations of public decency, challenges to the constitutional order, incitement of enmity or violence, and perpetration of crimes. Article 41 stipulates that everyone is entitled to seek, obtain and disseminate information, which right may not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality. Paragraph 6 of the Transitional and Concluding Provisions further stipulates that until the adoption of laws concerning the BNT, BNR, and BTA, the National Assembly exercises the prerogatives of the Grand National Assembly in relation to them.

The period after the adoption of the new constitution was characterised on the one hand, by rapid proliferation of the private press and private radio and cable TV programmes, and, on the other hand, by the preservation of state monopoly in the sphere of terrestrial TV broadcasting. As will be shown below, there were numerous political and legal struggles with regard to the state’s control over the public electronic media. Yet a societal consensus existed, that the press should be free from any form of state control and regulation (not simply censorship). The special status of the press in this regard was upheld in a decision of the Bulgarian Constitutional Court (BCC).³¹ The Court was asked to provide an authoritative interpretation of Articles 39, 40 and 41 of the Constitution, guaranteeing the right to freedom of opinion and expression. In its decision, the Court stressed that the press should not only be politically independent, but also “institutionally, financially and technically separate from the state”. No regulations and interventions in this sphere were thus considered to be admissible.³² For the Court, “the press publishers are in reality market actors, and it is rather the market mechanisms, which determine the type and the number of publications, and henceforth – the plurality of points of view.”

The situation of the electronic media is significantly different according to the Court. Not only does paragraph 6 of the transitory and concluding provisions state that Parliament is responsible for overseeing the activities of the electronic media until a special law is passed. The need for the regulatory role of the state towards these types of media is also mandated by “juridical, financial, technical or

³¹ BCC Decision № 7, 1996: *Interpretation of Articles 39, 40 and 41 of the Constitution*, *State Gazette* № 55/1996.

³² Excluded from this prohibition are the cases, as specified in Article 39(2) and 40(2) of the Constitution.

technological reasons”. One of the technological reasons is the constitutionally guaranteed sovereign right of the state with respect to the radio frequency spectrum (Article 18(3) of the Constitution), which is also used for the terrestrial radio and TV programmes, yet is a limited resource. Thus the freedom of the electronic media does not preclude state intervention. On the contrary, in the Court’s view, since the freedom of the electronic media is crucial for guaranteeing access to information to the public (another constitutionally guaranteed right according to Article 41(1) of the Constitution), the regulation of these media (with respect to their organisation, structure and financing) by an independent state body is not only admissible, but required.

This decision of the BCC, though upholding state regulation of the electronic media, aimed to counter the majoritarian impetus of Parliament, which via its standing committee on the media intrusively interfered with the independent work of the media. This parliamentary practice prompted the President of the Republic (under the pressure of several NGOs and associations of Bulgarian journalists, who actively campaign) to request an interpretation of the free speech constitutional provisions from the BCC. The result of the decision of BCC was the promulgation of the Law on Radio and Television (LRT), which will be discussed in detail below.

3.1.2 Regulatory bodies of the electronic media: constitutional controversies

The importance of the public electronic media for the Bulgarian parliamentary regime, and their special role in building the party system after the fall of communism, could hardly be overestimated. In the Bulgarian political system, characterised by the so-called “rationalised parliamentarianism”,³³ a political actor needs to rely on a strong (parliamentary) party or a cohesive coalition of parties in order to have control over the government. Sometimes this institutional logic may even create “empty shell” parties, searching for ideological substance. Thus the institutional logic promotes the emergence of disciplined parties even out of ideologically ambiguous groupings, once they have won a substantial number of votes. This creates a system of representation based not on single persons, or *ad hoc* electoral alliances, but rather on stable and durable parties.

The importance of the control over the public electronic media becomes clear when one takes into account the pressure of promoting strong and cohesive parties in a country without clearly articulated ideological differences and class cleavages which was the state of Bulgarian society after the fall of communism. The parties needed control over the major instrument of propaganda and public opinion formation – the electronic media – in order to solve the problems with their identity, and prevent the opposition from establishing and consolidating itself. Since all national electronic media were state-owned until 1999, the importance of such control was really crucial.

The early transition period was characterised by an intense confrontation in the field of the public electronic media regulation. Four major players were involved

³³ Rationalised parliamentarianism is characterised by the presence of strong institutional incentives for the creation of stable parliamentary majorities and parties in general, even in countries without established and long-standing ideological cleavages and democratic traditions. In Bulgaria, for example, in order to have control over the government, a political actor needs to rely on a strong (parliamentary) party, or a cohesive coalition of parties. The institutional logic itself promotes the emergence of disciplined parties even out of ideologically ambiguous groupings, once they have won a substantial number of votes.

in it. Along with the parliamentary majority and the opposition, and depending on the political circumstances (whether the president and the majority are or are not in the same camp) the presidential institution in Bulgaria also played a significant role in this sphere. The Bulgarian Constitutional Court (BCC) is the forth, and major player in this field: it has been involved in all the “battles” for media domination between these players since the fall of communism in 1989. In this field the Court did not stick to its customary role of arbiter in the disputes: in many cases its role was that of an active player.

The principal focus of all controversies has been on the formation of a body responsible for the appointment of the directors of the national TV and radio, and the supervision of the operation of the electronic media in general. As already mentioned, this body is currently the Council on Electronic Media (CEM). All political majorities since the beginning of the reforms in 1989 have tried, and to different extent succeeded, to control this body, and to ensure their intervention in the workings of the media.

For around five years after the adoption of the Constitution, the public electronic media were regulated and governed, on a “temporary basis”, by a standing parliamentary committee, dominated by the ruling party/coalition. This model was conceived when, in December 1990, the Grand National Assembly (convened to adopt the new Bulgarian constitution) passed *Temporary Rules on the Status of the Bulgarian National Radio and Bulgarian National TV*. The Rules were meant to be applicable only until the adoption of a law on public media. Such a law, however, was passed as late as 1996, did not prove effective because of constant challenges before BCC, and was replaced by a new law in 1998.

The first major constitutional controversy took place in 1995, and was provoked by a challenge of the constitutionality of the *Temporary Rules*, especially with respect to the guarantees for the independence of the media provided by the regime of appointment of the directors of the national TV, Radio and Telegraph Agency.³⁴ In assessing the legal framework, the Court first pointed out that the discussions in the Grand National Assembly during the adoption of the Constitution made clear that the appointment of directors of the public electronic media should not fall under the competence of the Parliament or the President of the Republic.³⁵ A public body was needed - an independent Council, to regulate the media. On the basis of these considerations founded on the “drafters’ intent,” and Article 40(1) of the Constitution, the BCC struck down the provisions of the *Temporary Rules*, which granted to a Committee of the National Assembly the power to supervise directly the BNT and BNR, appoint their directors, approve their structure and internal orders, be

³⁴ The very first interventions of the BCC in the area of media regulation took place as early as 1991. They concerned the constitutionality of appointments and dismissals of directors of the National TV and Radio, which showed the intensity of the struggle for dominance over the propaganda outlets. See Decision 3, 1991: *Dismissal of the Director of BNT*, *State Gazette* № 4/1992, for instance. In it, the Court held that the violation by the National Assembly of its own act (the *Temporary Rules* on the Status of BNT and BNR) was not a constitutional violation. The dismissal of the director was unobjectionable from a constitutional point of view, although he was dismissed by the Assembly as a whole, and not by a special independent Council, as required by the Rules. In Decision 15, 1993: *Dismissal of the Director of BTA*, *State Gazette* № 88/1993, BCC considered a similar case, involving the dismissal of the director of the Bulgarian Telegraph Agency (BTA) – based on paragraph § 6 of the Constitution, the Court upheld that dismissal as well. The early jurisprudence of the Court on the issue reveals the generally deferential attitudes of the judges to the legislature.

³⁵ Decision 16, 1995: *Constitutionality of the Temporary Rules on the Status of the BNT and BNR*, *State Gazette* № 86/1995.

informed about and give opinion on their programmes, and hear reports from their directors. The judges argued that Article 40(1) of the Constitution prohibited state intervention in the workings of the mass media.

In a follow-up case,³⁶ the Court dealt with an attempt by the National Assembly to reintroduce the powers of the parliamentary committee to approve the internal orders and the structure of the media through an amendment to the Rules. The BCC reaffirmed its previous decision and held that these prerogatives could not be delegated to a commission.

These BCC decisions were generally satisfactory: they sought to eliminate a pressing political problem. Arrangements at the time threatened the open and fair political process, and created possibilities for malicious governmental intervention in the media, leading to bias and favouritism. The situation could lead to the marginalisation or discrimination of views contrasting those of the political majority.

The second stage of the Bulgarian media saga took place in the 90s. The Videnov socialist government (January 1995 – February 1997) was the first to pass a separate Law on radio and television (LRT) in 1996, and establish an “independent” regulatory body, the *National Council on Radio and TV (NCRT)*, the majority of whose members (5 out of 9), however, were to be elected by the government and the ruling majority in Parliament. BCC again intervened,³⁷ announcing that this formula was unconstitutional. The law also empowered NCRT with extensive prerogatives, many of which were found to be unconstitutional.³⁸ A third point of controversy was the labelling of the NCRT as a “state organ” rather than a “public organ”.³⁹ The Court held that “the term ‘state’... presupposes expansive reading and the existence of governing (directing) prerogatives, and [thus] is in contradiction with... Article 40(1) of the Constitution.”⁴⁰ Although largely symbolic, this last issue is revealing of the sensitivity of the political opposition and of the civil society as a whole to governmental interference with the media: by 1996 political control over the electronic media was a widely recognised and discussed problem in the country.

As a result of the BCC decisions, the 1996 LRT did not have any effect during the rule of the Socialist government. However, it had *one crucial consequence*: it repealed the long suffering *Temporary Rules* and with them the legal authorisation for the National Assembly to govern/control the media. This effect did not come about

³⁶ Decision 24, 1995: *Constitutionality of Amendments to the Temporary Rules*, *State Gazette* № 1/1996.

³⁷ Decision 21, 1996: *Constitutionality of Some Provisions of the Law on Radio and Television*, *State Gazette* № 102/1996.

³⁸ In justices’ own words: “Art. 89 of LRT gives the following prerogatives for the imposition of coercive administrative measures... 1) giving of binding recommendations to the directors of the radio and television organisations; 2) temporary interruption of a particular programme; 3) temporary interruption of the programmes of a given media... The ‘giving of binding recommendations’... is outside the range of measures envisaged by Art. 40.2 of the Constitution, and amounts to a direct interference with the activity of the radio and television organisations... In all enumerated cases, the ‘interruption’ prevents the dissemination and reception of information, and violates explicitly recognised constitutional rights.” *Ibid.*

³⁹ In justices’ own words: “According to Art. 8.2 of the LRT ‘NCRT is a specialised state organ... it is an essential, basic characteristic of any state body to have governing prerogatives... [T]he competence of [NCRT] should be restricted to control and the imposition of administrative sanctions. The explicitly specified by the law prerogatives cannot include governing (directing) prerogatives vis-à-vis radio and television organisations...”. *Ibid.*

⁴⁰ *Ibid.*

automatically, however; it required another constitutional case. In a decision of 1997,⁴¹ the BBC ruled that: “From the moment at which such legal arrangements were adopted, paragraph 6 of the *Provisional and Concluding Rules of the Constitution* loses its effect... Therefore, from the day of entering of the LRT into force, the prerogatives of the National Assembly vis-à-vis the BNR and BNT are permanently terminated... No consequent events could revive the effect of paragraph 6, and to restore the prerogatives it envisages”.

Probably the most important decision for the future of the regulation of the electronic media from this period was the already mentioned BCC Decision 7, 1996 on the interpretation of Articles 39, 40 and 41 of the Constitution. In this decision, the Court stated that because radio frequencies are a “limited resource”, the state can regulate the establishment and operation of electronic media, and intervene in this area more extensively compared to the operation of printed media. However, the Court insisted that despite these possibilities of intervention, the state should respect the independence of the media: “the exclusion of any form of *governing* of the media by any state body is the primary condition for their structural independence.” This principled position of the court was in line with the developments in Bulgarian society at the time, which in the period 1995-1996 saw the development of strong civil society media organisations, spurring public discussion on the role of the media for the quality of Bulgarian democracy.

With the coming to power of Kostov’s pro-reform UDF cabinet in 1997, hopes were high that the situation would be finally legislatively resolved in favour of media independence and journalistic professionalism. Partly as a result of the 1996 decisions of the Court, discussed above, a new Law on Radio and Television (LRT)⁴² was passed by the UDF-dominated National Assembly in 1998. The law guaranteed the independence of the electronic mass media from political and economic pressure (Article 8), protected their freedom from censorship (Article 9), and granted them the right to receive information from the state institutions (Article 13). It also envisaged the creation of a special regulatory body: the National Council on the Radio and the Television. The task of this body was to guarantee that the law is observed by the electronic media. The majority (5 out of 9) of its members should again be appointed by the Parliament.

Understandably, there were complaints that this last provision of the LRT ensures the control of the National Assembly over the media, even though Article 20(2) declares that “in its activity, the Council is guided by public interests, defending the freedom and pluralism of speech and information and the independence of the radio and the television”. Indeed, despite this declaratory text, the formula of NCRT appointments provided by the 1998 LRT was not a dramatic improvement over that of 1996; the members were to be appointed by the President of the Republic (4) and the parliamentary majority (5). Since President Stoyanov was from the same party as the ruling majority (UDF), the formula provided similar results as the previous arrangements: dominance of one party in the appointment process.

The BCC disregarded some of its own arguments from previous case law, concerning the link between political pluralism and media independence, and ultimately upheld the UDF sponsored legislation. The judges held that the first factor

⁴¹ Decision 17, 1997: *Constitutionality of the Dismissal of the Directors of the BNR, BNT and BTA by the National Assembly*, State Gazette № 109/1997.

⁴² State Gazette № 138/24.11.1998.

guaranteeing the independence of the NCRT under the new arrangements was the fact that the MPs were obliged by the Constitution (Article 67(1)) to represent the people as a whole.⁴³ In the same vein, the President expresses the “unity of the nation” (Article 92(1)). The second major guarantee for the independence of the NCRT was the principle of “rotation”, according to which the members were to be elected. Thirdly, the BCC pointed out that the practice of developed Western democracies showed that such an arrangement was ultimately acceptable.

It is difficult to explain why the judges went out of their way in this case, having in mind the serious pressure from civil society groups and journalist organisations for striking down the law. In any event, the results of the law and the BCC’s decision were the de-legitimation of the NCRT and constant accusations of political partiality. The impression that the ruling party could pick and choose the directors of the national radio and TV persisted (and still does), as well as the public suspicion that the public radio and TV programmes are generally favouring the ruling party and the government.

The 1998 LRT entrusted *two regulatory bodies* with the power to licence commercial operators of electronic media. Besides the NCRT, which became responsible for licensing and overseeing the radio and TV programmes, there was a second body, involved in the regulation of the electronic media: the State Commission on Telecommunications (SCT). The SCT is responsible for granting individual licences for the use of the radio spectrum.

The BCC failed to prevent governmental interference with the workings of the SCT as well. Among the most controversial provisions of the 1998 Law on Telecommunications⁴⁴ was the *appointment* of the SCT *by the government*. This provision was challenged in front of the BCC. The argument was that, since SCT was authorised to participate in the licensing of electronic media, its “politicisation” (namely the fact that its members are entirely dependent for their mandate on the parliamentary majority) provided no guarantees that the decisions of this body would not disregard expert considerations in favour of partial, political biases, in an area which should be free of political pressures. The Court dismissed the argument by observing that the control over the *programmes* of media operators was not within the powers of the SCT but with those of the NCRT instead.⁴⁵ The SCT was meant to grant only *technical licences* for the use of radio frequencies. BCC held that while the body regulating the substance of the programmes of media operators (i.e. the NCRT) should be “independent”, the SCT need not be free of governmental control. On the contrary, the state and its bodies should control the licensing process, because the radio frequencies are an exclusive state monopoly according to the Constitution (Article 18(3)).⁴⁶ This argument, however, was clearly undermined by the decision,

⁴³ Decision 10, 1999: *Constitutionality of the 1998 Law on Radio and TV*, *State Gazette* № 60/1999.

⁴⁴ *State Gazette* № 93/1998.

⁴⁵ Decision 33, 1998: *Constitutionality of the Law on Telecommunications*, *State Gazette* № 147/1998.

⁴⁶ Another contentious issue was the term of office of the SCT, set longer than the term of the National Assembly. The challengers argued that appointed non-elected bodies should not have fixed mandates: their mandate should expire with the expiry of the term of the appointing body. The Court simply rejected this claim and argued that the “fixed mandate” principle was not constitutionally prohibited for appointed state bodies. Moreover, in certain cases the fixed mandate is desirable, because it boosts the independence of the agencies. The real fear of the challengers was that the present government would entrench its influence in the regulatory body even after the end of its staying in office. Finally, the judges dismissed the challenges against the envisaged re-licensing of already existing media and telecommunications operators. Re-licensing was required only for operators, authorised after the Law

adopted in 1999⁴⁷, which allowed the “politicisation” of NCRT as well. In sum, the Court’s jurisprudence from 1998 and 1999 in this field reinforced suspicions that candidates close to the government were being favoured in the allocation of TV and radio frequencies.⁴⁸

The next controversial issue of the 1998 LRT was the requirement for re-licensing by the regulatory bodies CEM and CRC of the already existing TV and radio operators (local cable TV and radio broadcasters in most cases) after its entering into force. The BCC upheld the constitutionality of these provisions as well. Politically, the 1998 LRT concentrated too much power in the hands of the government and the parliamentary majority, and excluded the opposition from participation in the granting of media and telecommunication licences.

To conclude, the continuous attempts of the post-communist governments in the 1990s to regulate the electronic media did not manage to guarantee its independence. The regulatory bodies NCRT and SCT as a result enjoyed low legitimacy in the following years.

3.1.3 Structural regulation

Structural regulation of the Bulgarian media market has mainly focused on licensing matters. Contrary to the press, which is not subjected to licensing procedures (in line with the constitutional recognition that the press is free from state interference), detailed rules have been adopted to regulate the licensing of television and radio operators in the country. With regard to media ownership, there are few special rules regarding the sector. Rather, the media market is governed in its entirety by the general provisions of anti-trust regulation. There are no specific mono-media or cross-media restrictions, nor are there currently any restrictions concerning the integration of the media industry with other business sectors.

3.1.3.1 Licensing rules

The regulatory regime of electronic media licensing is based on Article 18(3) of the Constitution, according to which the state has sovereign rights over the radiofrequency spectrum. Two laws currently determine the legal framework for licensing and registration of the radio and TV operators: the Law on the Radio and TV and the Law on Electronic Communications⁴⁹ (which repealed in 2007 the Law on Telecommunications⁵⁰).

on Concessions (LC) had entered into force. Operators licensed before that had only to renew their licences – a much simpler procedure. The challengers argued that the different regimes create unjustified discrimination against a group of telecommunications operators. BCC rejected the claim by arguing that after the LC had entered into force the operators should have obtained a concession, not a licence for the use of radio frequencies. By obtaining a licence, they had in fact violated the LC: violation of a law could not be a ground of a claim for equality before the law, argued the judges.

⁴⁷ Decision 10, 1999: *Constitutionality of the 1998 Law on Radio and TV*.

⁴⁸ These suspicions were exacerbated when weeks after Kostov’s resignation in 2001, the Supreme Administrative Court annulled, on the grounds of procedural violations, the licence of Nova TV, a commercial national TV programme, allegedly close to Kostov and his party.

⁴⁹ *State Gazette* № 41/22.05.2007.

⁵⁰ *State Gazette* № 88/7.10.2003.

After the liberalisation of the media market in the country in the early 1990s,⁵¹ the licensing procedures remained unclear until the adoption of the 1998 LRT and often proved contradictory. The first licence for a commercial radio broadcaster was issued by the newly constituted *Temporary Council for Radio Frequencies and TV Channels* under the pro-reform UDF government in October 1992. The legal framework, however, was based on a by-law of the socialist era, the 1975 *Law on Telecommunications*. By 1997 there were more than 150 commercial radio broadcasters in the country, yet only 51 of them held valid licences.⁵² The situation was similar with respect to the commercial cable and satellite TV programmes. The first cable networks were built in 1992-1993, and by mid-1997 there were around 400 TV operators in the country, where only 94 of them held valid licences.⁵³ In 1994-1995 the first commercial terrestrial TV operators started transmitting their programmes in the country.

The main characteristic of the licensing process for the electronic media in the pre-1998 period, was the lack of clear rules on licensing. Thus the licensing decisions were entirely in the discretion of the executive and were often politically motivated. The second feature was the lack of control over the electronic media market, where between 2/3 (radio) and 3/4 (TV) of the operators functioned without proper licences (they were “pirate” broadcasters), and, among many other legal breaches, massively violated copyright law.

With the adoption of the 1998 LRT, a dual regulatory regime was introduced: a regime of licensing – for the terrestrial (analogue) radio and TV operators, and a regime of registration – for the cable and satellite operators.

From 1998 (the year of entry into force of the LRT) until November 2001, terrestrial radio and TV operators were licensed on the basis of a competition, organised by an inter-institutional commission that was appointed by the Prime Minister: the State Commission on Telecommunications (SCT). The winner was decided by the Cabinet on the basis of a report by SCT. The *programme licensing* (concerning the content of the programmes, and not how they are transmitted) was de jure independent: it was carried out by the independent NCRT. Yet de facto it was also decided within the framework of the same tender procedure. SCT was the body issuing the licence, yet it had to take into account the position of NCRT on the content of the programme (the programme licence). The final decision rested with the Council of Ministers, the patron of SCT. As a whole, this licensing procedure of terrestrial radio and TV operators was heavily criticised by both the operators and the representatives of civil society for being non-transparent and liable to political influence.

On its basis, two tenders for commercial terrestrial TV operators were held. However, Bulgarians became able to watch just one national terrestrial commercial programme, BTV (from May 2000), since the governmental decision for the national licence of the second winner, Nova TV, was successfully challenged in court. It took three years for Nova TV to win a new bid (in July 2003) and for Bulgarians, to have a second commercial national TV operator. This practice of constantly challenging the

⁵¹ Council of Ministers’ Executive order № 114 from 1991, *State Gazette* № 51/1991.

⁵² Data quoted in D. Boryana “Deset godini, koito raztursiha elektronnite medii (no ne i natsionalniya efir)” [Ten years that shook the Eelectronic media (but not the National TV-broadcasting)], in G. Lozanov, L. Deyanova and O. Spassov (eds), *Media and transition* (2000).

⁵³ *Ibid.*, p. 49.

decisions of NCRT and SCT (and those of their successors, as will be explained below) in front of the administrative courts, and of the judiciary finally deciding the cases rather than the regulatory bodies, has contributed to the low credibility and status of the media regulatory bodies.

Cable and satellite TV and radio operators, on the other hand, were licensed by SCT without a tender, solely on the basis of a *registration decision* of NCRT. One controversial issue was the requirement to re-license, according to this new procedure, all pre-existing cable and satellite TV and radio operators. Yet the BCC upheld the constitutionality of this requirement, and thus all cable/satellite operators were compelled to go through the registration procedure.

Despite its many shortcomings, the 1998 LRT had one major advantage: the requirements for the programme licence (issued by NCRT) were identical for all types of TV operators, both cable/satellite and terrestrial. This principle is in line with the EU requirements for technical neutrality of the regulation of the content of TV programmes.⁵⁴

After the amendments brought to LRT by the coalition government of NDSV and DPS in 2001,⁵⁵ a so-called “unified” procedure for the licensing of terrestrial TV and radio operators was introduced. Accordingly, the decisions of the two regulatory bodies in the field - NCRT (succeeded in November 2001 by a new body, the Council on Electronic Media - CEM) and SCT (succeeded in 2001 by an independent Commission on Regulation of the Communications - CRC) - are interdependent. The decision on the licensing of the programmes is taken by CEM. CEM communicates its decision to CRC, which on its part issues the technical licence for the use of the radiofrequency spectrum. This procedure follows the principles of “functional interdependence” and unified licensing: while formally the licences are two – one for the programme and the other technical (for the use of the radiofrequency) - they are issued within the framework of only one procedure. Most importantly, the role of CEM is decisive in this procedure: CRC cannot refuse to issue a technical licence to the winner of a tender (since procedures are opened only if there are free radiofrequencies to be distributed), nor can CRC oblige CEM to issue a programme licence to its preferred competitor.

Yet the process of licensing terrestrial radio and TV operators was virtually terminated already in mid-2001. Following the dissolution of NCRT by the new coalition government, the establishment of CEM took time to materialise, which temporarily stopped the licensing process. The 2002 amendments to LRT had the same effect for a longer period. They mandated to CEM and CRC the task of proposing a long-term strategy for the development of terrestrial radio and TV activities, to be approved by the Parliament. Until such strategy had been approved by the Parliament, issuing new licences was prohibited. The purpose of this amendment was obvious for the political and media analysts in the country. The new body CEM had lost the trust of its sponsors: the parliamentary majority. Thus the governing coalition effectively blocked CEM’s main prerogative - the licensing of terrestrial TV and radio programmes - by not adopting the required strategy until the end of its mandate in 2005.

⁵⁴ N. Ognyanova “Mediyniyat zakon v kraya na analogovoto vreme” [Media law at the end of the analogue age], Capital weekly, 28/11/2008.

⁵⁵ Amendments to LRT, *State Gazette* 96/ 9.11.2001.

There were other significant results produced by this governmental stance: the blockage of CEM's activity happened when the second wave of licensing procedures was due, that for the *regional* terrestrial TV operators in the biggest towns of Bulgaria. In short, for more than 5 years, there were no new terrestrial licences issued. The pre-1998 licences of the regional terrestrial operators were just prolonged under unclear terms,⁵⁶ leaving them hostage to the changing – and often politically motivated – will of CRC. This uncertainty of course boosted the market value of the already licensed national TV operators. This raised concerns within civil society that there are lobbyist interests behind the delay in the adoption of the strategy by Parliament: the majority allegedly served private interests, aiming to monopolise the electronic media market in the country.

The idea behind the delay was obviously to wait with the strategy adoption until a new LRT was passed. The new LRT would mandate the dissolution of CEM and the constitution of a new, more favourable to the parliamentary majority media regulatory body. After two attempts to pass such a new LRT (opposed by civil society/media NGO organisations and by the EU partners, as the country was already an official candidate-member of EU), the only option left to block the activity of CEM was not to adopt the required strategy. This saga, in sum, brought uncertainty to the media market and clearly favoured the *status quo*.

The 2002 LRT amendments created a further set-back for media regulation: the principle of technologically-neutral regulation was abandoned, and two separate regimes for TV *programmes licensing* – one for cable, another for terrestrially transmitted TV programmes - were re-introduced.⁵⁷

As a result of these processes, the reform in the public media - BNT and BNR - was also delayed: CEM was to be its primary “driving force” as the independent regulatory body of the media. The situation in the private media market further deteriorated, since CEM was not performing many of its LRT mandated functions, including control of compliance with its provisions by the private electronic media. One of the other major problems concerned the ownership over the media (which is still a pressing concern), making it difficult to guarantee equality of the media actors in the media market. In the final analysis, the plurality of the expressed positions - crucial for the quality of democracy in a country - was under threat.

This was, roughly, the regulatory situation in the Bulgarian media market, approaching “the end of the analogue era”.⁵⁸ The digital switchover, due to be completed by the EU members states by the end of 2012, brought even more problems.

By technically allowing the transmission of a multiplicity of programmes, the digital technology offers enormous opportunities for enhancing media pluralism. This is one of the main reason behind the requirement that all EU members “get digital” in the sphere of electronic media by the end of 2012. Yet, as the transition in Bulgaria proceeds, there are serious concerns that rather than enhancing media pluralism, it will bring media concentration, if not fully-fledged monopolisation of the electronic media market.

⁵⁶ §9a of the Transitory and Concluding Provisions of LRT stated, that terrestrial operators, holding non-renewed licences in regions, where there were no tender procedures, may continue their activities till such tenders are held.

⁵⁷ N. Ognyanova “Mediyniyat zakon v kraya na analogovoto vreme”.

⁵⁸ Ibid.

The transition process to digital transmission started late in Bulgaria.⁵⁹ Though digital broadcasting started in May 2003 in Sofia – using one multiplex (i.e. digital broadcasting centre) with a capacity for six channels, it was only in 2008 that the coalition government of BSP, DPS and NDSV adopted a two-phase digital switchover plan. During the first phase (2009/July 2010) competitions had to be held, one for giving a licence to a company to build two national commercial multiplexes, another to choose a company to build the national public “multiplex”, which would digitally broadcast the public electronic media BNT and BNR. During the second phase (July 2010/December 2012), these multiplexes should take over broadcasting. By the end of 2012 analogue broadcasting should terminate.

However, the procedures to follow, as well as the entire normative framework for the digital switchover were adopted very late. They were provided by two laws – the Digital Communications Act (DCA) and amendments brought to the Law on Radio and Television. A third law - the Public Broadcasting Act⁶⁰ - was to set the procedures and principles for the digital broadcasting of the public electronic media BNT and BNR. This law was adopted in the last days of the coalition government of BSP, DPS and NDSV in May 2009, yet was met with hostility by the civil society. The reason for the hostility was a plethora of texts in the law, perceived as lobbyist by the public. They provided for the establishment of a state-funded national company “Public Digital Broadcasting”, as well as of a second company (a joint venture between the state and a private company) to build the digital multiplex to broadcast both the public BNT and BNR, and some other TV programmes, without clear rules for selecting them. The envisaged financial involvement of the state without clear rules and criteria for selecting the operators and the company to build the multiplex, prompted conflict-of-interests and corruption concerns. As a result of these concerns even one of the minor coalition partners, NDSV, did not support this law in Parliament. This controversial law was finally abolished by the new government of GERB in the beginning of 2010.⁶¹ Important provisions for the digital switchover that were included in it, were subsequently incorporated in LRT and DCA, yet some of the lobbyist texts were maintained, and some others were added. Firstly, the prohibition for advertising companies to own electronic media, introduced already in the original 1998 LRT, was lifted. Secondly, the number of TV programmes that should be automatically (i.e. without competition) put on the multiplexes was increased. Thirdly, the requirements towards these automatically selected TV programmes were at the same time relaxed: to qualify, they only had to provide TV programmes to more than 50% of the population in the country.

The crucial for the digital transition legislative rules were introduced only in March 2009, and were highly controversial. According to one of them, a multiplex (digital broadcasting) operator cannot develop its own transmission network. This prohibition was successfully challenged before the BCC.⁶² The other controversial provision concerns the so-called “must carry” requirement, according to which not only the public BNT and BNR, but all national terrestrially broadcasted commercial

⁵⁹ Some steps were taken earlier – already in 2000, as reported in O. Spassov, “Public service television in Bulgaria at the end of the analogue age” in, M. Sükösd and A. Isanović (eds), *Public service television in the digital age: Strategies and opportunities in five South- East European countries* (2008).

⁶⁰ *State Gazette* № 37/19.05.2009.

⁶¹ Amendments to the Law on Radio and TV, *State Gazette* № 12/12.02.2010.

⁶² BCC Decision № 3: *Constitutionality of Some Provision of the Digital Communications Act and the LRT*, *State Gazette* № 45/2009.

TVs (i.e. BTV, Nova and Pro.bg) will go digital without having to participate in a competition or go through any further procedure. Each one of them will also have the right to put on the commercial multiplex up to 5 more additional programmes. The “must carry” rule applies not only to commercial TV operators with licences for *national* terrestrial broadcasting, but also to TV operators, holding *regional* terrestrial broadcasting licences, when they provide TV services with a minimum coverage of 50% of the population.

In the last days of its mandate the coalition government of BSP, DPS and NDSV managed to push through the CRC (the state commission authorised to run the competitions for the digital multiplexes) the decision to select the company to build the first two commercial multiplexes (thus fulfilling the requirements of phase 1 of the digital switchover plan). This decision was taken hastily and in breach of the requirement to hold an open and transparent competition for digital multiplex operators. In addition, 102 analogue regional licences were offered and won in the context of another non-transparent competition (with just a 6-day application period) by two TV operators, who met the 50% regional coverage requirement. This guaranteed them inclusion in the “must carry” quota for the digital multiplexes, as explained above. These decisions of the state Commission were very controversial, since they were taken just 3 days before the Constitutional Court decision (declaring unconstitutional some of the procedural rules for these tenders) entered into force. Currently the European Commission has launched an investigation on both the national legislation and the concrete tender procedures that were followed for their compatibility with EU law.⁶³

The new GERB government speeded the process in the spring of 2010 by adopting amendments to LRT and DCA, which removed the most controversial provisions (yet passed others, in particular with regard to media ownership, which will be discussed in more detail below). CRC also managed in a speedy and completely non-transparent way to decide on the second company that will build the other 3 commercial multiplexes. The same company (Hannu Pro) has also won the competition to build the public multiplex, which will broadcast the public BTV and BNR. This essentially means that a single company will control 2/3 of the broadcasting of digital terrestrial TV in the country. There are allegations in the media that this company is connected to the other company - Tower com - which won the competition for the other 2 multiplexes, and owns ½ of the TV transmission network in the country.⁶⁴ Quite naturally, the EC is concerned that monopolisation by a single player of the Bulgarian digital media market (allowed by the new government of GERB, has thus been made possible.⁶⁵ In view of all these developments, the likelihood of Bulgaria meeting the 2012 digital switchover deadline is slim.

3.1.3.2 Ownership and competition rules

One major feature of the press market in Bulgaria is the lack of special ownership rules and of rules that would guarantee the transparency of the market in general. This has long been perceived as a major problem in the field. Yet it was only in September 2009, that the Union of the Publishers in Bulgaria sent a letter to the Prime Minister,

⁶³ “Шум в ефира” [Noise in the air], Capital weekly, 10/09/2010.

⁶⁴ “Кент флеш роял” [Royal flush], Capital weekly, 16/07/2010.

⁶⁵ “Шум в ефира” [Noise in the air].

asking the government to take active steps towards regulating the ownership in the print media, the origins of the investments there, as well as media concentration. An inclusive working group to prepare the necessary regulations was formed, and thus in 2010 amendments to the Law on Obligatory Depositing of Print and Other Products (there is no law on the press in the country, as explained above) are being introduced.⁶⁶ The amendments require that the names of the “real owners” (the ultimate beneficiary/ies of the ownership in the legal entity) of the print media are published on the front page of the first issue of the publication for the year. Any changes in the ownership need also to be reported in due time. The Ministry of Culture has to publish information on print media ownership on its website. The control over the compliance with the regulation is with the municipal authorities, which are the beneficiaries of the substantial monetary sanctions for breach of these rules.

With respect to electronic media, special ownership rules exist, yet they leave much to be desired. According to the LRT, only legal persons who can prove ownership in their properties or capital, and were not declared bankrupt in the last five years (Article 105 (4)) may apply for a TV or radio licence. Further restrictions (Article 105 (4)7 and 8) are imposed on legal entities with advertising⁶⁷ and security as their registered object of activity (or which carry out such activities). In May 2010, as already mentioned, the restriction on cross-ownership between advertising companies and TV operators was lifted. Telecommunications operators, enjoying a monopoly status on the market (which was the case with the then state-owned Bulgarian Telecommunications company – BTK)⁶⁸ cannot apply for a licence (Article 105(4)9). Article 108 also requires applicants to submit a declaration that “they do not hold stakes, shares or other rights of participation in radio and television operators above the limits admissible pursuant to the anti-trust legislation of the Republic of Bulgaria”.

The Bulgarian Anti-trust Law⁶⁹ does not prohibit *per se* neither monopoly,⁷⁰ a dominant market position, nor concentration. Prohibited is just the abuse of a dominant position on the market. The presence of a dominant position is established by the *Competition Commission*, an independent state body, entrusted with the application of the anti-trust legislation in the country. The law does not set any strict ceilings above which a dominant position is deemed unacceptable. Determining whether there is a case of abuse of a dominant position or whether ownership

⁶⁶ On Sept 23rd 2010, the amendments were voted by Parliament on their first reading.

⁶⁷ Already in 1998 the LRT incorporated the restriction for advertisement companies to get TV and radio operator licences as well. During the years, this restriction was constantly neglected/ side-stepped, the most prominent case being that of Krassimir Guergov, the biggest player in the advertisement market in Bulgaria. He was officially just a consultant to the foreign owners of the first commercial national TV programme – BTV, yet recently admitted to have been among its owners from its first days in Bulgaria. See “Едно лицемерие по-малко” [One piece of hypocrisy less], *Capital* weekly, 4/06/2010.

⁶⁸ BTK was privatised in mid-2004 (the state sold 65% of its shares to Viva Ventures) and the privatisation process was complete in January 2005, when the rest of its shares were traded on the Bulgarian Stock Exchange –Sofia.

⁶⁹ *State Gazette* № 102/28.11.2008.

⁷⁰ Monopolies are only allowed when determined by Law, pursuant to Article 18 paragraph 4 of the Constitution.

concentration is permissible is a matter of discretionary decision of the state Competition Commission.⁷¹

There is one special rule in the LRT (introduced in 2008), prohibiting TV and radio operators to become digital multiplex operators. The restriction for digital multiplex operators to build their own transmission networks, which was introduced in 2008, was successfully challenged in front of BCC, as already mentioned. Only one special restriction, introduced in 2009,⁷² remains. According to it national coverage TV programme licences cannot be issued to TV operators that hold a licence for regional/local broadcasting (yet they may give up their regional/local licences and then acquire a national one).⁷³

There are no mono-media or cross-media ownership restrictions. The existing rules aim only at the prevention of monopolisation of the market, and mono- and cross-media ownership are not interpreted as posing such a threat. There are no limits on market shares, circulation and audience shares, and advertising revenue shares in the media market or in the capital shares in a media company. Only the monopolistic domination of the market is excluded. Cases of cross ownership can be identified for all three types of media – press, TV and radio. Foreign media ownership is also allowed and the same ownership rules apply to it as well.

Currently an entirely new Law on the Electronic Media is under discussion, which will specifically address media ownership rules. During the public discussions held in July 2010 on the general direction of the new media law, the position of the Association of TV and Radio Operators in Bulgaria (ABRO) and of press publishers was expressly against the introduction of special media ownership restrictions that would go beyond the general provisions of the Anti-trust Law. Calls for lifting the restriction for TV and radio operators to be digital multiplex operators were also put forward. Since no official draft of this law has been publicised yet, it is difficult to assess its content and even general orientation.⁷⁴

With respect to media competition rules, they are entirely regulated by the Anti-trust Law. There, as already mentioned, dominant position on the market per se is not prohibited, but just its abuse. Whether this is the case with the concrete company is established by the state Competition Commission. There are also a number of provisions specifying which practices constitute non-loyal competition practices: like libel, providing misleading information on the competitors and their products, misleading or comparative advertising, etc. Yet there are no specific provisions in this law, targeting specifically the media market.

⁷¹ The Anti-trust Law mandates (in Articles 26 (1) and (2)) the Competition Commission to permit ownership concentrations even when they lead to or enhance a dominant market position, when the aim of the concentration is the modernisation of the relevant economic activity, the improvement of the market structure, the better protection of consumers' interests and when "overall the positive effect of it outweighs the negative influence over the competition in the respective market".

⁷² Amendments to LRT, *State Gazette* № 14/2009.

⁷³ Article 116B (3) of LRT.

⁷⁴ The current chairperson of CEM, Georgi Lozanov, declared during the public discussions of the media law project that the philosophy behind the new law is liberalisation of the regulation, yet with clearer ownership rules. Voices were heard that these two desiderata are hardly compatible. Experience shows that the final shape of the media law will be more a matter of happenstance of influential interests in the media community rather than of principles.

3.1.4 Content regulation

The 1998 Law on Radio and Television and the 2004 Ethics Code of the Bulgarian Media contain a variety of legal provisions and self-regulatory measures, which aim at regulating the content of information that is provided by the press and audiovisual media operators, so that it meets standards of responsibility, quality, objectivity and pluralism. Article 10 of LRT, for example, requires media providers to follow the following principles in their activities: free expression of opinion, right of access to information, non disclosure of their sources of information, personal inviolability and inviolability of personal life, inadmissibility of programmes propagating intolerance, violence, cruelty or racial, ethnic, gender or religious hatred, preservation of the purity of the Bulgarian language, copyright (and neighbouring rights) protection, protection of children from exposure to violence or any visual content that may distress them/hinder their development, etc. All operators - public and commercial - also have the obligation to include, when possible, in their programmes EU-produced TV and radio content, which should be a minimum 50%⁷⁵ of all TV and radio content on the programme. Of these EU programmes, 12% should be the work of independent EU producers. The requirements placed on public operators are more extensive and stricter: they have to provide political, economic, cultural, scientific, educational and other publicly important information, guarantee access to the national and world cultural values, popularise scientific achievements, promote the Bulgarian and European cultural heritage, guarantee pluralism of opinions in each of their news and commentary programmes, enhance tolerance and mutual understanding in society, etc.⁷⁶ Content regulations determine also the admissible forms of advertising. The public TV and radio operators are subject to stricter requirements in this respect as well.⁷⁷ There are also strict rules, applying to all electronic media, concerning product placement, advertising in children programmes, advertising of alcohol and tobacco products, etc.

It is also a particular responsibility of the national public operators to inform citizens about the events of public life, and even the commercial media are duty bound to provide at least partial access to important public events (over the coverage of which they may have exclusive rights) to the general public.⁷⁸ The media regulatory body CEM has many prerogatives, not only concerning the monitoring of compliance with the structural rules, but also of those concerning the content of the programmes. In short, the goal of content requirements and the relevant regulatory measures is to guarantee the right of citizens to receive information and to ensure political and cultural pluralism.

The content regulation regarding *the press*, by contrast, is not provided in the law, nor is it enforced by a state regulatory body. It is a matter of self-regulatory codes of conduct of the journalists. This particularly concerns the objectivity and impartiality of the published information: censorship is constitutionally banned, so it is not for the state to determine whether the published information is objective and

⁷⁵ 50% or more of EU- produced TV content is the target, which has to be reached in the five years following the introduction of this provision in the law – i.e. by 2014.

⁷⁶ Article 6 (2) and (3).

⁷⁷ Article 89 of the LRT limits advertising time to 12 minutes per hour for the commercial TV operators, and to 15 minutes for the whole 24 hours programme of BNT (of which max 5 minutes may be used in prime time).

⁷⁸ Article 21 (3.1) of the LRT.

impartial. Thus in 2004 an Ethics Code of the Bulgarian Media⁷⁹ was signed, which applies both to the electronic media and the press. In accepting the Code, the signatories declare to respect the following principles: 1. to provide truthful (strictly checked and cross-checked) information to the society, 2. to use open, fair and lawful means (the use of secret cameras, microphones and other such devices is only allowed when there is no other means of providing public access to crucially important for the society information. The use of such means should be clearly stated in the final media product.); 3. to respect the persons and their private life, 4. to have special responsibility for the rights of the children; 5. to not discriminate on grounds of race, gender, religion or ethnicity; 6. to exhibit special sensitivity in informing about crimes and cruelty, so that the rights of both suspects and their victims are respected, and 7. to maintain decency of language and style. Special sections in the code are devoted to guaranteeing the independence of the media from political and economic pressure/influence and to regulating the relations within and between the media outlets. The main professional associations in the field and journalistic NGOs⁸⁰ established in 2005 a “National Council for Journalistic Ethics” (NCJE). This is an NGO, whose main objective is the creation and support of two national media ethics councils for electronic and for print media. These councils currently monitor the compliance of the media with the above ethics code⁸¹ and mediate disputes within the media. Their decisions are mandatory⁸² for the media, and in case they are not complied with within the set deadline, LRT mandates CEM to impose monetary sanctions.⁸³ This last mandate concerns only the electronic media, since CEM has no jurisdiction over the print media. The two councils and NCJE are members of the Alliance of Independent Press Councils of Europe.

It could be maintained that the media deregulation and the development of private television and radio have enhanced the diversity and pluralism of broadcasting content. At the same time the media experts (both in the country and abroad) have been warning that the quality of the media output is deteriorating,⁸⁴ because of lack of clear media ownership rules, attempts to gain economic and political control of the media and self-censorship of journalists, especially in the local media outlets. Because of these problems, the mandate of CEM has been reinforced. Now it is the responsibility of the media regulatory body to not only issue programme licences and remove them when the regulations of LRT are severely and repeatedly violated, but also to enforce the Ethics Code of Bulgarian Media. However, with respect to both of these functions, the work of CEM has not been satisfactory.⁸⁵ It remains to be seen

⁷⁹ National Council for Journalists Ethics, “code of journalistic ethics of the Bulgarian media”, available at: www.mediaethics-bg.org (last visited on 20/10/2010).

⁸⁰ The Association of the TV and radio operators (ABRO), The Union of Publishers in Bulgaria, the Union of Bulgarian Journalists and a couple of NGOs – The Bulgarian Media Coalition and The Foundation “Centre for Media Development”.

⁸¹ According to the last available report for their activities (for 2008), they have received 18 complaints from citizens and media representatives, of which just 1 was found to violate the Ethics Code.

⁸² Article 76 (2) of the LRT, *Amendments to LRT, State Gazette* № 12/2010.

⁸³ Article 126g of the LRT, *Amendments to LRT, State Gazette* № 12/2010.

⁸⁴ The 2005 report for Bulgaria of the “Media Sustainability Index” found that the quality of journalism and the compliance with professional standards in Bulgaria deteriorated compared to previous years (the index was started in 2000).

⁸⁵ The State Audit Office checked CEM’s activities for 2007-2008. According to its report the control of the media regulatory body over the licensed and registered TV and radio operators was ineffective. For the whole period just 14 (out of a total of 560) TV and radio programmes were checked, and though violations of the licences were established, no sanctions or other administrative measures were

what the effects of the recent⁸⁶ reduction in the number of members of CEM (from 9 to 5) will be on the work and effectiveness of this body.

Currently the Bulgarian legislation does not treat the internet-generated content (blogs, social networking sites, etc.) as media. Such content is not regulated. Yet in the presently widely discussed by civil society draft of the new Electoral Code, the internet is treated as a media and therefore there will be regulations concerning it as well. The parliamentary majority plans to prohibit the libellous speech on political candidates in blogs and the social networking sites. The regulations in this regard will thus become identical for all types of media – press, electronic and internet-generated. Concerning the other draft law which has received much attention by civil society, the one on the media, it is yet unclear⁸⁷ whether it will treat blogs and other internet-generated content as media, and thus regulate them.

It took a long time for the right of free expression through the media to take a root in post-communist Bulgaria, even though it enjoyed constitutional protection. For more than a decade, a major problem of the post-communist Bulgarian media was the large number of Bulgarian journalists sued for libel and insult (these were and remain criminal offences). For the period 1990 – 1998 there were 45 libel trials and 6 insult trials against Bulgarian journalists.⁸⁸ After 2000,⁸⁹ the number of trials increased significantly but the number of convictions was relatively small.

The legal provisions against libel and insult⁹⁰ are included in the Penal Code⁹¹ (Articles 146, 147 and 149), which was adopted in 1968. The penalty was effective imprisonment (up to two years for insult and up to three years for libel) and financial sanctions. After a long political and legal battle (involving a negative decision of the BCC,⁹² which upheld the constitutionality of these articles of the Penal Code), amendments were finally passed in June 2000.⁹³ These abolished imprisonment, yet imposed substantial monetary sanctions.⁹⁴

taken. See “Сметната палата отчете слаб контрол на CEM” [The national audit office reported weak control by CEM], *Novinar*, 11/11/2009.

⁸⁶ This provision was introduced with the last amendments to the LRT in June 2010, *Amendments to LRT, State Gazette* № 47/2010.

⁸⁷ The opinion of the chairperson of the working group, Georgi Lozanov, on the draft-law is that the regulation will not affect the blogs and social networking sites, since they are forms of personal communication, where the production of audio-visual products, if there is such, is not aimed at the market. The EU regulations in the field, according to him, are only limited to audio-visual *services* in the internet, and the blogs and networking sites are not services but forms of personal communication. See “Интервю с доц. Георги Лозанов: Медийната регулация няма да засегне сайтове, блогове, социални мрежи” [An interview with assoc. Prof. Georgi Lozanov: The media regulation will not affect sites, blogs and social media], *vsekiden.com*, 22/06/2010, available at: www.vsekiden.com/71255 (last visited on 22/06/2010).

⁸⁸ “Програма за правна защита на съдебно преследвани журналисти” [Programme for legal protection of prosecuted journalists], Foundation “Reporter” (1998).

⁸⁹ The 2003 report on “Libel and Offence Trials against Bulgarian Journalists” of the Bulgarian Helsinki Committee established that for the period March 2001 – March 2003 there were 91 such trials.

⁹⁰ An overview of the developments in this sphere is provided in M. Chuturkova, *Свободата на словото и нейните граници* [Freedom of speech and its limits] (2009).

⁹¹ *State Gazette* № 26/2.04.1968.

⁹² BCC Decision № 20: *Constitutionality of Provision of the Penal Code*, *State Gazette* № 83/1998.

⁹³ *Amendments to the Penal Code, State Gazette* № 51/23.06.2000.

⁹⁴ The fine is 1000lv to 3000lv for insult, and 3000lv to 7000 lv for libel. When the insult is public and disseminated in the press or in other media, and is against an official and with relation to her official duties, the fine is from 3000lv. and may reach up to 20 000 lv. depending on the gravity of the action and its consequences.

It is not just the Penal Code that protects the personality, honour and dignity of individuals. With regard to the electronic media, the LRT requires TV and radio operators to ensure that persons are treated with respect and that their honour, dignity, good name and family life are protected. However, even though operators are not allowed to distribute information on the personal life of the citizens without their consent (Article 16(1)), they may include such information on public persons/or persons with influence in the public life, when access to this information is in the public interest (Article 16(2)). When these provisions are violated, the operators owe a public apology to the affected persons. The public apology does not deprive the victims of their right to seek redress (monetary compensation) in civil court. Public figures and officials, as well as ordinary citizens have a right to response, which must be broadcasted in the next issue of the same programme (Article 18).

4. Media policy and democratic politics: an assessment

The present overview of norms and developments demonstrates the importance of the media for the Bulgarian parliamentary regime, and their special role in building the party system after the fall of communism; this political aspect could hardly be overestimated. There have been generally two models of interaction between political and media actors over the last twenty years. The first model of aggressive majoritarian attempts to control the (public electronic) media was characteristic of the 1990s. The second model started to shape after 2001, when the party system of the first ten years started to disintegrate, and populist newcomers won a succession of parliamentary elections. These developments took place against a much more pluralistic (and not susceptible to direct governmental control) environment. The end result was a new pattern of relationships between political parties and specific media, which (at their extreme) led to hybrid political structures - party-media or media-party -, or at least to very heavy emphasis on the development of capacities for media presentation and PR in party politics.

In order to better grasp these developments, a brief introduction to Bulgarian transition politics is necessary. The 1991 Constitution introduced “rationalised parliamentarism” as a general logic of the political regime. Rationalisation of parliamentarism consists mainly in the constitutional provision of very strong institutional incentives for the creation of stable parliamentary majorities and parties in general, even in political contexts where there are no established and long-standing ideological cleavages and democratic traditions. In Bulgaria, in order to have control over the government, a political actor needs to rely on a strong (parliamentary) party, or a cohesive coalition of parties. The institutional logic itself promotes the emergence of disciplined parties even out of ideologically ambiguous groupings, once they have won a substantial number of votes. Sometimes rationalised parliamentarism may even create “empty shell” parties, waiting and searching for ideological substance. The institutional pressure may “invent” fake ideological differences, or amplify increasingly irrelevant differences. Still, the institutional logic of the regime attempts to create a system of representation based not on a single person, or *ad hoc* electoral alliances, but rather on stable and durable parties.

The institutional pressures to have strong and cohesive parties in a situation where the ideological differences and class cleavages are not clear and articulated, required from the “empty shell” parties to impose control over the major instrument of propaganda and public opinion formation – the electronic media. Thus the control

over the media was one of the major instruments of the parties from the early transition period to solve their identity problems and to prevent the opposition from establishing and consolidating itself. Since all national electronic media were state-owned until 1999, the importance of such control was really crucial. This feature of Bulgarian constitutional design has placed a very strong imprint on media development in the first ten years after the transition.

In the beginning of the 2000s, however, new developments marked the Bulgarian party system. The parties, which have been established in the period 1989-2000 came gradually under attack by new, extra-parliamentary players. These developments have been described as a “rise of populism”. Populism in this context is understood as the creation of parties, which appeal to the people as a whole, and are very light in terms of programme/ideology and organisational structures.⁹⁵ The rise of populism in Bulgaria 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 Ataka party, for instance. Days before the 2005 presidential election the pollsters in Bulgaria were in for a big shock: out of the blue, a new political actor appeared claiming 8-9% of the voters’ support. Since this was so surprising, the rumour was that leading polling agencies delayed the announcement of their data, because they doubted the accuracy of their results. The new actor was a party organised around a TV cable station and a journalist radically criticising the political establishment as corrupt and dangerous from the point of view of the national interests. The TV station was called “SKAT”, and the journalist Volen Siderov. Siderov had a programme “Ataka” on the station, which he successfully managed to turn into a nationalist political party of the same name. Siderov’s biography is instructive for the student of populism. In the beginning of the transition, Siderov was the editor-in-chief of the newspaper of the UDF - the main democratic reformist party - *Democracy*. After that he became a journalist in one of the most influential dailies *Monitor*, a newspaper on the borderline between the serious press and the tabloids. Ataka ultimately entered the Bulgarian parliament in 2005, surprisingly becoming the biggest opposition group in it (albeit for a short period of time, since the group soon after disintegrated). The other bigger parties – the BSP, the tsarist NDSV, and the Movement for Rights and Freedoms (DPS) – formed a grand ruling coalition.

The role of the media, and TV SKAT in particular, explains much of the success of Ataka. This was the main tool of mobilisation of electoral support of the organisation. SKAT is in fact a TV station which provides a forum for populist discourse. It has mainly publicist and analytical programmes, giving voice to the second, third and the lower tiers of the political and intellectual elite. Not surprisingly, the station is “anti-elitist” (meaning against the empowered political elites), defends public morality, national interests, national integrity, etc. All this is presented with a degree of popular culture, conspiracy theories, and tiny bits of high culture.⁹⁶ The

⁹⁵ See the publication G. Mesežnikov, O. Gyárfášová, and D. Smilov (eds), *Populist politics and liberal democracy in Central and Eastern Europe*, working paper, available at: <http://www.ivo.sk/5353/en/news/ivo-released-working-paper-populist-politics-and-liberal-democracy-in-central-and-eastern-europe> (last visited on 20/10/2010).

⁹⁶ It is very important that the network does not invest in the quality of the picture or the quality of the content of its programmes. This is probably an intentional aesthetic choice, which gives to the whole

party Ataka, in this sense, represented a hybrid between a political organisation and a media outlet. The success of this party demonstrated the increased relative weight of media presentation and PR in party politics and party building.

In 2007 there was another electoral shock for the political establishment in Bulgaria. At the May EU parliamentary elections a new political party – GERB – led by the popular mayor of Sofia Boiko Borissov won most of the votes. GERB’s main resource was the personal charisma and appeal of its leader. The party was registered and set up only in 2006, reflecting the political ambitions of its leader to convert his general popularity into representation at the national level. Borissov speaks directly to the Bulgarian people. Much of his success could be attributed to his ability to speak to the ordinary people, to look like many of them, and to articulate what they commonly think about complex governmental matters. Thus, electoral success and mobilisation are to be attributed largely to personality factors, not programmatic issues. In this sense, Borissov is to a large extent a product not of party life and party politics, but of media presentation. He has an extremely fine sense for PR matters and manages always to be in the focus of media attention. His use of street jargon in a relatively delicate manner and with a fine sense of humour makes him one of the media favourites.

The parliamentary elections in Bulgaria on July 5, 2009 confirmed the already existing trend of diminishing of the electoral strength and appeal of the so-called “traditional” parties, identifying themselves along the left-right political spectrum: the centre-left Bulgarian Socialist Party (BSP) and the successor of the once-mighty centre-right Union of Democratic Forces (UDF). These were the two major parties of the 1990s, which dominated the political scene during the most decisive years of the Bulgarian transition. As of September 2010, these “traditional” parties enjoyed the support of less than 20 % of the population. Most of the rest of the Bulgarian citizens express preference for new political players, who campaign mainly along two issues: the fight against corruption and mild nationalism.

In line with this trend, in July 2009, the clear winner of the parliamentary elections was the political party GERB, which took 116 out of the 240 seats in the Bulgarian National Assembly. Second came the incumbent BSP with 40 seats, which was more than twice less than what they had in 2005. DPS (the Movement for Rights and Freedoms) – a regional party representing mostly the Bulgarian Turks - was the only party of the triple ruling coalition (BSP, DPS and NDSV), which was able to stabilise and even slightly increase its performance in comparison with 2005. In contrast, the party of the former tsar Simeon II – NDSV – failed to clear the 4% electoral threshold and remained outside of the parliament: this was a dramatic development having in mind that this party had won 40% of the vote of Bulgarians in the 2001 parliamentary elections. Of particular importance was the fact that most of the remaining vote went to populist and nationalist parties such as Ataka, “Order, Law and Justice”, and Leader, the first two of which got over the 4% electoral threshold.

show a very “natural” air, bringing it close to reality TV and even the documentary genre. The overall effect is that it is as if “the people” express themselves in the programmes of this TV.

Table 1: Results of the 2009 parliamentary elections

№	Party	Votes	Percentage of the total vote
1	Order, Law and Justice	174582	4.13%
2	Leader	137795	3.26%
3	GERB	1678641	39.72%
4	Movement for Rights and Freedoms (DPS)	610521	14.45%
5	ATAKA	395733	9.36%
6	Coalition for Bulgaria (BSP)	748147	17.70%
7	Blue Coalition (UDF and Democrats for Strong Bulgaria)	285662	6.76%

The electoral results were a confirmation of the seemingly perpetual capacity of the Bulgarian party system to disintegrate and transform. Thus, both the dominant parties of the 1990s (BSP and UDF), and the dominant party of the early 2000s (NDSV) are now losing strength and being marginalised: the NDSV is already an extra-parliamentary party, while the successors of the UDF are dangerously close to the electoral threshold. In their stead there are rising new players, who are very light both in terms of programmes and ideologies, and in terms of party structure and organisation. It is as if they come from the virtual world of the electronic media, materialise during elections, and then disappear in virtual reality again within a few years.

With these developments in the political sphere, it is clear that the media have again become an area of intense political contestation. It is no surprise that at present there are attempts by the ruling majority to revamp the CEM – the Council on the Electronic Media – with the apparent intention to increase its influence on this body (or at least to diminish the influence of its opponents in it). Further, there are important changes in the media market, which are influenced significantly by the political processes. A financial group owning one of the Bulgarian banks (and allegedly close to DPS) has provided credits for the creation of an influential media group – The New Bulgarian Media Group. It owns the daily with the biggest circulation (“Telegraf”), the most influential tabloid newspaper (“Weekend”), as well as a host of other publications and TV stations. It also controls the company, which will build 2/3 of the digital multiplexes in the country. It is telling that this financial group became the authorised banker of most of the Bulgarian publicly owned companies during the reign of the so-called “triple coalition” in which the DPS was a key player. All these developments make the Bulgarian case very interesting from the point of view of the intersection of media and party politics.

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The case of Croatia

Helena Popović, Paško Bilić, Tomislav Jelić and Nada Švob-Dokić

1. Introduction

In its recent history Croatia has experienced most of the problems that post-socialist states have faced regarding the media, that is “slow technological change; weak news competition; crisis of public service broadcasting; persisting political pressure on the media; weak professional performance of journalists; problematic minority access to the media; hate and nationalist speech; inadequate press and media markets; Europeanisation of media regulation”.¹ The differences between socialist and communist practices and political systems in eastern, south-eastern and central Europe, as well as the historical and cultural specificities have added to the transitional complexity, and have resulted in different ways in which the system has been challenged and in which institution building has been processed.

Croatia gained independence through the breakdown of Yugoslavia, which had serious repercussions for the democratisation processes that were delayed due to the war (1991-1995). In the beginning of the 1990s, the nationalist movement led by the Croatian Democratic Union (the winners of the first parliamentary elections in Croatia in 1990) mobilised dissident groups of the previous system, but also gained the support of the masses, triggered by the beginning of the war in 1991. The media system has been seriously affected by such developments.

The reorganisation of the Croatian media landscape began in the early nineties, with the transformation of the socialist system into a democratic political system introducing a liberal market economy. Transition from the state controlled and publicly owned media to a system in which the media were to become public institutions and services or private enterprises did not go smoothly.² At the beginning of the nineties, the new parliament enforced new media regulations that led to initial democratic changes. Submitted to regulation were the institutions and areas like the news agency HINA in 1990, the national radio television HRT in 1991, 1992, 1993 and 1996, the telecommunication area in 1994, and public information regulation in 1996.³ The privatisation processes which enabled the emergence of commercial media started. However, the first liberalisation results incited worries about the loss of control over the media and these processes were suspended. In the nineties, the media were still seen as a means for reinforcing the power of the political establishment. The newly established regime controlled the media through various methods, for example by appointing people loyal to the regime to supervisory regulatory bodies through which control was exercised (e.g. the Programme Council of the Croatian Radio Television - HRT), or through the distribution of concessions. Pressure was particularly put on national television, whereas the press was not of primary concern to the authorities, though those that openly criticised the regime - such as the weekly *Feral Tribune* - were submitted to various forms of oppression, for example through

¹ See: M. Sükösd, P. Bajomi-Lázár (eds), *Reinventing media: Media policy reform in East Central Europe* (2003), at p. 15.

² See: Z. Perusko, *Televizija u Europi: zakonodavstvo, javne politike i neovisnost – Hrvatska [Television accross Europe: regulation, policy and independence - Croatia]* (2005).

³ See: N. Zgrabljic Rotar, “Hrvatska medijska politika i javni mediji” [Croatian media policy and public media], 9(1) *Medijska istraživanja* (2003) 59.

legal provisions, attempts to stop its distribution or tax impositions that did not apply to other printed media.⁴ Civil society activities were viewed as dangerous when not in accordance with state politics. Civil society organisations and media supported from abroad, such as human rights organisations or organisations that dealt with democratisation (e.g. the Open Society Institute, Croatian Helsinki Committee, etc.) were under direct political pressure. In the second half of the nineties, particularly in 1996, civil society started to express its dissatisfaction with political pressures being exercised. An indicator of this was the formation of the civil society group *Forum 21* that claimed the right to independent and free media. In the same year the *Radio 101* protest took place in which 100,000 citizens of Zagreb fought the decision to deny *Radio 101* its concession.⁵ Regardless of these initial actions, it was only with the death of Franjo Tuđman (1999), and the new elections in 2000, that concrete steps to democratisation were taken.

In 2000, when the left coalition came to power, a new set of media regulations was passed. It aimed to create a framework for the development of public media and a more favourable environment for the introduction of commercial media. While the press market opened up at the end of the nineties,⁶ in 2000 the entrance of foreign owned commercial television into the market marked the first steps towards a pluralistic media system. This period was particularly characterised by the attempts to implement regulations and procedures that would enable independent and free media performances. De-linking the state from the media was the primary task, while competition introduced by the commercial media was seen as positive.⁷ The emergence of commercial media was in that period viewed as a support to pluralism and independence from the state-controlled media. However, this optimism was soon replaced by a new worry, linked to the obvious profit-oriented logic that proved to be the driving force of the commercial media, which regarded their public attributes as secondary. The awareness of such media orientations was connected to the third phase in Croatian media policy, which emerged with the acceptance of the Croatian application for membership of the EU and the candidate country status awarded in 2004. In this period the focus slowly transferred from a national to a European and global context.⁸ Parallel to the adjustment to European regulations the Croatian media system is still struggling with internal problems linked to issues associated with the transition from one political and economic system to another. At the same time, new challenges have emerged - such as fast technological changes, convergence, audience fragmentation, hyper-commercialisation, the spread of tabloid media and sensationalism – that force the actors involved in the media landscape to simultaneously “juggle” multiple problems on various levels.

⁴ See: M. Thompson, *Kovanje rata: mediji u Srbiji, Hrvatskoj i Bosni i Hercegovini* [Forging war: media in Serbia, Croatia and Bosnia and Herzegovina] (1995), p. 185.

⁵ See: S. Malović and G. W. Selnow, *The people, press and politics of Croatia* (2001).

⁶ The first concession to Nova TV was granted in 1999, while the RTL entered the market in 2003.

⁷ See: Z. Peruško, “Medijska koncentracija: izazov pluralizmu medija u Srednjoj i Istočnoj Europi” [Media concentration: a challenge to media pluralism in Central and Eastern Europe], 9(1) *Medijska istraživanja* (2003), at p. 40.

⁸ See: Z. Peruško and H. Popović, “Media concentration trends in central and eastern Europe”, in K. Jakubowicz and M. Sükösd (eds.), *Finding the Right Place on the Map: Central and Eastern European media change in a global perspective* (2008) 165.

2. The media landscape in Croatia

The diversity of the media landscape in Croatia is manifested in a large number of different information sources as well as in the fast changes of their structural, technological and content characteristics. However, due to concentration trends it is not always clear whether these numerous sources reflect diverse opinions and critical views or just differ in the mode and area of their expression. This is seen in the oscillating number of printed media that also show signs of frequent content changes. Reliable figures on sold copies and generated income are hard to obtain. Competition is high but there are also trends of growing concentration. In this respect the printed media market is at the same time dynamic and not easily surveyed. Radio is regionally structured and with strong regional competition. National radio public channels have a very small audience share. Television, on the other hand, is the most widespread medium with two public service broadcasters (PSB) and two commercial channels dominating the national audience share. Internet Protocol Television is increasingly diversifying the number of channels and the governmental strategy of implementation of Digital Television Broadcasting is currently under way. The number of Internet users is rising steadily and the competition between Internet portals is also increasing. Social media are among the most popular websites and Internet users favour them as information sources over television or newspapers. There are also several news agencies with diverging political orientations. According to the information by the Croatian Journalists' Association (CJA) the majority of journalists are highly educated.

2.1 The media market

The press

The number of newspapers, magazines, free press and other printed media has multiplied in the last twenty years or so and has also proved unstable, showing a tendency to frequent change. According to different sources the overall number of printed media currently oscillates between 850 and 2,525.

The daily with the highest circulation, *24 sata* (Twenty four hours) is a pure tabloid launched in 2005. It has a new, small format and brief news, and is sold at the lowest price of only 4,00 Croatian kuna, while the other dailies costs 7,00. *Večernji list* (Evening paper) is a conservative daily with a long tradition (founded in 1959), while *Jutarnji list* (Morning paper), founded in 1998 was initiated as its left centre alternative. Today it is difficult to identify its political leaning. *Slobodna Dalmacija* is a daily most popular in the Dalmatian region, and *Novi list* is similar in the Istria region. *Vjesnik* is a broadsheet still owned by the state with a very small circulation and with clear support for the government. In an attempt to categorise the dailies along the tabloid-broadsheet continuum, only two papers can be clearly classified: *24 sata* as a tabloid and *Vjesnik* as a broadsheet. *Novi list* can also be categorised as a newspaper with broadsheet elements, while the other dailies - *Večernji list*, *Jutarnji list*, *Slobodna Dalmacija* - are all hybrids. *Sportske novosti* is the only daily specialising in sport.

In 2009, the planned editions for the most popular daily newspapers were: *24 sata* – 215,000; *Jutarnji list* – 103,919; *Večernji list* – 142,000; *Slobodna Dalmacija* – 67,000; *Sportske novosti* – 41,148; *Novi list* – 47,000.

Data on sold copies and generated income is not easily accessible. The website of the *Styria Group*⁹ publishes data on its outlets, according to which *24 sata* sells 181,396 copies while 80,000 copies are distributed as a free afternoon edition; *Večernji list* sells 96,806 copies. However, this has to be taken with some reservation, since data from the media outlets are often geared to attracting advertisers. Similar data is not available on other websites of media outlets, nor are they accessible on the website of the Croatian Chamber of Economy (CCE).

The audience share for 2009, as visible from the research agency Puls, shows that the daily *24 sata* has the highest percentage of average issue readership (AIR)¹⁰ (31%), followed by *Jutarnji list* (13.6%), *Večernji list* (13.4%), *Slobodna Dalmacija* (6.8%), *Sportske novosti* (4.4%) and *Novi list* (3.9%). In addition, the average reach¹¹ of *24 sata* (60.7%) is followed by *Jutarnji list* (31.9%), *Večernji list* (30.4%), *Slobodna Dalmacija* (12.2%), *Sportske novosti* (11.1%) and *Novi list* (6.8%). According to the same source 44.7% of the sample does not read any final edition newspaper (AIR), while the average reach shows that 13.8% do not read any daily newspaper.

The AIR for weeklies in 2008 shows that the women's magazine *Gloria* is the most popular with 7.8% followed by the celebrity magazine *Story* (4.8%), the political weekly *Globus* (3.7%) and the other political weekly *Nacional* (3.1%). The average reach of these weeklies is: *Gloria* – 19.8%; *Story* – 12.0%; *Globus* – 9.1%; *Nacional* – 7.8%.

Nearly all major newspapers have a website that is free of charge. The only exception is *Novi list*.

The Austrian company *Styria Media International AG* owns the daily *24 sata*, *Večernji list*, and, since 2009, *Poslovni dnevnik* - a daily specialising in business and politics with a small number of printed copies.¹² Westdeutsche Allgemeine Zeitung Medien Gruppe (WAZ) is the biggest shareholder of Europapress Holding (EPH): it holds 50% of the shares and controls the largest part of the Croatian print market. The media tycoon and board director of EPH, Ninoslav Pavić, owns a large part; however the real ownership structure is not transparent, neither are their business activities. An example is the sale contract of *Slobodna Dalmacija*, previously owned by the state and sold in 2005 under dubious circumstances. The sale contract has been proclaimed confidential, even though there is frequent public pressure to reveal it. EPH owns *Jutarnji list*, *Slobodna Dalmacija*, *Sportske novosti* and the popular weeklies *Globus* and *Gloria*. EPH also has many Internet portals, a news agency (EPEHA) and a photo agency (CROPIX).

Notwithstanding the low transparency of the ownership shares it is evident that these foreign companies and their local subsidiaries dominate the Croatian print

⁹ Available at: <http://www.styria-international.com/en/firma.php?tochter=3> (last visited on 21/10/2010).

¹⁰ AIR – average issue readership, the percentage of respondents from the whole sample or target group that read the last issue of a certain daily newspaper. MEDIApuls, “Media report, dailies 2009”, unpublished commissioned research study.

¹¹ Average reach – the percentage of respondents from a whole sample or target group that read at least one issue of a certain daily newspaper over a longer period (last fourteen issues).

¹² According to the *Styria Group* website, it is 12,000, but according to the data on planned copies, collected by the CCE, it is 4,860 copies.

market. They have also transferred their competition and development strategies into the local market.

Due to the high number of print outlets, competition is high. The market of daily newspapers is regionally structured, while the magazines are nationally structured. However, there is a growing concentration of media ownership control by a small number of media companies. The estimation is that EPH holds around 60% of the total share in Croatia.

Radio

The total number of registered radio stations in Croatia is approximately 165 (more than 100 of them have Internet streaming). There are six radio stations with national reach; the public service broadcasting (PSB) stations - Croatian Radio 1, Croatian Radio 2, Croatian Radio 3; and three commercial stations - Croatian Catholic Radio (100% owned by the Croatian Bishops' Conference), Otvoreni Radio (owned by Adrimex (25%) and Media-Plan (75%)), and Narodni Radio (owned by Miroslav Drljača (20%), Juraj Hrvačić (60%) and Marko Perković (20%)). Seven PSB radio stations operate at a regional level in addition to 22 commercial regional stations. The rest are local.

According to the research agency Puls, data from 2009 show that Narodni Radio (a radio station predominantly playing folk music) has the highest average daily reach¹³ (10%), followed by Antena Zagreb (8.7%), Otvoreni Radio (6.1%), and the PSB Croatian Radio 1 (5%).

According to a study conducted in 2006 on the media market in Croatia, the radio market is regionally structured (the study on media markets in Croatia identified twenty one regional markets). Based on the Croatian average, local stations hold 47% of radio audiences, regional hold 18%, while national commercial stations hold 24%. Three national public channels have a joint share of 10% of the audiences. On average, in each region there are two or more strong radio competitors.¹⁴

Television

The terrestrial television broadcasters operating at the national level in Croatia include the PSB Croatian Radio-Television (HRT) with two channels, HTV 1 and HTV 2, and two commercial television broadcasters: RTL Television and Nova TV. In addition there are 13 local and 8 regional television broadcasters.

Nova TV entered the Croatian market in 2000. It is owned by the *Central European Media Enterprises* (CME). RTL Television, launched in 2004, has the following ownership structure: RTL Group (74%), Agrokor (13%) and Atlantic Grupa (13%).¹⁵

¹³ Radio daily reach is the percentage of the sample or target population that listens to the radio station for at least five minutes daily.

¹⁴ See: Z. Peruško and K. Jurin "The Croatian media market: regulation and concentration trends", unpublished study for the Media Division of the Council of Europe (2006).

¹⁵ Electronic Media Council, "Televizijski nakladnici" [Television publishers], available at: http://www.e-mediji.hr/nakladnici/televizijski_nakladnici.php (last visited on 21/10/2010).

The television market in Croatia is national and highly concentrated. In 2005, the average audience share of the first three television channels in Croatia was 92.22%, while all the regional and local television companies together had a share below 8%. In 2005, the public service broadcaster HRT had 53.97% of the audience share (HRT 1 – 38.18% and HRT 2 – 15.79%), while the commercial Nova TV had 13.48 % and RTL 24.77%.

Data from 2008 show a changing trend with a decrease of the audience share of the PSB (46.62%) and an increase in that of the commercial television companies: Nova TV (19.48%) and RTL (22.88%). It also shows that the regional and local televisions' audience share is increasing and is now around 11%.¹⁶

If the three television companies are compared in terms of genre coverage, the PSB HRT – in accordance with its public service role - has most broadcasting time devoted to news programmes (even though this percentage is low compared to other European PSBs), educational programmes, sports events, art and culture, religious programmes, history and other content that is considered to be of public interest. Nova TV focuses its output on movies, series and soaps, while RTL specialises in comedy, drama and light entertainment.

A research study¹⁷ on primetime news bulletins that included all three television companies in a comparative perspective (for 2005 and 2007/2008) showed that international news (de-linked from Croatia in any way) were lacking. In 2007/2008 the PSB news had 13.30% of their total number of clips devoted to international news, whereas Nova TV had 15.24% and RTL 17.79%, which was clearly insufficient. The same research confirmed a trend in the PSB that showed it was changing and adjusting to the commercial media in the battle for audiences and advertisers. In the period from 2005 till 2008, the number of crime stories has increased in all three television companies. In 2007/2008, the PSB had 9.90% of clips devoted to crime; Nova TV had 21% and RTL 18.4%.

The PSB is financed through the licence fee. Owners of radio and television receivers are obliged to pay an amount of 1.5% of the average monthly net salary of the employees in the Republic of Croatia, on the basis of the statistical data for the previous year. Other means of financing for the PSB are advertising, production of audiovisual and other services (web pages, teletext, on demand services, production of music, concerts etc.).

The PSB is currently faced with a multiple crisis: a financial crisis (due to dubious spending); an excessive number of employees (around 3,700); forms of censorship;¹⁸ and crises in the managerial structure (e.g. procedural problems in appointing the new General Manager).

The multi-channel environment is developing in Croatia. There are services such as Internet streaming and the services provided in cooperation with telecommunications companies, such as Video on Demand and Internet Protocol

¹⁶ According to AGB Nielsen's annual average audience share for television stations.

¹⁷ See: T. Perišin, "Televizijske vijesti: u potrazi za vrijednostima" [TV news: a quest for values] 14(2) *Medijska istraživanja* (2008) 63.

¹⁸ See: "Ravnatelj HRTa Vanja Sutlić opet prekoračio ovlasti (Kadija te tuži, kadija ti sudi ili Sutlić mimo odluka Etičkog povjerenstva)" [CRT Director Vanja Sutlić again oversteps his authorities (The judge accuses, the judge prosecutes or Sutlić oversteps decisions of the Ethic Board)], *Politika.com*, available at: <http://politika.com/ravnatelj-hrt-a-vanja-sutlic-opet-prekoracio-ovlasti-kadija-te-tuzi-kadija-ti-sudi-ili-sutlic-mimo-odluka-etickog-povjerenstva> (last visited on 21/10/2010).

a computer, while 57% of households have an Internet connection (the highest percentage of users, 61%, are located in the capital Zagreb and the surrounding area).

Cable connection is the most popular, used by 40% of the respondents; wireless connection is used by 29%, analogue dial-up by 19%, cable Internet by 5%, ISDN modem by 5%, mobile phone by 3%, and other connections by 5%. The dominant service providers are T-Com (72%), Optima, Optinet and B-Net (around 6% each), Iskon Internet and CARNET (around 5% each). The most frequent modes of Internet usage are search engines, information seeking, email usage and usage of social networks. The Internet is more used by men than women (51% versus 49%) and by the younger population.

The weekly reach²² of portals in 2009 shows that the website of the tabloid daily newspaper *24 sata* (www.24sata.hr) is the most popular with 14.4% of users; followed by NET – 12.4% (www.net.hr); INDEX – 11.8% (www.index.hr); T-portal – 10.9% (www.tportal.hr); NJUSKALO – 9.1% (www.njuskalo.hr); *Jutarnji list* – 8% (www.jutarnji.hr); *Večernji list* – 7.9% (www.vecernji.hr); and *Moj posao* - 6.8% (www.moj-posao.net). The most preferred web portal is NET (5.5%), followed by INDEX (3.9%) and T-portal (2.7%).

Social media online

According to the GfK research,²³ approximately 850,000 citizens use social network sites (SNS). Some 19% of Internet users use the Internet because of SNS. However, SNS are but one aspect of social media and other types are largely unaddressed for research in social science or market research in Croatia. Some data is available through specific international web services. Alexa²⁴ places SNS Facebook (facebook.com) second on the “top sites” list in Croatia which confirms the aforementioned usage statistics. Video sharing service YouTube (youtube.com) comes in fourth and Wikipedia, the collaborative web-based encyclopaedia project (wikipedia.org), is in ninth place. The weblog publishing tool Blogger (blogger.com) has the fifteenth place and SNS and micro-blogging service Twiter (twitter.com) is number twenty one. According to the latest research, Internet users place the highest trust on Wikipedia as an information source (61%) followed by television (53%) and newspapers (49%).²⁵

There is also a noticeable trend of other websites using Facebook as part of their marketing strategy to improve Google search results. As an example, the *Jutarnji list* news web portal (jutarnji.hr) may be mentioned, since this portal has been one of the first to introduce direct commenting on its articles through Facebook.

²² Defined as the percentage of respondents from the whole sample or target group, that visited certain web portal in the last seven days.

²³ GfK Croatia, “Gdje smo danas u informatičkoj pismenosti?” for 2009. Based on a representative sample of citizens older than 15 years (n=1000).

²⁴ “Top sites in Croatia”, available at: <http://www.alexa.com/topsites/countries/HR> (last visited on 21/10/2010).

²⁵ “Hrvata na Facebooku više od Slovenaca i Austrijanaca” [More Croatians on the facebook than Slovenians and Austrians], [vecernji.hr](http://www.vecernji.hr/vijesti/hrvata-facebooku-vise-slovenaca-austrijanaca-clanak-185913), 01/09/2010, available at: <http://www.vecernji.hr/vijesti/hrvata-facebooku-vise-slovenaca-austrijanaca-clanak-185913> (last visited on 21/10/2010).

News agencies

HINA²⁶ was the first Croatian news agency established by the Croatian News Agency Act (OG 96/01) in 1990. The new Act on HINA passed in 2001 enabled its transformation from state to public status. The funds of the agency are mainly ensured by agreements with the state and other users of its services. The agency offers multimedia services, a photo and audio service, and an electronic data base (EVA). It employs 160 people, of whom 130 are journalists and editors, with around 60 foreign correspondents. The position of journalists is further regulated through the statute and the collective agreement. HINA is a member of the European Alliance of News Agencies.

STINA²⁷ is a news agency based in Split, founded in 1991 with the aim of providing an alternative to the nationalistic and state discourse that prevailed at the beginning of the 1990s. It mainly focuses on the region and eastern and central Europe. It has a network of fifty correspondents, and has developed projects linked to information and educational topics.

IKA²⁸ is a Catholic news agency, founded in 1993, owned by the Croatian Bishops' Conference. It gathers and distributes information linked to religious matters. It has a correspondence with Catholic agencies worldwide.

EPEHA (news agency) and CROPIX (photo agency) were founded within the EPH Group and supply their own outlets with information.

2.2 Media literacy and media status in society

Media consumption in Croatia is clearly marked by the domination of electronic media, particularly television, and by the decline of the influence of printed media. Electronic media and media online are ever more easily accessed, but the involvement of the citizens in online content production is low.

Croatia is a country of about 4,435 million inhabitants. Age structure according to the 30 June 2008 estimate is the following: 0-14 years – 15.4%, 15-64 years – 67.3% and 65 and over 17.3%. According to the 2001 census the illiteracy rate was 1.8%, or 0.7% of the male population and 2.8% of the female population.²⁹

According to the research (N=1000) conducted by the research agency Media Meter and the Faculty of Political Science (University of Zagreb) at the end of 2009 (“Croatian Journalists and Media in the Eyes of the Citizens: Credibility, Trustworthiness, and Impact”)³⁰, the most credible sources of information are the Internet (45%), radio (39%), television (35%), magazines (30%) and weeklies (31%), and finally dailies (24%). Citizens are more inclined to trust foreign media while, in the national context, they are more inclined to trust local media than the national ones.

²⁶ See HINA, official website, available at: <http://websrv2.hina.hr/hina/web/index.action> (last visited on 21/10/2010).

²⁷ See STINA, official website, available at: http://stina.hr/index_en.htm (last visited on 21/10/2010).

²⁸ See IKA, official website, available at: www.ika.hr (last visited on 21/10/2010).

²⁹ Central Bureau of Statistics, “Statistical yearbook 2009”, available at: www.dzs.hr (last visited on 21/10/2010).

³⁰ See: “Hrvati vjeruju internetu i radiju, novinama i televiziji ne” [The Croats trust internet and radio, not newspapers and television], JutarnjiLIST, JutarnjiLIST, 05/11/2009, available at: <http://www.jutarnji.hr/gradani--novinari-su-pismeni--no-skloni-manipulaciji-i-senzacionalizmu/334731/> (last visited on 21/10/2010).

Of 19 social institutions the citizens trust the Church most (3.44 on a 1-5 scale), followed by scientists (3.36), educational institutions (3.32) and the army (3.25). Journalists occupy the eighth place with (3.27) while political institutions are the least trusted (2.21).³¹

2.3 Journalists' background and education

The only data available on journalists' background and education is from the CJA regarding their membership. In 2009, the CJA had 3,185 members, of which 3,047 are full members (1,725 employed, 714 freelancers, 527 retired, and 81 journalists with an inactive status). There are 1,326 female and 1,859 male members in the CJA. According to the level of education members are distributed in the following categories: 19 members have a PhD, 44 have a master's degree, 1,691 have a bachelor's, 173 have other forms of higher education, 1,233 have accomplished secondary school, and 25 have no adequate education. Around 60% have accomplished higher education.

Media-related studies are developed within two institutions at the University of Zagreb: the Faculty of Political Science - Journalism Studies, and University of Zagreb Croatian Studies - Communication Studies. The University of Dubrovnik (founded in 2003) has the Department of Communication Studies. In addition to these public institutions there are private higher education institutions that are oriented towards journalism practice, such as the Journalist School, formed within the NCL Group (owner of the political weekly *Nacional*) in which education lasts for three years. There are also short programmes for journalist training, for example those of the International Centre for the Education of Journalists (ICEJ).

3. Media policy in Croatia

A national media policy has never been elaborated. Most media policies are developed and implemented through the mandates and activities of the state bodies and organs involved in media regulation or through media companies present in the media market. The communication and cooperation among these actors is rare and occasional while the eventual impacts of their interactions on media policies are not quite clear.

The main state and non-state actors involved in the media policy processes are presented in the following text, as well as the key legal provisions and acts that define and regulate freedom of expression and information. Some inadequacies of the legal acts are emphasised so that this sub-section is concluded with an assessment of access to information and freedom of the press. Structural regulations are examined in the sub-section that follows. Requirements and concessions for the establishment of media service providers are evaluated as well as transparency of the ownership structure, concentration restrictions and market competition. Considerations on content regulations follow to show that although considered adequate for electronic media, these regulations fail to address printed media. Quota rules and advertising

³¹ See "Istraživanja: Hrvati, većinom kseno i homofobi, najviše vjeruju Crkvi i Internetu" [Research: The Croatians, mostly xeno and homophobes, trust mostly the Church and Internet], Manjgura, available at: <http://manjgura.hr/mediji/istrazivanja-hrvati-vecinom-kseno-i-homofobi-najvise-vjeruju-crkvi-i-internetu/> (last visited on 21/10/2010).

regulations are presented, as well as defamation and libel rules. New provisions for electronic publications are discussed in line with adequate legal acts. Access to information and protection of journalists are also examined. The chapter concludes with the overview of media policy tools not mentioned previously, but which influence the overall media policy in Croatia.

3.1 Actors of media regulation and policy

The Croatian Parliament, the Croatian Government, the Ministry of Culture, the Ministry of Sea, Transport and Infrastructure as well as specialised agencies and councils are involved in media regulation and policy.

The *Ministry of Culture* is the central state administrative body which has responsibility for creating the legislative framework in the media field. Pursuant to Article 15 of the Central State Administrative Bodies Act,³² the Ministry of Culture deals with administrative affairs in the area of public information. These affairs include various activities such as drafting of media acts and giving legal opinions and interpretations of provisions of the media acts. These duties are discharged by the Media Department of the Ministry of Culture. However, the Ministry of Culture is not in the position to influence the independence and functioning of the media organisations and companies directly, but its indirect influence is nevertheless rather strong. Its task is to provide for the clear and effective legal framework which has to be practically implemented. The Croatian media legislation was assessed as fully harmonised with the European media standards and the *acquis communautaire*.

The *Electronic Media Council* (EMC) is a body of the Electronic Media Agency which is responsible for regulatory tasks. The EMC is established by the new Electronic Media Act (EMA)³³ as an independent regulatory body in the field of electronic media. The EMC has seven members (including the president) appointed by the Parliament, upon recommendation from the Government, with a mandate of five years. It is financed with 0.5% of the total annual gross income gained in the previous year by all media service providers offering and engaging in audio and audiovisual media services. The tasks of the Council are to conduct the procedures for granting concessions and licences; implement provisions relating to the protection of pluralism and diversity; ensure the supervision of implementation of provisions on programme principles and obligations; consider the complaints of citizens on the media service providers' behaviour; cooperate with regulatory bodies of other states and the European Commission. The EMC has an important and powerful role in media regulation, especially in the regulation of commercial television. It has at its disposal an administrative service mandated to monitor programmes of electronic media. However, the work of this service is not transparent enough and it is sometimes inadequate. Infringements of EMA are clearly visible, but there are no repercussions for the media organisations that do not respect its provisions.

The *Ministry of Sea, Transport and Infrastructure* (MSTI)³⁴ is responsible for electronic communications. The MSTI creates strategies for the technological

³² OG 199/03, 30/04, 136/04, 22/05, 44/06, 5/08, 27/08 and 77/09.

³³ OG 153/09, available at: http://www.e-mediji.hr/propisi/zakonski_akti.php (last visited on 21/10/2010).

³⁴ See Ministry of Sea, Transport and Infrastructure, official website, available at: www.mmpi.hr (last visited on 21/10/2010).

development of electronic communication in Croatia and monitors its implementation. The national regulatory body is the Croatian Post and Electronic Communications Agency (CPECA), a public agency in charge of sustainable competitive conditions in the market, the monitoring and regulation of prices and the general business requirements in the electronic communication market. The Agency is also in charge of market analysis; it defines the rights and obligations of telecommunication operators and decides on the allocation, transfer and withdrawal of licences. It also creates the radio frequencies plan, manages the technical maintenance of the radiofrequency spectrum, monitors the implementation of ECA and cooperates with the EU regulatory bodies and other legal entities. The CPECA reports its annual activity to the Croatian Parliament and to the Government. Funds for carrying out these tasks are secured from various fees (for the use of addresses and numbers, the use of radio-frequency spectrum etc.) and from a percentage of the total annual gross revenue earned by operators in the previous calendar year through providing electronic communication networks and services in the market.

*The Parliamentary Committee on Information, Computerisation and the Media (PCICM)*³⁵ of the Croatian Parliament participates in the enactment of legislation in the field of media, and monitors the implementation of media policy.

The regulatory body for market competition is the *Agency for Market Competition Protection (AMCP)* and the *Council for Market Competition Protection (CMCP)* that operates within the agency. The CMCP consists of five members appointed by the Croatian Parliament upon recommendation from the Government.

The area of audiovisual activities is within the purview of the Ministry of Culture. The public regulatory body is the *Croatian Audiovisual Centre (CAC)*,³⁶ financed through the state budget and its own activities. Among other tasks, the CAC issues public calls for applications for funding of audiovisual production.

The *National Programme for the Promotion of Audiovisual Activity* adopted by the Minister of Culture for a four-year period, aims to define a framework for the stimulation of audiovisual activities. It is funded through the state budget and a part of the annual gross income derived from the exercise of audiovisual activities by: Croatian Radio-Television (2%); broadcasters of television programmes at the national level (0.8%); broadcasters of television programmes at the regional level (0.5%); operators of cable distribution systems (0.5%); operators in fixed and mobile telecommunications networks and Internet providers (1%); and individuals who display audiovisual work in public (0.1%).

The *Croatian Journalists' Association (CJA)* is a professional association of journalists which has over three thousand members. It is a member of the International Federation of Journalists (IFJ). The main goals of the CJA are as follows: fulfilling of the professional interests, ethical standards and ensuring the freedom of public expression; promoting the constitutional right of the public to be informed on all events in the society and the right of any person to the freedom of expression, opinion and accessibility to the public media; protection of the honour and dignity of the profession; protection of journalists against the self-will of publishers and preventing monopoly; material and social protection of journalists. This

³⁵ See Croatian parliament, page of the Parliamentary Committee on Information, Computerisation and the Media, available at: <http://www.sabor.hr/Default.aspx?sec=2665> (last visited on 21/10/2010).

³⁶ Croatian Audiovisual Centre, official website, available at: http://www.havc.hr/index_eng.php?menu_id=9 (last visited on 21/10/2010).

Association has an Assembly as the main administrative body, which elects a President, Executive Board, Supervisory Board, Council of Honour and some members of the Administrative Board of the Solidarity Fund. The CJA has a significant influence in the media policy formulation and implementation due to the activities of its members, as well as due to the participation in drafting of past and current media legislation. Its assessments of particular issues related to the media freedom are crucial in shaping of public opinion and initiating necessary steps for legislative changes. Its Council of Honour has a significant role in maintaining high ethical standards in the journalists' profession.

The *Croatian Journalist Union (CJU)*,³⁷ founded in 1990, has more than 3,000 members. Its activities include the free provision of legal advice in labour disputes between media owners and journalists. The CJU also negotiates collective work agreements for journalists and media workers with the state and media owners at the national level, in order to protect all workers, especially those working in small local media and part-time media associates. This association has raised issues regarding the worsening of the position of journalists in Croatia, as they have been increasingly subjected to precarious work, with short-term contracts, which keeps them in a constant position of insecurity. At the same time, media owners profit by avoiding paying social benefits (which is a backlash not only to journalists, but to the state's taxation system as well). This has serious repercussions on the quality of journalists' work and media performance in general.

The *Croatian Helsinki Committee*, established in 1993, has played a role in the monitoring of the freedom of information and expression.

The *Centre for Media and Communication Research*, established in 2007 at the Faculty of Political Science of the University of Zagreb is the university centre for the study of media and communication. It collects analyses and evaluates information on media.

3.2 The media regulatory framework

3.2.1 Freedom of expression and information

The Constitution of the Republic of Croatia³⁸ guarantees freedom of speech and is thought in accordance with Article 19 of the Universal Declaration of Human Rights³⁹ (UDHR) and Article 10 of the European Convention on Human Rights (ECHR).⁴⁰ The Constitution (Article 38) defines the freedom of expression in its full complexity guaranteeing its main components: freedom of the press and other media communication, freedom of speech and public expression as well as the right of free establishment of all institutions of public communication. This constitutional provision forbids any form of censorship. It also guarantees the right of correction to anyone whose constitutional and legal rights have been violated by public

³⁷ See Croatian Journalist Union, official website, available at: <http://www.snh.hr/> (last visited on 21/10/2010).

³⁸ OG 56/90, 135/97, 113/00, 28/01 and 55/01- corrigendum.

³⁹ United Nations, "The universal declaration of human rights", available at: <http://www.un.org/en/documents/udhr/> (last visited on 21/10/2010).

⁴⁰ See Human Rights Education Associates, "Convention for the protection of human rights and fundamental freedoms as amended by Protocol No. 11", available at: <http://www.hrea.org/erc/Library/hrdocs/coe/echr.html> (last visited on 21/10/2010).

information. In Article 39 of the Constitution, incitement to war, violence, national, race or religious hatred, and any other type of intolerance is prohibited. These constitutional provisions lay down the legal basis which is further elaborated in the media legislation.

In the spirit of the above mentioned constitutional provision, Article 3 of the Media Act (MA)⁴¹ states that the freedom of expression and freedom of media shall be guaranteed. This article even further deepens the meaning of the freedom of media stating that the freedom of media is particularly based on: freedom of the expression of opinion, independence of media, freedom of collecting, researching, publishing and disseminating information for the purpose of informing the public; pluralism and diversity of media, free flow of information and openness of the media for different opinions, beliefs and for various contents, accessibility to public information, respecting the protection of human personality, privacy and dignity, freedom of establishing legal persons for the performance of all media, printing and distribution of press and other media from the country and abroad, production and publishing of radio, television and other electronic media, autonomy of editors-in-chief, journalists and other authors of programme contents in compliance with professional codex. The limitation of the freedom of media shall be permitted only when and as necessary in a democratic society, in the interest of national security, territorial integrity or public peace and order, prevention of disorder or criminal acts, protection of health and morality, protection of the reputation or rights of others, prevention of disclosing confidential information or for preservation of the authority and impartiality of the judiciary exclusively in the manner stipulated by this Law.

This declaratory provision covers all aspects of freedom of expression, but it lacks its full elaboration in the MA. From the observations of the public and experts it can be concluded that the improper regulation of issues such as respecting the protection of human personality, privacy and dignity could be stated as the main shortcoming of this Act.

The protection of interests such as human personality, privacy and dignity often compete with freedom of expression. Yet these interests should not always triumph over freedom of expression. However, the lack of journalists' and editors' professionalism in treating very delicate private matters has often been the stumbling block to the implementation of the formally correct legal norms which need to be backed by further elaboration of the rules for their enforcement. This points out to another very serious problem: the lack of any sanctions for the breach of the guaranties defined by this Act.

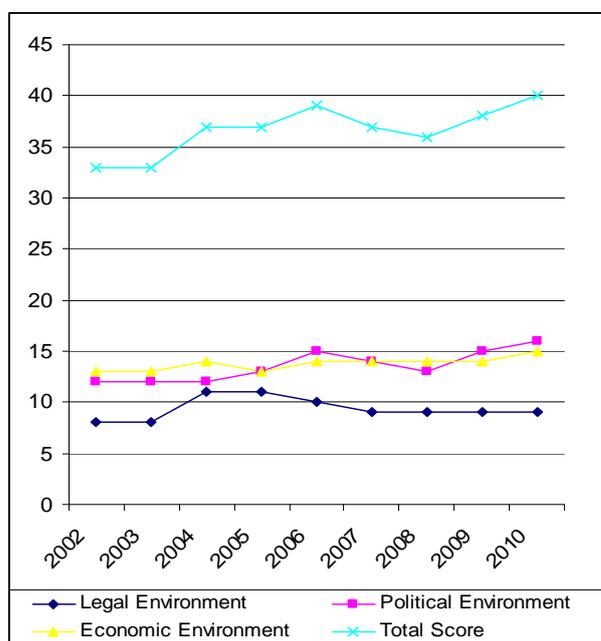
Under the pressure of some international organisations that monitored the drafting of the MA and which were concerned with political influence on the media, a provision was incorporated in Article 1(2) of the MA, according to which the provisions of this Act shall be applied and interpreted in line with the ECHR. According to Article 10 of that Convention the right of freedom of expression includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, the MA cannot provide for the full implementation of this provision since it lacks the needed application rules and measures as well as criteria of media freedoms. The Act does not even prescribe the obligation for the media publishers to publish truthful,

⁴¹ OG 163/03, 59/04, available at: <http://narodne-novine.nn.hr/clanci/sluzbeni/306926.html> (last visited on 21/10/2010).

complete and timely information respecting the right of the public to be informed about events, phenomena, persons, things and activities as well as the rules of journalists' profession and ethics. The issues of the truthful and complete information as well as obeying the rules of journalists' profession and ethics regularly arise as the unsolvable problems in the implementation of this Act.

The same importance to the Convention is attached in the wording of Article 2(4) of the Electronic Media Act (EMA)⁴² which states that the ECHR shall apply to the relations governed by that Act. Article 3 of the EMA states that the freedom of expression as well as the freedom of full programmes of electronic media shall be guaranteed. Article 8 stipulates that the Republic of Croatia shall ensure the freedom of transmission and reception of audio and audiovisual media services from the EU Member States and other European states party to the European Convention on Transfrontier Television of the Council of Europe and that it may, in particular cases, restrict the freedom of broadcasting of those services only in compliance with international agreements and this Act. EMA incorporates the provisions of the Audiovisual Media Services Directive and formally guarantees to the media service providers the right to design programmes independently. It also envisages their liability for the programme. Their eventual exposure to indirect interference of their owners or co-owners e.g. local and regional units of self-government, cannot exclude them from legal responsibility.

The Republic of Croatia is a party to the European Convention on Transfrontier Television which in Article 4 regulates that the Parties shall ensure freedom of expression and information in accordance with Article 10 of the ECHR and that they shall guarantee freedom of reception and shall not restrict the



retransmission on their territories of programme services which comply with the terms of this Convention. There have been no cases of restricting the freedom of reception and retransmission of programme services in the Republic of Croatia.

Even though the legal framework ensures freedom of expression, political pressures are still occasionally present. Criticism of the establishment still has repercussions. Powerful media moguls and entrepreneurs guard the mediated sphere and diminish the space for critique. This is particularly problematic for small media outlets that are critical and

focus on investigative journalism.⁴³ Needless to say, this reduces media diversity.

⁴² OG 122/03, 79/07, 32/08, 153/09, available at: http://www.e-mediji.hr/propisi/zakonski_akti.php (last visited on 21/10/2010).

⁴³ The *Feral Tribune* - a critical weekly - did not manage to attract advertisers because they could not afford to be associated with the paper; they were threatened by large players that were often the target of criticism in the *Feral Tribune*.

Another problem is access to information. Public institutions retain a closed position towards the public, regardless of the regulatory provisions in the Access to Information Act (AIA)⁴⁴ that guarantees access to public sources. This creates difficulties in journalists' work. The pilot research, ordered by the CJA and the Association for Independent Media Culture, showed that most of the journalists were denied access to information (73%), by ministries and public institutions (schools, hospitals, faculties, social institutions). The denial of access was usually not explained but was brushed aside with the excuse of "not having the information". The average period of waiting for an answer was around two weeks. However, even though most of the journalists stated that they are familiar with the AIA, they never used it as an argument for their enquiry.⁴⁵ The Freedom House analysis for 2010⁴⁶ puts Croatia on the 85th place in the global press freedom rankings (196 states), and gives it a "partly free" status. This low ranking is partially a result of the killing of two journalists in October 2009. However, the "partly free" status seems to be relatively stable with a slight tendency to worsening. The above chart clearly demonstrates such a tendency by showing the scores for legal, political and economic environment for Croatia in the period from 2002 until 2010.⁴⁷ The legal environment tends to be most stable which can lead to the conclusion that the implementation is the main problem.

3.2.2 Structural regulation

In the Republic of Croatia any natural or legal person may establish a newspaper publisher or other media services provider. According to Article 11 of the Media Act (MA) and Article 2 of the Electronic Media Act (EMA) a newspaper publisher, radio and television broadcaster and other media service providers may be established and entered into a court or other register as a legal or natural person, provided that the legally stipulated conditions have been met and that they have a seat, i.e. a permanent residence and the editor's office seat in the Republic of Croatia. The press registration is required. A newspaper publisher is obliged to report the publishing of the press in the Register kept by the Croatian Chamber of Economy. This model of establishing newspaper publishers and other media services providers meets all democratic standards and corresponds to the right of establishment criteria in the EU. Governmental bodies do not have any role in establishment of publishers and broadcasters.

According to Article 22 paragraph 1 of the EMA, providing television and/or radio media services may be performed by legal and natural persons (television and/or radio broadcasters) entered in the court register or other register prescribed in the Republic of Croatia in accordance with this Act and separate regulation. Operators must have obtained a concession and concluded a concession contract in accordance

⁴⁴ OG 172/03, available at: <http://narodne-novine.nn.hr/clanci/sluzbeni/307079.html> (last visited on 21/10/2010).

⁴⁵ The research was conducted by the sociologist Snježana Beros. See H-Alter, "Kokoši na tri noge" [Three-legged chicken], available at: <http://www.h-alter.org/vijesti/mediji/kokosi-na-tri-noge> (last visited 22/10/2010).

⁴⁶ Freedom House, Freedom of the press 2010, "Table of global press freedom rankings", available at: <http://freedomhouse.org/images/File/fop/2010/FOTP2010Global&RegionalTables.pdf> (last visited on 21/10/2010).

⁴⁷ For yearly analyses see Freedom House, Freedom of the press, available at: <http://www.freedomhouse.org/template.cfm?page=16> (last visited on 21/10/2010).

with the EMA and the Concessions Act (CA).⁴⁸ The Electronic Media Council (EMC) as an independent regulatory body conducts the procedure of granting concessions in compliance with the EMA, the CA and the ordinance referred to in Article 73(3) of the EMA. The EMC enters into a concession contract with the most advantageous tendered pursuant to the EMA. Also the EMC conducts the procedure of granting licences for providing audio and/or audiovisual media services on demand and satellite, Internet and cable transfer of audiovisual and/or radio programmes. This procedure of granting the concessions and licences, clearly prescribed by the EMA, satisfies the necessary criterion of transparency.

The protection of pluralism and diversity in the media finds its realisation through a number of measures prescribed by the media legislation. Since the application of general competition rules are not sufficient to guarantee the observance of demands concerning cultural and media diversity and the pluralistic expressions of ideas and opinions, the most important measures for the protection of these values prescribed by the media legislation are the transparency of ownership structure and prohibition of the impermissible concentration.

The media legislation guarantees transparency of ownership structure by imposing the obligation of publishing in the official gazette data on stock holders and share holders every year. According to Article 37 of the MA an impermissible concentration of enterprises in the market of general information daily newspapers or general information weekly magazines shall be considered to exist if the market share of participants in that particular enterprises' concentration exceeds 40% of all sold copies. This restriction imposed to the newspaper publishers was at the time of the adoption of this law criticised as an inappropriate threshold in a rather small Croatian print market. However, there were no proposals for its removal or imposition of a harsher measure that would eventually allow for an increase of the sold copies.

The EMA (Article 54) regulates impermissible concentration taking into account the horizontal integration phenomena as well as vertical integration phenomena. Article 54 precisely regulates the impermissible concentration in the areas of TV and radio broadcasting and print media.⁴⁹

According to Article 60(1) of the EMA a legal person whose activity is collection, shaping and mediation in advertising, as well as a natural or legal person, or a group of connected persons, that has more than 10% of the ownership share in the capital of an advertising company, i.e. property of that sort, or has more than 10% of management or voters' rights, may not be a television and/or radio broadcaster and/or founder of radio and/or television broadcaster, nor can it have ownership of stocks or shares in the capital of the television and/or radio broadcaster. According to Article 61

⁴⁸ OG 125/08, available at: <http://narodne-novine.nn.hr/clanci/sluzbeni/306318.html> (last visited on 21/10/2010).

⁴⁹ It regulates concentration for TV and/or radio broadcasters with a concession on state level in relation to other broadcasters on the regional, county, city or municipality level; in relation to publishers of daily newspapers; in relation to a legal persons who perform the activity of a newspaper agency; the television and/or radio broadcaster with a concession on state level which simultaneously publishes daily newspapers; television and/or radio broadcaster with concession at the local or regional level in relation to other broadcasters at the local or regional level; television and/or radio broadcaster with concession at the local or regional level who simultaneously publish daily newspapers; the media service provider who has the licence for satellite, Internet and cable transmission and who simultaneously publishes daily newspapers; the media service provider who has the licence for satellite, Internet and cable transmission and who has a certain share of the capital of a publisher who publishes daily newspapers.

of the EMA an operator who performs the activity of audiovisual and/or radio programme transmission may not be the television and/or radio broadcaster as well as the media service provider who has the licence for satellite, Internet and cable transmission of the audiovisual and/or radio programme or other permissible ways of transmission. The mentioned provisions on ownership and concentration also apply to foreign legal and natural persons, regardless of the state in which they have their seats, i.e. permanent residence.

The regulations on the protection of competition, through the Market Competition Protection Act (MCPA)⁵⁰, also apply to publishers, legal persons engaged in media distribution, and other legal persons performing tasks related to public informing as well as to media service providers. This Act generally regulates the abuse of dominant position and incompatible concentration and represents the additional tool for the protection of plurality and diversity in the media sector.

However, some of these provisions have been criticised by the Croatian Chamber of Economy (CCE), engaged in the collection of data. The CCE argues that there is no official classification of relevant markets, which results in figures on market shares being calculated in an arbitrary manner. Furthermore, the monitoring of the provision according to which media owners have to make their data public is not regulated and nobody knows whether this is implemented or not. The overall evaluation of the MA is that it is outdated and needs to be written in accordance with new developments in the media sphere.

3.2.3 Content regulation

Regarding general content requirements designed to satisfy citizens' information needs and ensure equal media access for diverse points of view, the Croatian media legislation regulates these questions in a satisfactory manner, especially in relation to the commercial electronic media. However, there is a lacuna in the Media Act (MA) in relation to the obligation of the printed media since this Act does not prescribe the obligation for the media publishers to publish truthful, complete and timely information respecting the right of the public to be informed about events, phenomena, persons, things and activities.

This Act does not regulate the printed media principles and obligations regarding the citizens' information needs and the equal media access for diverse points of view.⁵¹ In spite of the fact that it provides for the journalists' right to express their standpoints regarding all events, occurrences, persons, subjects and activities, it fails to ensure the adoption of self-regulatory media statutes that should enable journalists to exercise these rights by regulating relationships between the publisher, editor-in-chief and journalist as well as their mutual rights and obligations. The media statutes should be defined within the first six months of the media organisation's establishment and operation. If this is not the case, it should be defined through an arbitration procedure requested by the journalists' representative. However, it is suspected that almost none of the media organisations have followed this regulation, and this is a problem that has been raised by the CJU.

⁵⁰ OG 48/95, 52/97, 89/98, 122/03, 79/09, available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2009_07_79_1877.html (last visited on 21/10/2010).

⁵¹ In light of the freedom of expression guarantees, the state refrains from intervening in the regulation of contents.

The publishers in the Republic of Croatia are free to establish the programme basis of the media independently. Prior to a change or important supplement to the programme basis, the publisher is obliged to obtain the opinion of the editorial board (MA, Article 14). According to Article 7(1) of the Electronic Media Act (EMA), media service providers, in compliance with this Act, independently form the programme basis of the media and are liable for the programme provision.

The question of the codes of conduct, ethics codes and codes on editorial freedom is generally regulated by the MA. A journalist has the right to refuse to prepare, write or participate in the drafting of a report, the content of which is contrary to the rules of the journalist profession and ethics, about which he will inform the editor-in-chief in writing. If a journalist refuses to act upon an order because, by doing so, he would break the rules of the journalists' profession, the employer may not terminate his working contract, decrease his salary or alter his position in the editorial board. If in case of a dispute journalists express facts which justify the doubt that the termination of the working contract, decrease of salary or altered position in the editorial board is the consequence of refusing to act upon order, the burden of proof falls on the publisher (MA, Article 28). The ethics code has been established by the Croatian Journalists' Association, but it has been regularly breached since this organisation has not a clout to actively enforce the ethics rules among its members.

Regarding quota rules and obligations to invest in content production, the EMA imposes on the broadcasters the obligation to ensure broadcasting a prescribed portion of own production, European works and audiovisual works of independent producers. According to the Draft Proposal of the Croatian Radio Television Act (CRTA), the Croatian Radio Television will have a significantly higher quota and obligations regarding the mentioned works than the commercial broadcasters. These rules are generally observed except the quota for the own production which has been breached in prime time by commercial broadcasters. The new EMA has lowered this quota in order to accommodate economic potential of the broadcasters.

The current CRTA (2003) emphasises the importance of balanced broadcasting of information, culture, education and entertainment. The content has to be of interest to the public, defined as political, economic, social, health, cultural, educational, scientific, religious, ecological, sport and other events that facilitate an open and free debate. CRTA stresses that attention has to be given to specific groups such as the Croatian diaspora, national minorities, children and youth, and people with disabilities. More than 55% of the programme has to be produced in the Croatian language (particularly movies, documentaries, cartoons and entertainment), while 50% of the remaining programme has to be in a European language or of European production. (Article 10) A minimum of 10% of the television programme has to be produced by independent producers (exceptions are news, sports events, games and advertisements) (Article 11).

Radio and television broadcasters operating at regional and local levels have to devote 10% of their total weekly programme to news. National operators have to include 30 minutes of news programme daily, with one news bulletin at least 20 minutes in length (EMA, Article 36). The television broadcaster has to devote 20% of its daily programme to its own production, while the similar quota for radio broadcasters is 30% of their daily programme. Radio broadcasters also have to play 20% of Croatian music daily (EMA, Article 39).

European audiovisual works (which includes Croatian audiovisual works and own production) need to comprise the majority of broadcasting time. In order to fulfil this requirement, the broadcasters annually have to increase it by 20%, compared to the previous year. (EMA, Articles 40, 41, 42). This does not include news, sports, games, advertisements, teletext and telemarketing. Independent production has to comprise 10% of annual broadcasting time (EMA, Article 44).

A new draft of the CRTA has been prepared and was a matter for public debate in April 2010. The main reason for change is harmonisation with EU regulations, particularly concerning the protection of market competition which aims to ensure that public services are clearly separated from the commercial activities of the PSB. In this respect the law has to be harmonised with the Rules on State Subsidies for Public Broadcasting Services⁵² through which the public function of the PSB has to be more precisely defined.

The act needs to be changed in respect to technological innovations that enable diversification of services through different platforms of distribution. New regulations are needed that would be in accordance with the new EMA. The proposed draft introduces a five-year contract between the CRT and the Croatian Government that would define the financial assets needed to fulfil the contractual programme-related units. Funds gained through state subsidies (licence fees) can only be used for the costs of maintaining the public service. The envisaged changes diminish the role of the Programme Council, particularly to the domain of programme monitoring and the appointment of editors, while the Supervisory Board takes over the appointment of the general manager and financial supervision. So far the consensus on the draft act proposal and the way the PBS should operate in future has not been reached.

Advertising is regulated in the MA (Article 20) and relates to all media. It is also regulated in the EMA (for all electronic media) and the CRTA⁵³ for public service broadcasting. Regulation is in line with the current European standards and the EU legislation. The essential change is expected as regards the Croatian Radio Television since the draft proposal of the CRTA significantly shortens the duration of commercials in each of the HRT programmes in television programme channels, especially in prime time which will undoubtedly improve the market position of the commercial broadcasters and their ability to invest more in their programme.

The Illegal Advertising Act (IAA)⁵⁴ applies to advertising rules linked to fair competition. The EMA (Article 16) prohibits covert audiovisual commercial communication and subliminal techniques. The overall duration of advertising and teleshopping for television broadcasters shall not exceed 12 minutes per hour. These can be inserted between and within a programme, but in such a way that the integrity and value of the programme and authors' rights are not violated. For non-profit media the overall time of advertising cannot exceed three minutes per hour (EMA, Article 48).

In respect to defamation and libel rules, in the light of the present legal provisions on the criminal offences of libel and defamation in Article 199, 200 and

⁵² OG 31/10, available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2010_03_31_726.html (last visited on 21/10/2010).

⁵³ OG 25/03, available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2003_02_25_362.html (last visited on 21/10/2010).

⁵⁴ OG 43/09, available at: http://narodne-novine.nn.hr/clanci/sluzbeni/2009_04_43_984.html (last visited on 21/10/2010).

203 of the Penal Code,⁵⁵ it is an accepted view that the criminal offences mentioned may be considered decriminalised since the current provisions prescribe a fine for the defamation as well as for press libel. However, the Penal Code expressly stipulates that there is no criminal action if a defamation or libellous content has been rendered in the journalist job with the exception of the behaviour that is only aimed at harming one's honour and reputation which can be clearly concluded from the way of expressing and other circumstances.

Also, according to Article 21(1) and (7) of the MA, the publisher who by publishing information in the media causes damage to another person shall be obliged to pay compensation, except in cases stipulated by that Act. If the information has been authorised, and certain parts thereof contain evident insults or libels, the authorisation shall not exclude joint liability of both the publisher and the editor in chief, if they failed to act in good faith.

According to Article 7 of the MA every person shall have the right to the protection of privacy, dignity, reputation and honour. A person performing public service or duty shall have the right to the protection of privacy except in cases related to public service or duty that he performs. A person who by his statements, behaviour and other acts relating to his personal or family life himself draws attention of the public cannot request the same level of the protection of privacy as other citizens. There shall be no violation of the right to the protection of privacy if in relation to the published information a justified interest of the public prevails over the protection of privacy with regard to journalist profession or information (Article 8). It is assumed that the protection of privacy is the weakest part of the Act because there is a widespread opinion that the media trespassing on someone's privacy happens too often without any responsibility on the part of the media.

According to Article 16 of the MA, the media shall be obliged to respect privacy, dignity, reputation and honour of citizens, especially of children, youth and the family. The publishing of information that discloses identity (e.g. of a child, of a witness) shall be prohibited. This provision is also regularly breached on the detriment of the children and young people without any consequence on the part of the media.

Concerning the rules for private websites, blogs, news groups and civic journalism, the EMA regulates *electronic publications* i.e. edited websites and/or portals containing electronic versions of printed press and/or media information thus being available to general public regardless of their volume. The Act forbids the hatred speech in the electronic publications as well as the contents which offend human dignity and contain immoral and pornographic content or might seriously impair the physical, mental or moral development of minors. The Croatian media legislation does not regulate private websites and blogs, although the rule that the hatred speech is not allowed on the private websites and blogs applies as a general rule deriving from other legislation.

The MA contains the rules regarding information gathering processes. Article 6 of the MA states as follows: "With the aim of publishing information through the media, bodies of executive, legislative and judiciary power and bodies of local and regional self-government units, as well as other legal and natural persons who

⁵⁵ OG 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07 and 152/08 (last visited on 21/10/2010).

perform public service and/or duty, shall be obliged to provide accurate, complete and timely information on issues from their scope of activity. Information held by the mentioned persons shall be accessible to journalists under equal condition” (MA, Article 6(1)-(2)). This issue is also regulated by the Access to Information Act (AIA). Generally speaking, these legal provisions regulating the access to information have not been fully observed so far by the private and public (state bodies, bodies of local and regional self-government) legal persons, which has added to the partial obstruction of the fulfilling of the media’s mission to inform citizens truthfully, completely and timely about the events, phenomena, persons, things and activities. This problem has been spotted as very significant so that amending of the AIA is under way.

The protection of journalists’ sources is also addressed by the MA in the way that it gives guarantees against the disclosure of the published information. In the specified cases which relate to interest of national security, territorial integrity and protection of the health the court may order the journalist to disclose data on the source of the published information or information he intends to publish. Although this provision was seen as an intrusion on the journalists’ freedom there has never been a request for its enforcement before the court. Furthermore, the courts have no means to enforce it since there is no fine prescribed in the law in case of the breach of such a court order.

By virtue of Article 3 of the MA limitation to the freedom of the media may be permitted only when and to the extent necessary in a democratic society in the interest of national security. This situation has never occurred in the Republic of Croatia even during the war in the 1990s. The same applies for the provision of the EMA that openly forbids the audio and/or audiovisual services jeopardising the constitutional order and national security [but this situation also has never happened].

3.3 Other media policy tools

The Fund for Promotion of Pluralism and Diversity of Electronic Media which is the Fund of the Croatian Electronic Media Agency (EMA, Articles 63 and 64) has a significant impact on the democratic functions of the media. The Fund’s means (3% from the CRT fee) are regularly used for stimulating the production and broadcasting of audiovisual and radio programmes of television and/or radio broadcasters at the local and regional levels which are of public interest and audiovisual and radio programmes of non-profit television and/or radio broadcasters (community television /radio). The financing from the Fund includes particularly programmes important for the exercise of citizens’ right to public information, promotion of cultural creativity and fostering of cultural heritage, development of upbringing, education, science and arts, promotion of works in dialects of the Croatian language, promotion of special programmes in areas of special state concern, national minorities in the Republic of Croatia, encouragement of the development of the awareness of gender equality, and promotion of programmes for children and youth aiming at enhancing their well being.

The Fund is also used for stimulating employment of highly qualified skilled employees in television and/or radio broadcasters at the local and regional levels and non-profit television and/or radio broadcasters. Notably, it is the only financier to a number of local broadcasters since they would not be able to operate without financial

means earmarked for their programmes. The role of the Fund is especially essential for the national minorities' media which broadcast in their languages. Grants are distributed once a year based on the public tender and prescribed criteria.

4. Media policy and democratic politics: an assessment

The deregulation in the media sector took place during the 1990s and started with the adoption of the *Act on Public Information* (1996) liberalising domestic media ownership. This Act did not contain any restrictions on the printed and electronic media ownership, which triggered the establishment of many new printed media. The media ownership restrictions for the printed media were imposed by the *Media Act (MA)* in 2003, in the form which is effective today. Two foreign TV companies entered the media market in 2000 and 2003, but the deregulation of the electronic media started in 2003 when the *Croatian Radio Television Act (CRTA)* prescribed the privatisation of the third channel of the Croatian Radio Television (CRT) which was allocated to the private company established by the foreign capital. In addition to the CRT, 24 television and 155 radio concessionaries are active in the Republic of Croatia today, while the number of electronic publishers has not been established. The number of printed media oscillates between 2,525 in 2008 and about 850 in 2010.

All political forces as well as the proponents of foreign investment supported deregulation in the media sector predicting a fast development and benefits for both the citizens and the media. However, the first results of liberalisation warned about the consequences of uncontrolled privatisation for the overall media landscape and the unrestricted concentration of cross-media was stopped. The *Electronic Media Act (EMA)* adopted in 2003 set forth the rules for the diagonal integration which was positively accepted by the public.

The transition to democracy significantly influenced the media and media policy in the 1990s. At that time the state influence on the media was evident especially as regards the CRT and the state owned newspaper *Vjesnik*. The local media owned by the local self-government units were also under the political aegis of local politicians. In 2003 the *CRTA* was adopted transforming the CRT from the state run television into the public television. Since then the political influence on the media has been losing its leverage and it has been slowly superseded by the pressure of different commercial interests. In the transitional context the links between the (foreign) commercial investors and the local political elites were at that time strong and functional. They were well harmonised in transferring the control over media to commercial interests which contributed to the establishment of the media market where the positions of new owners were privileged and in many respects favoured by the state. Today the forms of state intervention and control of media are not visible in the operation of the private media companies. Limited political influence can be exerted through the procedure of appointing the members of the governing bodies which can eventually promote certain political interests. The state retains its founding rights in the CRT, the Croatian Information and News Agency (HINA) and the newspaper *Vjesnik*. It financially supports the activities of *Vjesnik* and of HINA although the agency operates on the contractual basis with users of its services, while the CRT is financed through the radio-television fees and advertising. Political intervention is more visible on local levels where the local self-government units own and co-own a number of local media. The commercial interests are also entrenched in the media companies which depend on their advertising revenues and are compelled

to modify their standpoints accordingly.

Although the current media legislation protects pluralism and diversity of the media the fact that the media outlets earn their income in the market makes them vulnerable to the interests of commercial groups. Article 28 of the EMA expressly forbids state bodies and their representatives, as well as labour unions and various interest groups, to exert influence over television and/or radio broadcasters regarding the creation of audiovisual or radio programme. However, the current economic crisis induces some media to restore links with the state and political powers and to try to enter the Government programme for the economic recovery, which may have the worst possible impact on the media independence and functioning. The media is trying to survive through harsh conditions imposed by the recession. A number of media companies are running debts due to the current situation in the market. This adverse situation also has a negative impact on the work of journalists and their determination to work in line with the best professional and ethics practices.

The public service broadcaster, the CRT, is at the moment in the middle of the financial, organisational and editorial crises. The present situation in the public service may illustrate the adverse economic and legal developments. The CRT is currently indebted trying to cut its operational expenses. At the same time the public television is undergoing a crisis in terms of its leadership and editorship exposed to harsh inner tensions provoked by different interest groups. The Programme Council has not managed to appoint the director general of the CRT since December 2009 when the director general and other members of the CRT Management Board resigned under the pressure of the Programme Council. The company is currently run by the acting director general and acting members of the CRT Management Board. The Programme Council is also in the disarray whereas some of its members have submitted resignations to the Croatian Parliament. Now the CRT, which is a PBS, functions without supervision of the Programme Council, representing and protecting public interests, as well as without the regularly appointed Management Board.

At the same time the public television was to adjust its functioning and financing to the Communication from the Commission on the Application of State Aid Rules to Public Services Broadcasting (2009/C257/01). This adjustment demanded an additional effort to be invested in restructuring processes of the CRT, which prompted the Government to start the procedure of amending the CRTA. The Government has been drafting a new CRTA to be submitted to the Parliament for the second reading in the fall this year. The first draft was publicly debated in April 2010. It contained some controversial provisions, including the one stipulating that the Management Board should be appointed by a supervisory board nominated by the Croatian Parliament and proposed by the Government. In July 2010, during the first reading, a changed version envisaged that the civil society organisations and institutions should establish a programme council which would participate in appointing the management board together with the supervisory board. During the Parliament debate both position and opposition did not fully support the proposed concept, although they favoured the civil society participation in nomination of the programme council and management board. The new version of the CRTA is to be sent to the second reading with the intention to preserve the organisational and editorial independence of the public television, which would be a key democratic achievement in regulating its functions.

In parallel the Croatian Parliament received the Act on Amendments to the current CRTA proposing the cut of radio-television fee for 20%. This was interpreted as the political pressure on the public television. Following the public reaction the Government partly modified its proposal after negotiations with the CRT acting Management Board and agreed to postpone the deadline in which the Act should come into effect. The acting Management Board has undertaken to prepare a plan for the reorganisation and financial consolidation of CRT. This measure was perceived as a positive step towards improvement of the functioning of the public television.

Concerning a possible government control of the media regulatory body, i.e. of the Croatian Electronic Media Council, it is important to note that the president and other members of the Council are appointed by the Croatian Parliament upon the proposal of the Government. The Government announces a public invitation to nominate candidates for Council members every four years. This procedure has been criticised on the grounds that involvement of civil society is low and inadequate. In 2008 the public debate, held in line with recommendations of the European Commission, resulted in the conclusion that the involvement of civil society in the appointment of the Council members was appropriate. However, it was obvious that the appointed members of the Council represent only some of different groups of civil society. In some cases they lacked professional capacity to accomplish their job.

The new Electronic Media Act (EMA) intends therefore to support an increase of administrative capacities through the Electronic Media Agency that has been added to the Council as a professional service. The Council works independently and professionally in handling its most important duties prescribed by the EMA, which include allocation of the concessions and licences. The Electronic Media Agency should be further strengthened in the near future since the Proposal of the new CRTA envisages a number of tasks for this body.

The efforts, whether fruitful or not, that the Government has invested in the redrafting and amending of the CRTA reflect the problems that occur in the process of state regulation of the public broadcasting services. They also illustrate wider problems of implementation and enforcement of the media regulation, particularly visible in the area of freedom of expression.

The Croatian legal system has incorporated all necessary legal instruments to underscore the importance of freedom of expression coping at the same time with the protection of other concurrent rights and values such as privacy, personal dignity, family and professional life. There are views among legal experts that citizens are exposed to media violence and that the media cannot be stopped in deceiving and detrimental writing about someone's personal and family life. Unfortunately, the lack of respect for the basic human rights is usually accompanied by the disrespect of the journalist ethics and in some cases caused by the pressure from the publisher itself to get a better position in the media market.

In the legal sense these phenomena are to be corrected following the provisions of the Media Act (MA), regulating the right to correction of published information and the right of response to published information. The concerned natural or legal person has the right to request from the editor-in-chief to publish, free of charge, his/her correction or reply to the published information. However, these rules are in many cases breached or circumvented by the publishers and the cases end before courts that usually take decisions when the published information is no longer

relevant. Thus the legal institution does not help much to remedy the detrimental behaviour of media. This requires amending of the MA which is already under way.

Some other legal norms are not implemented fully. For example, the Republic of Croatia has a legal obligation to stimulate and protect pluralism and diversity of media by the financial means from the state budget (MA, Article 5). Since 2005 it was due to stimulate the programs of local and regional media as well as media intended to inform persons with special needs. It should have established new printed media, especially local and non-profit media, and media of non-governmental organisations. Unfortunately the state failed to carry out this obligation due to the lack of financial means, as well as due to the rather marginal public interest in such media. This state obligation is partly compensated by the Fund for Promotion of Pluralism and Diversity of Electronic Media that is financed by the apportionment of 3% of the CRT fee in line with the CRTA.

Media regulation and policy promote citizenship participation and democracy in the Republic of Croatia. The publishers and especially the public television, the CRT, are obliged to respect and encourage pluralism of political, religious, philosophical and other ideas and enable the public to be informed about them. In the realisation of their programming they are obliged to contribute to the respect and promotion of fundamental human rights and freedoms, democratic values and institutions, as well as to the development of the culture of public dialogue. The new EMA stipulates that the audiovisual or radio programs shall particularly promote understanding of international surroundings and the public's sense of justice, defend democratic freedoms, and promote equal treatment of national minorities.

In the Republic of Croatia the freedom of expression is guaranteed by the fundamental legal act, the Constitution of the Republic of Croatia as well as by a number of laws regulating the media sector. However, there is ample room for the implementation of these regulations, especially regarding the status and professional work of journalists.

The protection of pluralism and diversity in the media is realised through a number of measures prescribed by the media legislation. Since the application of general competition rules are not sufficient to guarantee the observance of demands concerning cultural and media diversity and the pluralistic expressions of ideas and opinions, the most important measures for the protection of these values prescribed by the media legislation are the transparency of ownership structure and prohibition of the impermissible concentration, which are at present difficult to observe in Croatia.

As regards general content requirements designed to satisfy citizens' information needs and ensure equal media access to diverse points of view, the Croatian media legislation regulates these questions in relation to the commercial electronic media. There is a lacuna in the MA in relation to the printed media since this Act does not prescribe obligations of the media publishers to publish truthful, complete and timely information respecting the right of the public to be informed about the events, phenomena, persons, things and activities

A significant impact on the democratic functions of the media exercises the Fund for Promotion of Pluralism and Diversity of Electronic Media established by the Croatian Electronic Media Agency. The Fund's means are regularly used for stimulating the production and broadcasting of audiovisual radio and TV programmes and/or radio broadcaster at the local and regional levels.

The codes of conduct, ethics codes and codes on editorial freedom are generally regulated by the MA. The ethics code has been established by the CJA, but it has been regularly breached since this organisation has not a clout to actively enforce the ethics rules among its members. The idea is that a new regulatory body should be installed to monitor implementation of these rules.

Taking it altogether the Croatian media legislation is in line with the European media standards and criteria. The updated media regulations are in accordance with European provisions and have taken into consideration contemporary technological changes and new media services. Media regulation and policy are designed to promote citizenship participation and democracy in the Republic of Croatia. However, the provisions are not always clearly stated nor fully enforced. Although publishers and especially the public television are obliged to respect and encourage pluralism of political, religious, philosophical and other ideas and enable the public to be informed about them, such obligations may be overshadowed by professional insufficiencies, ideological standpoints or market interests. In this respect there is a room for the improvement of regulations and legal provisions.

In such a context the media policies can hardly perform the role of public policies intended to regulate the development and functioning of activities having general social significance. In Croatia they are developed through fragmentary reactions to the market or state challenges, and are not quite able to express the public interest which itself is hard to define in a country in transition.

5. Conclusion

During the last twenty years or so the media landscape in Croatia has almost constantly been upset by the radical changes in the social and political status of the media clearly reflected in the establishment of the media market, withdrawal of the state control of contents and difficulties in the media regulation and functioning. This is clearly reflected in precarious positions of journalists, occasional political pressures on the media and journalists and the domination of a few big media moguls. Independent media, which have had an important role in the democratisation processes in Croatia, and which have contributed to the diversity of the Croatian media landscape, have a hard time coping with the pressures of the market rules and the revived political and state interests in the media, prompted by the present economic crisis. The advertising industry, which is fuel for the media industry, unavoidably influences the type of content. The political and economic crisis also incites the political elites to strengthen their interests in the media, and the media to rely more on public sources and funds. In this context independent, alternative and critical discourses are hard to maintain.

The path from a state-controlled media system to a democratic one remains at the same time uneven and dynamic. The main aim of the proposed and partly implemented changes is harmonisation with the EU media environment, which is itself extremely complex. In this respect, interventions in the Croatian media system appear to be spiral: political and state interventions resurge from time to time, as well as public democratic moves and developments. Therefore it seems accurate to depict the processes of change as multi-directional. They are much more complicated than presented in the proclaimed aims and regulations. The media system is submitted to occasional and restricted changes mostly introduced under the pressure from the EU

or from markets, but it is not systematically restructured. The changes are not rooted in coherent media policy strategies, but reflect a fastly changing interplay of different influences and interests. In such a situation it is difficult to define the roles that politics, the state, private media or civil society may play, particularly because their mandates or areas of competence are not précised.

It is therefore no wonder that the media policies are not transparently elaborated. To a certain degree such policies are defined through the legal regulations of media. However, since the legal provisions are not fully enforced, it is difficult to analyse the policies that they intend to promote. There are also different levels of policy elaboration: the state, the local political actors, private media owners and public media services all develop some policy aspects or particular approaches which are not coordinated or systematised on the country level. The absence of a systematic interlinking among them reflects the political and economic systemic insufficiencies.

The dominant forces that shape the contemporary media landscape in Croatia slide between different types of “dependencies” (public or private) of the media. How do political forces ensure a framework for independent media in this context? What emerges as a field within which alternatives might be vivified is civil society, an area within which participatory democracy might promote public interests often marginalised by the state or private sector. However, this area is to a large extent limited to online media and smaller audiences. Moreover, the possible democratic impacts of the online media still remain to be tested. It is unknown to which extent they may represent commercial interests that expand very quickly through the application of new technologies, and whether and how they could stand for public interests and democratisation.

The Croatian media reflect struggles with challenges that are linked to the transformation of the political and economic system and those dominating media systems in “old” democracies such as commercialisation, tabloidisation, infotainment, a rise of celebrity culture and forms of covert censorship and self-censorship. Most media actors react to such challenges by drafting new regulations, which may orientate the issuing media policies to treat these problems separately. Such an approach neglects a wider development context and social backgrounds of new types of communication that are contextualising media policies.

This is reflected as a discrepancy between regulatory provisions and their practical implementation. Rather frequent and fast regulatory changes in Croatia during the last about fifteen years have often created confusion as to which provision to follow and how to interpret them. The most serious consequence is that the rules are not even expected to be followed, which leads to distrust in the functioning of public institutions and the legal system. In this respect there is a room for the enforcement of regulations and improvement of legal provisions in the future.

The clearly visible improvements in the contemporary media landscape are seen in technological innovations, in the establishment of new media services and in an evident plurality of media. Although delayed and fragmented, the media policies are developed to rationalise and eventually organise all such changes which influence the local situations in a specific way that is at the moment hardly followed or analysed. However, the innovative new media services prompt more open and fast communication and thus support public interest in general democratisation of the society and in media democratisation in particular. The development of media policies is a part of such processes and expected to rationalise and improve media functioning.

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The case of Denmark

Henrik Søndergaard and Rasmus Helles

1. Introduction

The Danish media system represents clearly what Hallin and Mancini call the Democratic Corporatist Model, as it is characterised by “a historical coexistence of commercial media and media tied to organised social and political groups, and by a relatively active but legally limited role of the state”.¹ One of the fundamental features of the Danish media system is its mixed character as it contains both commercial and public service media. Media policy as well as media regulation is first of all oriented towards finding the right balance between the different media types (private or public, printed or electronic media). Originally media policy was closely related to the culture policy of the welfare state, but since the 1980s cultural policy is one among many other motives for regulating the media. Quite obviously, media policy in Denmark has for the last decades been more directly oriented towards competition policy as the media themselves increasingly have come to be seen as an important part of the economy.

The political conflicts on media and media policy are mainly, but not exclusively an ideological struggle on the proper balance between state and market. In this conflict the right wing parties (which currently are in power) favour market-based and privately owned media, whereas the left wing supports public media and a (more) regulated media system. The balance between state and market within the media system is of course partly determined by the relative strength of the political parties in parliament, but is also influenced by the relative strength of the media involved. Moreover, new technology, international developments and not at least European media regulations have influence as well.

It is, however, important to notice that the fact that Denmark is such a small country (5,500,000 inhabitants) has a great impact on the way in which the media structure has developed – and on the way in which media regulation has been conducted. One of the consequences of being a small country is that the national media market has a very limited size, and one of the goals of media regulation has right from the beginning been to avoid some of the most harmful effects of the limited financial opportunities. Market size is important for all kinds of media, but it is obvious that it has more to say when it comes to television than to print media, since the economical advantage of low marginal cost increases with market size. In many other countries the political battle between market and state has been quite harsh, but in Denmark it has been more moderate, since there has for many years been a kind of consensus on the need for market intervention and strong public service media as a prerequisite for a healthy public sphere, for diversity and pluralism and not at least for national culture.

The balance between private and public media ownership is not the same for the various media. The printed press and magazine press have always been privately owned and have operated since 1849 almost without any influence from the state - besides from heavy subsidies - whereas radio and television from the very beginning were organised as publicly owned monopolies. From the 1980s onwards privately

¹ D.C. Hallin and P. Mancini, *Comparing media systems* (2009 [2004]), at p. 11.

owned radio stations and television channels evolved. When it comes to “new media”, in particular online media, the media system represents a mix between public and private actors – corresponding to a great extent to the structure within the “old” media, as “new” media hasn’t really led to new kinds of ownership.

In terms of its political system Denmark has a long tradition for democracy and the Danish society has in many ways been subject to an ongoing process of democratisation as part and parcel of the development of the welfare society after World War II. When it comes to media legislation it has been oriented toward guaranteeing not only freedom of expression, but also giving media access to different groups in society and developing pluralism. Also public access media have been stimulated by public subsidies and initiatives in order to spread media literacy. Media is as most other parts of Danish society relatively highly regulated, and even though there have been attempts to deregulate the media during the last decades it is more reasonable to regard this as a process of re-regulation. As the media system has been rapidly expanding since the 1980s, the regulatory system has grown as well.

2. The media landscape in Denmark

In this part of the report we are looking at the Danish media system by giving an overview of the various media in terms of history, ownership, and market position. The news agencies are seen as an important part of the media system. We also explain the journalists’ background and education. Finally, we will look at media literacy and the status of the media in society.

2.1 The media market

The press

The number of newspapers has been rapidly declining since the 1960s, partly due to media concentration and partly as a consequence of the fact that still fewer Danes read newspapers on a daily basis. The decline in newspaper readership has been particularly visible in the last decade, as web-media has expanded.

To get an idea of the newspaper landscape it is appropriate to distinguish between national and regional/local papers and between Sunday papers and everyday papers. In 2010 there are 9 Sunday papers,² and 5 of these are national papers that are also published on workdays. These include *Berlingske Tidende*, *Politiken* and *Jyllands-Posten* (all omnibus papers) and the two tabloids *B.T.* and *Ekstra Bladet*. Moreover, there are 9 national papers published only on workdays, one of them being a weekly paper (*Weekendavisen*), another a specialised paper for the building industry (*Dagbladet Licitation*) and 3 of them being free of charge papers (*Urban*, *MetroXpress* and *24timer*). The number of regional/local papers without a Sunday edition is 26, whereas there are 12 regional weekly newspapers – all of them run by a

² Dansk Oplagskontrol, “Kontrollerede oplagstal” [Controlled circulation numbers], available at: www.do.dk (last visited on 14/10/2010), and TSN Gallup, “Læsertal” [readership], available at: www.gallup.dk/nyhedscenter/statistik/laesertal.aspx (last visited on 01/10/2010).

single company: *Søndagsavisen*. Finally, there is a huge number of mainly weekly free district newspapers; in 2007 there were 282 of these papers.³

Historically newspapers in Denmark grew out of book printing, and the oldest newspaper is *Berlingske Tidende*, which dates to the 16th century.⁴ However, from the early 19th century newspapers became instruments for the political struggle for democracy and from the 1870s they became closely connected to the political parties. There were four major parties at that time, and in the beginning of the 20th century every city had four different local newspapers to choose from. In the 1950s the number of newspapers fell dramatically, as a process of concentration took place. As a result the newspaper market changed and a kind of newspaper monopoly was established at regional level – as only one of the four papers survived. Among the national newspapers there was concentration going on as well, and most of the newspapers with an explicit connection to a political party disappeared, whereas the omnibus papers such as *Berlingske Tidende*, *Politiken* and *Jyllands-Posten* were competing heavily at a nation-wide level. The tabloids *B.T.* and *Ekstra Bladet*, owned by *Berlingske Tidende* and *Politiken* respectively, expanded especially in the 1960s and 1970s, but have faced major losses in readership from the 1980s and onward.

The major newspapers affiliation with political parties has weakened during the second half of the 20th century, even though most of them have a political orientation towards right wing. It is characteristic that newspapers with connection to socialist parties and the labour unions have almost entirely disappeared during the last decade. The very last labour union owned newspaper *Det fri Aktuelt* was closed down in 2001. Also newspapers owned by political parties such as *Land og Folk* (The Communist Party) and *Socialistisk Dagblad* (The Socialist Peoples Party) were closed – in 1982 and 1991 respectively. Only the socialist paper *Dagbladet Arbejderen* is left as a political party-paper (owned by The Communist Party). Of the newspapers still on the market only the highbrow paper *Information* is left wing, whereas *Politiken* has centre-left orientation, though none of them is affiliated or financially supported by a political party.

In the beginning of the 21st century major changes took place in the newspaper market, as a number of free newspapers were introduced – and a very costly and intense competition between four different free papers started.⁵ In 2001 the Swedish company Metro International launched *MetroXpress* as a commuter paper, and shortly after Det Berlingske Officin responded by launching its own free of charge commuter paper called *Urban* in order to keep a share of the advertising revenue. The two new papers reached quickly a balance and coexisted easily with the paid for papers. In 2006 Icelandic businessmen introduced a new nationally distributed free of charge paper *Nyhedsavisen* on the market, and a so called “newspaper war” took its beginning. Det Berlingske Officin launched *Dato* in response, a daily free of charge nationally distributed newspaper, and *Politiken* launched *24timer* the day after. The “newspaper war” ended in 2008 when *Nyhedsavisen* was closed down due to financial problems. *Dato* already ended its existence in 2007, whereas *24timer* in 2008 became a part of the company behind *MetroXpress*.

³ Rambøll Management, *Udredning af den fremtidige offentlige mediestøtte* [Analysis of the future public media support system in Denmark] (2009), at p. 59. For more precise information on district papers, see Danske Reklame-og Relationsbureauers Brancheforening, *Media Scandinavia 2010* (2010).

⁴ K. B. Jensen (ed.), *Dansk Mediehistorie* [Danish media history] (2001 [1996]), at p. 78f.

⁵ K. Minke, *Aviskrigen* [The Newspaper War] (2008).

The current developments within the newspaper business are to a great extent marked by the rapid expansion online. In order to keep advertising revenues almost every newspaper has launched an Internet version of their paper, which makes it more difficult to maintain readership for the printed version. The number of subscribers has fallen quite substantially. The three major national newspapers – *Berlingske Tidende*, *Politiken* and *Jyllands-Posten* – have lost more than 600,000 readers from 2009 to 2010.⁶ Only the niche papers *Information* and *Kristeligt Dagblad* have been able to avoid the decline. There is no doubt that the Danish newspapers face huge problems and are in the middle of a crisis that cannot but lead to a number of mergers between the major newspapers.⁷

The printed press is heavily dependent on subsidies and it is quite clear that most papers would find it indeed very difficult if not downright impossible to survive without the subsidies. Today the printed press receives three kinds of financial help from the state, the one being exemption from the normal VAT (25%) and the other being subsidies to distribution. In 2010 the distribution subsidies are estimated to more than 330 million DKR.⁸ Moreover, Dagbladsnævnet [The Newspaper Board] gives financial help to projects that aim to establish new newspapers, to reorganise existing newspapers or to help newspapers in financial trouble.⁹ Dagbladsnævnet is a board set down by the Prime Minister (in accordance with *Lov om Dagbladsnævnet* [Law on the Newspaper Board]¹⁰) and has as its aim to promote versatility and pluralism within the Danish newspaper market. In 2009 the Dagbladsnævnet granted app. 20 million DKR to these purposes.

In the next chapter the legal framework behind this system of public subsidies will be described, but it is important here to notice that in spite of the massive public funding the printed press regards itself as a private, market-based business.

Radio

FM is by far the most important distribution platform for radio in Denmark, and historically the national public service broadcaster DR, that even today holds a very strong position, has heavily dominated radio. Since the 1980s there has been a number of attempts to build a private radio industry, but so far it has turned out to be rather difficult to achieve this goal. When DR's monopoly was broken in 1982, the idea was to establish grassroot radio as a supplement, but later efforts were concentrated on creating a commercial radio system that could compete with DR.

The number of analogue radio frequencies is limited, as Denmark has only 6 nationwide FM frequencies. Today DR runs 4 FM-channels, one of them being a regional station. However, it has recently been decided that DR shall give up one of

⁶ TSN Gallup, "Læsertal".

⁷ In 2003 the companies behind *Politiken* and *Jyllands-Posten* merged, but it is supposed that more mergers will take places in the future.

⁸ Bibliotek og medier, "Dagbladspuljen" [Funds for daily newspapers], available at: <http://www.bibliotekogmedier.dk/medieomraadet/aviser-og-blade/dagbladspuljen/> (last visited on 14/10/2010).

⁹ Bibliotek og medier, "Tilskudsmodtagere" [Recipients of funds] available at: www.bibliotekogmedier.dk/medieomraadet/aviser-og-blade/dagbladsnaevnet/tilskudsmodtagere/ (last visited on 14/10/2010).

¹⁰ Available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=20989> (last visited on 14/10/2010).

its channels by 2011, when a new privately owned, but licence fee funded radio channel shall be established in its place. The fifth FM frequency which has nearly-nationwide coverage is run by SBS and is called Nova FM, whereas the sixth FM frequency that covers only 38% of the population is run by Berlingske Media in a joint venture with SBS. The channel is called PopFM and was launched in September 2010. DR runs 17 DAB channels, three of them being redistributed from the FM channels, and also Nova FM redistributes its FM-channel in DAB.

Local radio was established in 1983, originally as an experiment, but later on as a permanent part of the radio system. In the beginning local radio was not allowed to bring adverts, but later legislation was liberated in order to give room for commercial radio. Today there are 326¹¹ local radio stations: 175 non-commercial stations and 151 commercial stations. Most local radio stations are dependent on public subsidies.

In 2008 DR had a 76% audience share,¹² whereas Nova FM had only 5%. The daily reach for radio was in 2008 70%, and DR had a daily reach on 54%, while commercial radio 28%. There is no up to date information on the number of listeners to non-commercial local radio, but an analysis from 2003¹³ showed that out of 43 stations 14 had a weekly reach under 1% of the listeners.

Television

Due to the very limited number of frequencies the number of Danish television channels has been restricted much in the same way as radio even though analogue distribution ended in 2009 and was replaced by a digital terrestrial net with larger capacity. In the analogue terrestrial network there was only room for the two public service broadcasters DR and TV 2 and for local television, and as a consequence competition was relatively limited, as commercial broadcasting was almost entirely distributed through cable and satellite. The closing of analogue distribution has changed all this, but DR and TV 2 still have a dominant position amongst the audience. The most important private broadcasters, MTG and SBS, are not Danish companies, and they are broadcasted from England in order to avoid the relatively strict Danish regulation of the broadcasting sector.

There are three public broadcasters in Denmark: DR and TV 2/Denmark, and 8 regional (TV 2/Regioner) channels, which originally were a part of TV 2, but today are independent institutions. DR and the regional TV 2-stations are fully funded by licence fees, whereas TV 2/Denmark is funded by advertising.

DR runs six television channels (DR 1, DR 2, DR K, Ramasjang, DR HD and DR Update), all of them being fully funded by licence fee and distributed nationwide. TV 2 runs only one public service channel (TV 2/Denmark) financed by advertising, but runs also 5 pay-channels (TV 2 Zulu, TV 2 Charlie, TV 2 Film, TV 2 News and

¹¹ Kulturministeriet, "Lokalradio- og TV" [Local radio and television], available at: http://kulturministeriet.dk/da/kulturpolitik/medier/lokal_radio_tv/ (last visited on 1/10/2010).

¹² E. Harrie, "Radio och tv-landskapet i Norden" [The radio- and television landscape in Scandinavia], in U. Carlsson and E. Harrie (eds), *Nordiska public service-medier i den digitale mediekulturen* (2010), at p. 51.

¹³ Kulturministeriet, "Medie- og Tilskudssekretariatet Notat til arbejdsgruppen vedr. den fremtidige lokalradio og -tv-ordning" [Memorandum to the working group on the future local radio and television system] (2003).

TV 2 Sport¹⁴). The 8 regional stations send their programmes in “windows” within the TV 2/Denmark schedule, but are also distributed in the local distribution system.

Local television started in Denmark in 1984, but it was, in its original form, closed down in 2009, when the analogue television distribution ended and was replaced by a digital terrestrial system (MUX 1) with regional distribution architecture. The regional net within MUX 1 is partly used for privately owned and non-commercial local television channels distributed in particular regions and partly used for privately owned non-commercial channels that are distributed simultaneously in all 9 regions (in practical terms nationwide distribution). Today only non-commercial local television is permitted. In 2009 there were 44 nationwide non-commercial private broadcasters within MUX 1 and 171 local/regional non-commercial private stations.

MTG is the oldest private broadcaster in Denmark, and today runs 3 major channels (TV 3, 3+, Puls) and a number of pay channels (among the 7 film channels). The other important commercial broadcaster is SBS that runs 4 channels (Kanal 4, Kanal 5, 6’eren, The Voice TV). Even though the MTG channels and the SBS channels are financed by advertising, they are heavily dependent on viewers’ direct payment for access to the programmes.

Except from MTG and SBS there are a number of primarily foreign channels distributed in Denmark, but their market share so far has been marginal. Moreover, there is a small number of cable-only channels in Denmark and a few number of Danish satellite channels.

As mentioned, the public service broadcasters still have a strong position in the Danish television audience. In 2008 DR had a market share of 29%, TV 2 had 39%, MTG had 9% and SBS had 6%. The four major broadcasters taken together had a market share of 83%, which clearly gives them a dominant position.

Online media

The landscape of Danish online media is extremely varied, with a large number of organisations offering various types of online content. For purposes of the present discussion, the term “online media” is narrowed down to include only websites offering some level of editorial content of a broadly publicistic nature (i.e. news or culture), which are updated periodically, and which may or may not be combined with interactive features (i.e. comments or a forum).

In this group, the online activities of traditional media (the national newspapers and national public service media) are dominant. Taken together, the websites of the 7 daily, national newspapers (including 2 tabloid papers), the national public service provider DR, and the commercially run TV2, attract about 27% of all visits to Danish websites.¹⁵ In terms of content, very little is produced for online-publication only. The majority of content (83%) is produced in the editorial offices of

¹⁴ TV 2 Sport is a joint venture with Viasat.

¹⁵ Based on measurements for August 2010. Foreningen af Danske Internet Medier, “Toplisten” [Toplist], available at: <http://www.fdim.dk> (last visited on 01/10/2010).

traditional newspapers and TV-stations,¹⁶ and is published online and in the printed/broadcast version of the traditional media.

The business models of online media in Denmark are primarily based on advertising revenues generated from the relatively large amounts of traffic (excluding the public service broadcaster DR, which is not allowed to advertise). The exact size and importance of the revenue from online activities for traditional media is hard to establish, but it has not been sufficient to replace the revenue lost to other online enterprises (i.e. Google), and that lost as a result of the decline in newspaper circulation and subscriptions. All major newspapers currently employ a number of strategies aimed at maximising web traffic and thereby advertising revenues, i.e. by supplying links that allow readers to tag articles at their twitter/facebook account and thereby attracting members of their social network to the site.

No truly viable models for payment for access to online content have been found so far, although some newspapers have experimented with e-subscriptions, allowing readers access to online and/or downloadable versions of the newspaper. Also, the national television station TV2 run a service called Sputnik, allowing subscribers access to previously aired content for a fee.¹⁷

Since 1 January 2007, the licence fee for the national public service provider DR has been tied to ownership of any device that allows the reception of sound and image broadcasts, rather than just television sets and radios. This means that the obligation to pay the licence fee now extends to owners of computers with online access, even if they do not own a TV or a radio. It has also made it possible for DR to stream all broadcast content online.

The number of online media, which are not somehow part of the activities of a traditional media enterprise, is quite low, and are for the most part very specialised in terms of content. With few exceptions,¹⁸ these online-only media attract limited amounts of traffic, and they rely almost exclusively on advertising as their source of revenue, which helps explain their limited number and difficult financial situation.¹⁹

Social media

The use of social media sites and services in the Danish population is growing, and has already reached relatively high levels. Blogs are written by 18% of the population, and read by 33%. 49% regularly participate in chat or use online fora.²⁰ The national statistics do not include social media as a separate category, and therefore it is difficult to assess the activities at large social networking sites (i.e. Facebook). Other sources have made some effort in specifying the use level of social networking sites. By 2008, about 30% of the population aged 18 or over had Facebook accounts,²¹ and about 13% of the population logged on to the service every day. The specification of

¹⁶ A. B., Lund, *Specialmediene i den journalistiske fødekæde* [The special media in the journalistic food chain] (2010), at p. 3.

¹⁷ Rambøll, *Den fremtidige mediestøtte*, p. 76.

¹⁸ The Microsoft-owned <http://msn.dk> is the most successful online-only medium with an independent editorial staff, and attracts about 7% of all visits to Danish internet sites.

¹⁹ It is not possible to draw a clear picture of the business models of online-only media, since they are organised in many different ways, and are often part of larger business enterprises that generate income from sources other than media content production. See Rambøll, *Den fremtidige mediestøtte*, p. 78.

²⁰ Danmarks Statistik, available at: <http://statistikbanken.dk/BEBRIT04> (last visited on 1/10/2010).

²¹ R. Helles, *Personlige medier i hverdagslivet* [Personal media in everyday life] (2009), at p. 87ff.

access to and use of social media does not indicate the precise nature of the use of these services.

Currently, no reliable scientific evidence regarding the nature and distribution of the types of the communication taking place in social media exist, although several studies are under way. It is therefore not possible to gauge to what extent these sites are used for communication of a civic or public nature, or if topics for public opinion formation are voiced first in social media. Citizen journalism is also difficult to assess, as it may be published on virtually any online platform (in the form of a blog, a Facebook group, or a website).

The only way to gauge the extent of citizen driven journalism is to note that none of the top 250 sites²² in the index of Danish internet use can be classified as citizen driven media, but this does not include activities in Facebook groups or blogs with large readership.

News agencies

Ritzaus Bureau is the dominant news agency. Newspaq and Dagbladenes Bureau are minor agencies. All the Danish newspapers and DR own Ritzaus Bureau, which is financed through subscription fees. Ritzaus Bureau covers Danish and international news and cooperates with a group of seven news agencies in Europe called Group 39. The group consist of ATBP (Brussels), ATS (Zürich), ANP (Amsterdam), APA (Vienna), FNB (Helsinki), NTB (Oslo) and TT (Stockholm). Ritzaus Bureau has 150 employees – most of them situated in Copenhagen, but with some representation also in Aarhus, Odense, Brussels and Berlin.

2.2 Journalists' background and education

According to The Danish Union of Journalists there are about 14,500 journalists in Denmark. Among journalists with full time jobs 36% were women (2004).²³ There are no requirements for access to the profession of journalists, but in order to become a member of The Danish Union of Journalists one has to have completed an education in journalism/communication or to have worked as a journalist for at least three months.²⁴ The education of journalists takes mainly place at Danmarks Medie - og Journalisthøjskole (Aarhus), at the University of Southern Denmark (Odense) and at the University of Roskilde. An education in journalism is usually a BA, but a BA in journalism can be supplemented by a MA in journalism. Many journalists in Denmark have other university degrees outside the fields of journalism, as the need for journalists with expert knowledge is increasing. The average monthly starter salary for a journalist in 2010 is DKR 31,000 (c. EUR 4,150),²⁵ which is slightly higher than most other professions with a comparable educational background.

²² See Foreningen af Danske Internetmedier, "Toplisten".

²³ Dansk Journalistforbund, *Beskæftigelse og lønstatistik for kvinder [Statistics of employment and pay of female journalists]* (2005).

²⁴ Dansk Journalistforbund, *Bliv medlem af DJ [Join DJ]*, available at: <http://www.journalistforbundet.dk/sw19955.asp> (last visited on 01/10/10).

²⁵ Dansk Journalistforbung, "Dimittendstatistik" [Pay for newly graduated journalists], available at: <http://www.journalistforbundet.dk/graphics/nyheder/2010/dimittend-statistik.pdf> (last visited on 01/10/2010).

2.3 Media literacy and media status in society

Danish internet penetration levels are among the highest in the world. In 2010 89% of households had some form of internet connection.²⁶ Statistics also show that 88% of the population had used the internet at least once during a three month period.²⁷

The use of mobile internet services is also very high: 54% of all citizens between 16 and 74 years of age use some form of mobile internet access regularly.²⁸

Literacy rates are relatively high in Denmark. In international comparisons Denmark is consistently placed among the top-ten countries. Even so, it should be noted that the reading skills of around one in ten adults are such that they experience severe difficulties when trying to read normal prose texts or written news.²⁹

The high levels of internet penetration correspond to relatively high levels of digital literacy³⁰ in the Danish population. However, a large analysis of the ICT skills of the Danish population found that about a third of the population lack the computer skills necessary to perform basic tasks efficiently.³¹ Also, the analysis found that about a fifth of the population rarely or never use computers. The group of people with lower skills consist primarily of people over 60 years of age, with low educational levels.

Taken together the statistics quoted above outline a situation, where the availability and use of online services is high, and where a majority of the population possesses the computer skills necessary to access and participate in online communication.

The numbers also suggest the existence of a sizeable minority of about 15-25% of the population, for whom the use of computers and online services is of little significance in their daily lives, and for whom access to the internet and online media is problematic or impossible.

The high level of internet penetration in Denmark implies that a large range of media content is available to almost all Danish citizens. A sizeable portion of the content of printed newspapers is available online, just as a number of commercial and public service radio and television channels are streamed online.

The public libraries also play an important role in making media content available to citizens. Two thirds of the population visit a public library more than once a year, and about 11% use the library weekly.³² About 20% do not use the libraries at all. In addition to books, public libraries also make newspapers and magazines available to users. In recent years public libraries have expanded into

²⁶ Danmarks Statistik, available at: <http://statistikbanken.dk/BEBRIT01> (last visited on 01/10/2010).

²⁷ Danmarks Statistik, available at: <http://statistikbanken.dk/BEBRIT02> (last visited on 01/10/2010).

²⁸ Danmarks Statistik, available at: <http://statistikbanken.dk/BEBRIT03> (last visited on 01/10/2010).

²⁹ OECD, "Literacy in the information age. Final report of the international adult literacy survey" (2000), available at: <http://www.oecd.org/dataoecd/24/21/39437980.pdf> (last visited on 21/10/2010).

³⁰ Defined in the final report of the European Commission's ICT Skills Monitoring Group, as the ability to "[...] search and retrieve information, to navigate and communicate on-line, to participate in digital, and virtual communities." See "Benchmarking Member state policy initiatives", available at: http://www.technopolis-group.com/resources/downloads/reports/309_eSkillsRep.pdf (last visited on 05/10/2010).

³¹ Teknologisk Institut, *Analyse af danskernes IKT-færdigheder [Analysis of Danes' ICT skills]* (2005).

³² AKF, Anvendt Kommunal Forskning, "Danskernes kultur- og fritidsaktiviteter 2004" [Danes' culture and leisure activities], available at: http://www.akf.dk/udgivelser/2005/danskernes_kultur/ (last visited on 02/10/2010).

lending films, audio books, and digital media such as computer games and programmes as well.

In addition to making media content available on a range of platforms, public libraries also offer to help people using the internet, and so play a part in an ongoing effort to raise the level of digital literacy and in making online services available to people having trouble reading.

The Eurobarometer country survey for Denmark (2009) finds high levels of confidence in the press (50%), television (67%) and radio stations (73%).³³ All numbers are higher than the average numbers for European countries.³⁴

3. Media policy in Denmark

In this chapter we will look at state and non-state organisations responsible for the conduct of media policy in Denmark, and we will discuss the media regulatory framework addressing structural as well as content regulation. Moreover, we will give an overview of the system of public subsidies to the media, as it is of great importance to the actual functioning of the media system.

3.1 Actors of media policy and media regulation

State bodies and organisations

The Ministry of Culture is the organisational structure for developing media policy in relation to electronic media. However, also the Ministry of Science, Technology and Innovation is involved as it is responsible for information technology and telecommunications.

Regarding the printed press the responsible minister is the Prime Minister, but in legal terms the Prime Minister has very limited influence on the press. However, legislation that aims to keep diversity and plurality in the printed press through financial support is based at the Prime Minister's office. Moreover, the Prime Minister's office has regular, but rather informal meetings with representatives of the media – in what is called The Press Contact Committee.

In relation to the press The Newspaper Council (Dagbladsnævnet) plays an important role as it administers the press subsidies. Moreover, The Financial Institute of the Press has the task of giving economical support to newspapers in crisis, to reorganise newspapers and to establish new newspapers.

The Press Council (Pressenævnet) has the task of maintaining ethical standards in both printed and electronic media. The Press Council is, however, not part of the state administration, but is an independent, public body.

There are two different kinds of regulation: one for DR and one for the other radio and television institutions. DR is regulated through a Board that has the overall responsibility for DR's activities. The Board is appointed partly by the Minister of

³³ European Commission, Directorate General Communication, Eurobarometer 72, National Report, "Denmark", available at: http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_dk_dk_nat.pdf (last visited on 03/10/2010), at p. 22.

³⁴ The authors would like to thank Tatjana Hennesser for her research efforts on this and other parts of the report.

Culture, partly by the major parties in parliament and partly by the employees of DR. Politicians are prohibited from being elected into the board. The regional TV 2-stations also have a board elected by the council of each of the regional stations. TV 2/Denmark has a board with 9 members, 6 of them being appointed by the Minister of Culture and 3 of them selected by the staff of the station.

The major regulatory body for radio and television is the Radio and Television Tribunal (RTT). In relation to DR the board has only limited responsibility as it oversees that DR fulfils its programming obligations as stipulated in the public service contract. Also when it comes to TV 2/Denmark and the regional TV 2-stations, RTT has the role of supervision. Moreover RTT invigilates that TV 2 follows other parts of the Radio and Television Act. RTT is also the regulation authority in regards to regional/local television and local radio as well as cable a satellite radio and television.

Online media may register with The Press Council. They thereby obtain the same privileges as other media (especially in terms of source protection) granted under *Medieansvarsloven* [The Media Liability Act],³⁵ and are also obliged to follow the normal rules for ethical conduct for the press, administered by the Press Council.

Media and civil society organisations

A great number of non-governmental organisations have impact on the development of Danish media politics and media regulation. The journalist organisation – The Danish Union of Journalists – is of great importance, as it is both a trade union and a professional interest and pressure group within media politics, aimed at improving the skills of journalists and at ensuring that the media and communications sectors actively promote openness and dialogue in society. The union has as one of its goals to contribute to national and international debates about freedom of the press, freedom of expression and freedom of information.³⁶

Danske Mediers Forum is an interest organisation consisting of DR and TV 2 and six Danish media organisations. Its mission is to work in favour of good conditions for the media and for the freedom of speech. The six media organisations are Danske Specialmedier, Dansk Magasinpresses Udgiverforening, Danske Dagblades Forening, Digitale Publicister, FDIM, Radioerne and Ugeaviserne. The most powerful of these organisations is probably Danske Dagblades Forening, which is an interest and lobby organisation for all Danish newspapers.

Local media have their own interest organisations: Danmarks lokal-tv Forening (local television) and DILEM (non-commercial local radio and television). Moreover, a number of listeners and viewers interest organisations exist – either political as ARF (workers/social democrats) or religious as KLF. The listeners and viewers organisations have a joint organisation called Samarbejdsforum for danske lytter - og seerorganisationer (SSL) that has quite an important role in media politics and is represented in the Radio and Television Tribunal and in the Dialogue Forum in DR and in the representatives for the regional TV 2-stations.

³⁵ *Medieansvarsloven* [The Media Liability Act], available at: <http://www.pressenaevnet.dk/Love-og-regler/Medieansvarsloven.aspx>, (last visited on 01/10/2010).

³⁶ Dansk Journalistforbund, “Om Dansk Journalistforbund” [About the Danish journalists organisation], available at: <http://www.journalistforbundet.dk/sw101.asp>, (last visited on 14/10/2010).

Since 2001 a number of artist organisations made a joint effort to create public debate about the public service media in an organisation called Det nye Public Service Råd (The New Public Service Council). The council collects documentation about public service media and lobbies for strong public service media. It is worth mentioning that the council also has economical interests in the existence of public service media, as DR and TV 2 are important buyers of Danish music and art.

The actual influence that these institutions have on media policy in Denmark varies depending on their access to the politicians working within the field and the specific nature of the media policy in question. Most of the organisations have informal relations to some of the leading politicians or they have a privileged access to the management of the media. Usually, the media organisations primarily have a role to play when major media reforms take place. Proposals for new legislation are circulated among the media organisations in order to have their comments and opinions. During this process of public hearing the organisations can have some influence on the media legislation.

Research institutions have only a limited influence on Danish media policy, which perhaps is rare, since media regulation has become still more complicated both technically and legally. Media scholars are sometimes used as advisers when major media reforms are planned, and sometimes the ministries involved commission reports on a particular subject as background for policy making.

3.2 The media regulatory framework

3.2.1 Freedom of expression and information

In Denmark, *Grundloven* [The Constitution] from 1849 guarantees freedom of expression – revised in 1953 (§ 77), and prohibits censorship. This does not mean that the freedom of speech is unlimited. There are restrictions when it comes to utterances that incite to violence and offence due to sex, race and religion (*Straffeloven* [The Criminal Law] § 266b and § 140 on blasphemy) and defamation (*Straffeloven* [The Criminal Law] § 267).³⁷ The point is, however, that the utterance itself cannot be an offence to law; the content of the utterance can. The government cannot exercise any control of the content of the press, despite the fact that the government through media laws has a role to play when it comes to the structural regulation of the press and the general programming obligations of public media. Denmark has signed the European Convention of Human Rights in 1950 and in 1992 the convention was turned into Danish law (*Lov om den europæiske menneskerettighedskonvention* [Law on the European Human Rights Convention]).³⁸ Denmark is thus bound by Article 10 on freedom of expression.

Part of freedom of information is the ability for the media to gain information. This is guaranteed through § 65 in the Constitutional Law concerning public access to the administration of justice. *Offentlighedsloven* [The Information Act] requires openness and access to documents within public administration.³⁹ In *Retsplejeloven*

³⁷ Available at: <https://www.retsinformation.dk/forms/r0710.aspx?id=126465>, (last visited on 01/10/2010).

³⁸ Available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=12>, (last visited on 01/10/2010).

³⁹ Available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=59474>, (last visited on 01/10/2010).

[The Administration of Justice Act] there is a principle of open courts, which gives the media ability to gain information on court proceedings.⁴⁰

Anybody can start a medium without permission, except broadcast media, which require access to limited frequencies, as is the case for terrestrially, distributed radio and television. Usually, however, newly established media have to register, as it is also required for cable and satellite radio/television. All printed and broadcast media are automatically governed by the Media Liability Act.

All media in Denmark are responsible when it comes to copyrights, defamation and protection of private life. Most Danish media operate under the Media Liability Act. It is important to note that the Media Liability Act does not cover foreign media even though some of these are addressing a Danish audience, as is the case with the biggest private television channels on the Danish market. The law clarifies who are responsible within the media for the media content, and maintains that the content of the media and the way the media act have to be in accordance with sound press ethics. Moreover, the law sets out rules regarding the obligation to publish a reply. The Press Council [*Pressenævnet*], which is an independent, public tribunal, deals with complaints about the media. People, companies, associations, etc. who think they have been denounced by the media can lodge a complaint to the Press Council. The Press Council evaluates complaints in accordance with a set of Norms for Press Ethics.⁴¹ The system has a strong element of self-regulation, since the norms themselves are not part of the law. The Press Council can express its criticism if the ethical norms are violated, and it can order the media in question to publish the criticism. Moreover, it can demand that a person who has been mistreated by the press is given opportunity to retort.

3.2.2 Structural regulation

The regulatory framework has changed as the media system has grown during the years and has become more comprehensive involving many different sectors of society. All political parties in Denmark agree upon the fundamental aims of media regulation, namely on the one hand to guarantee the media freedom of expression in order to act in the service of democracy and democratic needs of society – and on the other hand to stimulate a versatile and pluralistic media system that serves all parts of the population and takes into account the cultural needs of society. The political consensus on the overall objective of the role of the media in society is striking and it seems to be one of the reasons why the media regulatory framework has evolved without major political conflicts.

The main criterion for public intervention in the market is whether or not media occupies limited frequencies. In terrestrial broadcasting the number of frequencies is limited, which calls for comprehensive regulation in order to ensure diversity. In print media and online media there are no use of limited frequencies, and the same is true with satellite and cable radio and television. This is why these media are less regulated than terrestrial broadcasting.

⁴⁰ Available at: <https://www.retsinformation.dk/forms/r0710.aspx?id=126338>, (last visited on 01/10/2010).

⁴¹ *Pressenævnet, Regler for god presseskik [Norms for press ethics]*, available at: <http://www.pressenaevnet.dk/Love-og-regler/Regler-for-god-presseskik.aspx> (last visited on 01/10/2010).

In the regulation of the printed press and non-terrestrial broadcast media the main aim is to ensure freedom of expression and to protect consumers' rights. The Press Council and the kind of self-regulation it practises are established in order to ensure these goals. When it comes to broadcasting, regulation is more complicated as several organs are involved. Regulation of radio and television was originally a result of the establishment of DR as state-owned monopoly institution – mainly as a way to ensure radio and television as a public service. The political climate in the 1920s when radio started was in favour of public services, and the same was true in the 1950s when television was introduced. Until the 1980s regulation of radio and television was regulation of DR, but later on, when the market was opened for competition, new types of regulation were needed. The political climate in the 1980s was clearly more market-oriented than before, which meant that regulation gradually changed in order to give room for private broadcasting. Regulation that opened the market did not stand alone, as a number of initiatives were taken in order to stimulate local and grassroot media and to create a second Danish public service broadcaster (TV 2). The complexity of the media system that evolved from the 1980s paved the way for new regulatory organisations, the independent regulatory authority, the Radio and Television Tribunal [*Radio- og tv-nævnet*], being one of them. The importance of regulation in order to ensure cultural policy goals (diversity, pluralism, national culture) has not really been questioned, and the public money spent on subsidising the media has been growing since the 1980s. Media subsidising requires even more regulation – and consequently also more control to ensure that the money is spent properly. Nobody questions the need for public funding of the media, whereas the amount of money spent and which media companies should receive them is controversial. Until the 1990s media policy in Denmark was mainly about regulating access to the media market, but today it is more about the proper distribution of public funding and the specific requirements that follow the subsidies. The belief that regulation could protect the national culture and the national media institutions from the market and from foreign media has gradually been given up in favour of the view that positive media developments come from subsidies. This development is reflected in the organisation of a regulatory system in which independent regulatory organs such as the Radio and Television Tribunal, the Press Council and the Press Board ensure the principle of arms length between the media and the state.

Lov om radio- og fjernsynsvirksomhed [The Radio and Television Act] regulate radio and television operating from Denmark.⁴² Licensing rules differ according to the distribution platform used. Radio and television channels distributed through satellite or cable are licensed simply by getting a registration at the Radio and Television Tribunal, since this kind of broadcasting does not occupy public frequencies. DR and the TV 2 regional channels have a right to broadcast. TV 2/Denmark has a right to broadcast until 2013.

Regional/local terrestrial distributed television requires a licence, which the Radio and Television Tribunal gives on the basis of a so-called “beauty contest”. Only non-commercial broadcasters can get a licence. The Radio and Television Act states that DR has to operate 3 analogue FM-radio channels. The licences for the remaining 3 nationwide (or partly nationwide) analogue FM-channels are given by RTT and are based either on an auction (as is the case with Nova FM) or on a “beauty” contest (as

⁴² Available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=131197> (last visited on 01/10/2010).

is the case with PopFM – and is going to be the case for the 4th FM-channel that DR had run until now).

There are no ownership rules regarding Danish media, and there are no rules that prevent political parties or religious associations from owning media. However, media ownership can be affected by anti-trust legislation and legislation that seeks to secure competition. *Konkurrencelevnen* [The Danish Competition Act] (Act No. 1027 of 21st August 2007) prohibits anti-competitive agreements etc. and the abuse of a dominant position.⁴³ In accordance with the Competition Act major mergers between companies cannot take place without permission from the Danish Competition and Consumer Authority. A number of mergers within the printed press have passed this kind of control.

In relation to the invitation of tenders for licensing FM-radio channels certain media companies have been excluded in order to avoid media concentration.⁴⁴ The decision to exclude particular media has been taken by the Danish Parliament as part of the legislation behind the licensing. The criteria used for exclusion is that media companies already having a licence and DR cannot participate. In relation to local media it has recently been clarified that municipalities cannot own media. This is not a consequence of media regulation, but of rules regarding the kind of activities municipalities can legally operate.

The Radio and Television Tribunal is supervising Danish radio and television. The tribunal is an independent authority appointed by the Minister of Culture in accordance with the Radio and Television Act and the Promulgation on Rules of Procedure for the Radio and Television Tribunal (promulgation no. 201 of 28th of January 2010).⁴⁵ It consists of eight members representing expertise within legal, financial/administrative, industrial, media and art. One of the members is appointed by the Cooperation of Danish Listeners and Viewers organisations (SLS). The tasks of the Radio and Television Tribunal comprise evaluation of public service-reports from DR, TV 2/Denmark and the TV2 regional stations, licensing and supervision of terrestrial digital television distribution, licensing and supervision of terrestrial distributed radio and non-commercial television stations, and registration and supervision of satellite, cable and digital terrestrial television and radio. Moreover, the tribunal grants financial support to non-commercial local radio stations and non-commercial stations transmitting via Mux 1. Finally the tribunal decides upon violation of the rules regarding commercials and sponsorship.

3.2.3 Content regulation

Content regulation is exclusively related to radio and television and in particular to public service broadcasters. The public service broadcasters DR and TV 2 have to fulfil a number of programming requirements regarding diversity and quality in terms of programme types. In news and current affairs DR and TV 2 have special

⁴³ Available at: <https://www.retsinformation.dk/forms/r0710.aspx?id=132775> (last visited on 01/10/2010).

⁴⁴ DR has been excluded from participating in the licensing of FM5 and FM6, and the owner of FM5 has been excluded from participation in the competition for getting a licence to FM6.

⁴⁵ *Forretningsorden for Radio- og Tv-nævnet* [procedures for the radio and television tribunal], available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=130031> (last visited on 01/10/2010).

obligations towards fair and unbiased programming, and they have to pay attention to the societal importance of the news reported. As it is mentioned in the Radio and Television Act, public service broadcasters need to pay special attention to ensure freedom of speech.

In the Radio and Television Act the public service remit is articulated in general terms, as it emerges from paragraph 10. In paragraph 10 the fundamental principles of freedom of expression and the right to receive relevant information is stressed: “The overall public service activities shall through television, radio and Internet supply the entire Danish population with a wide range of programmes and services comprising news coverage, information, education, arts and entertainment. Quality, versatility and diversity must be aimed at the range of programmes provided. Within programming a primary concern for information and freedom of expression shall be taken. When it comes to information, emphasis must be placed on objectivity and impartiality. Programming shall ensure access to important community information and debate. There is also emphasis on Danish language and culture. Programming should also reflect the breadth of the production of art and culture and provide programmes that reflect the diversity of cultural interests in the Danish society”.

Some private media also have to fulfil content requirements. The 5th analogue FM-radio channel has obligations regarding the amount of news and current affairs programming⁴⁶ and the amount of Danish music played in the radio. Local radio and local/regional television are not obliged to fulfil any content requirements, but they have to live up to the programming they have committed themselves to when originally achieving their licensing from the RTT, as the RTT in accordance with legislation⁴⁷ has to pay attention to the overall diversity in local radio and television.

Ophavsretsloven [The Copyright Act] makes up a very important part of the publishing rules,⁴⁸ as it states that journalists and authors have copyright to their products both economically and ideally (that is a protection against altering a product and the right to have the author’s name mentioned). Nevertheless, a number of restrictions to the rights exist, for instance when it comes to private use of different sources. The Copyright Act has particular rules for the Danish public service broadcasters as most of their programming is regulated through an extended collective licence (paragraph 30). For other media copyrights are often handed over to right holder organisations that administer their rights, as is the case with Koda (composers’ rights), Gramex (musicians’ rights) and Copy-Dan (authors’ rights and rights regarding cable television). Right holder organisations must be approved by the Minister for Culture before they can make agreements within specified fields. The Minister for Culture stipulates detailed provisions on the procedure for approval of the right holder organisations. Questions on copyright and the role of Koda and Gramex are very important for the economics of the Danish media, not least when it comes to local media.

The Information Act [*Offentlighedsloven*], contains provisions regarding

⁴⁶ *Bekendtgørelse om Radio- og tv-nævnets udbud af den femte, jordbaserede FM-radiokanal* [Order on the tender of the fifth terrestrial FM radio channel], Bekendtgørelse nr. 393 of 02/05/2006 available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=11993&exp=1> (last visited on 01/10/2010).

⁴⁷ *Bekendtgørelse om lokalradiovirksomhed* [Order on local radio], Bekendtgørelse nr. 881 of 17 September 2009, and *Bekendtgørelse om ikke-kommercielt tv i MUX 1* [Order on non-commercial television in MUX 1], Bekendtgørelse nr. 882 of 17 September 2009.

⁴⁸ Available at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=129901>.

openness and access to documents within public administration. It plays a major role in the media's information gathering process as the media have a right to have access to files within the public administration. There are exceptions, however, when it comes to matters of a personal nature and matters of national security. A commission is preparing a revision of the Freedom of Information Act, and at the moment it is much debated whether a new law would extend or reduce the current amount of openness in public administration.

A number of bodies are entrusted with supervision tasks in relation to the media. The supervision bodies constitute an important part of media regulation as they aim to make the legislation function as intended by the legislators. As to the Danish printed and electronic press the Press Council handles complaints against the media in accordance with the Media Liability Act and can in particular cases by itself make accusations (*ex officio*). The Press Council shall rule in cases relating to whether the publication made is contrary to sound press ethics, cf. section 34, and whether under the provisions laid down in Part 6 of this Act a mass media shall be under an obligation to publish a reply, including the content, form and location of the reply. The Press Council comprises eight members appointed by the Minister of Justice. Two of the members shall be appointed upon recommendation by the Danish Journalists' Union, two members shall be appointed to represent the editorial managements of the printed press and radio and television upon recommendation by these media, and the Danish Council for Adult Education shall appoint two members as public representatives upon recommendation.

The Boards of DR and TV 2 supervise that DR and TV 2 respectively operate in accordance with the requirements of the Radio and Television Act and the public service-contracts. Each of the regional TV 2-stations has a council that supervises the activities of the stations.

DR's board has 11 members appointed by the Minister for Culture. Three members (including the Chairman) shall be nominated by the Minister for Culture, six members shall be nominated by the Danish Parliament, and the permanent staff of DR shall nominate two members and two deputies. The Board shall represent expertise in media, cultural, management and business affairs. It shall have the supreme executive authority over DR. It shall have overall programme responsibility and responsibility for the observance of the provisions laid down by The Radio and Television Act.

TV 2's board consists of nine members, six of which are appointed by the Minister of Culture and have to represent expertise within media, law, business and managing, cf. Statute for TV 2/Denmark Limited (of 11th of May 2010).⁴⁹

The Consumer Ombudsman decides and supervises advertisements in the printed press and online media and in some of the cases of advertisements within radio and television supervision. The Marketing Practices Consolidation Act covers the activities of the Consumer Ombudsman. The Consumer Ombudsman is an independent supervision authority appointed by the Minister of Economic and Business Affairs.

In general the organs mentioned above are fulfilling their duties as intended in the legislation. This is perhaps not surprising, as public administration in Denmark

⁴⁹ Kulturministeriet, "Vedtægter for TV2 Danmark A/S" [Statutes for TV2 Denmark PLC], available at: http://omtv2.tv2.dk/fileadmin/user_upload/pdf/Vedtaegter/Vedtaegter_TV_2_dk_28.04.2010.pdf (last visited on 01/10/2010).

usually operates quite effectively. It is, however, worth mentioning that the bodies with supervision tasks operate in different ways and are entrusted with different powers. The Radio and Television Tribunal is without doubt the most important regulatory body, as it covers most of the electronic media and has the power to regulate effectively. If a media company neglects the decisions taken by the RTT, the RTT can impose various sanctions on it. In practice the media companies follow the rules, and only rarely has the RTT found it necessary to withdraw a licence from a media company. Now and then the effectiveness of the Board of DR are discussed, primarily because some of its members have taken political controversial standpoints against DR or have tried to intervene in the daily operations of the institution.

No Danish rules regulate search engine results, such as the filtering out of search results based on keywords that might lead to harmful content (i.e. homepages of racist groups). One of the few examples of systematic internet censorship is the filtering out of sites containing child pornography. The scheme consists of so-called DNS-filtering, blocking all queries to sites listed in a blacklist database and routing the user to a site showing a stop sign and a description of the scheme.⁵⁰ Technically the scheme is implemented at the ISP level, and all major Danish ISPs participate, but a number of smaller ISPs do not.

Another recent example of systematic internet censorship is found in a verdict from the Danish Supreme Court which mandated all ISPs to block queries to the site www.thepiratebay.org (a website indexing bittorrent files), as the site was found to participate in the distribution of copyrighted material. The verdict has generated a debate about the possible consequences for the legal rights of other site owners, since the verdict specifies that the ISPs should not participate in making the website and its contents available to their customers.

3.2.4 Other media policy tools

In Denmark media policy has for the last twenty years been developed in relation to political agreements between the political parties in Parliament. Agreements are made every fourth year and cover in particular the programming requirements for DR and the amount of licence fees. However, the political agreements also cover many other areas of media policy and have in recent years been quite comprehensive documents that stipulate which reforms are going to take place. The political parties produce policy papers carrying out their own ideas of media policy – and bring them into the negotiations that lead to the agreement.

Sometimes media policy is developed in a more open way by establishing commissions to analyse the media system and to point at possible solutions to specific problems or challenges that the system faces. The idea of this kind of work is to have a more comprehensive, better informed and less politicised debate on media matters. In the 1980s the government set down a Media Committee, which gave out a series of analyses and proposals, and in the 1990s a similar committee prepared a number of reports.

Expert reports and analysis do play an important role in the development of media policy, but it does not mean that policy decisions are handed over to the

⁵⁰ For details see Rigspolitiet, “Om blokering” [On blocking], available at: http://www.politi.dk/da/borgerservice/boernepornofilter/om_blokering.htm (last visited on 05/10/2010).

experts. Especially when it comes to questions concerning media technology and economics experts are involved in establishing background information. It should be mentioned here that some of the non-governmental organisations such as the Newspaper Association and the association of internet media (FDIM) produce media policy reports themselves in order to have influence on government media policies. Also the public service broadcasters produce policy papers formulating their own view of the media situation and what the politicians ought to do about it.

4. Media policy and democratic politics: an assessment

Taking into account that Denmark is such a small country the Danish media system represents a relatively high level of diversity and quality. This is not a result of a free media market, but comes from a combination of regulation, subsidising and market forces – and high professional standards within journalism.

Freedom of expression is an important issue in Danish media policy and it has been discussed widely during the years. In Danish legal literature the scope of paragraph 77 of the Danish Constitution is one of the main topics, as most scholars agree that the paragraph only grants a formal protection of freedom of speech prohibiting any kind of censorship. More recently the discussion has focused on Article 10 ECHR and ECtHR rulings, particularly after the Danish High Court decided to follow the ECtHR's jurisprudence, thus setting a new course in Denmark. Some scholars found that the Danish High Court went too far in acknowledging a more progressive freedom of speech for journalists and the (new) role as a "public watchdog", instead of choosing a more moderate national interpretation of Article 10 with more consideration given to the sanctity of privacy. The relationship between Article 10 and the Danish Copyright Act is also being tested by the press and discussed. Newspapers have in several cases printed extracts or even whole manuscripts referring to freedom of information and freedom of speech and Article 10 ECHR, even though the copyright infringement is quite obvious. Some legal scholars see this as a tendency not only in Denmark, but also in other European countries, and suspect that it may be necessary to revise the Danish Copyright Act (*Ophavsretsloven*) and take freedom of speech into account in certain circumstances.

The media in Denmark are, as we have seen, marked by comprehensive regulation, especially in regard to nationwide radio and television, whereas the printed press and online media are less regulated. Moreover, broadcasting as well as the printed press are heavily subsidised and are to a great extent dependent on public funding.

The main objective for media regulation is preservation of national media and diversity and plurality within the media. For a small and open country as Denmark this is imperative, since an unregulated market would lead to dominance by foreign media companies and in broadcasting there would be room only for foreign programmes. In the Danish case, then, regulation aims at compensating for the unwanted consequences of free market forces on the one hand, and at providing funding mechanisms for domestic media and domestic media products on the other. Media in Denmark – in particular the printed press and radio and television - are very dependent on both regulation and on public funding.

This dependency is in principle problematic, as the state in practice is responsible for the wellbeing of most of the media. This does not mean that all media

are state media. The printed press is privately owned, and in broadcasting the public service media have a relatively independent position in relation to the state. However, the combination of a very open society, in which journalists have easy access to information about public administration, and a media system based on major public funding can lead to conflicts between politicians or government and the media. Regulation aiming at diversity, plurality and preservation of domestic media and culture does not fit easily with the ideals of press freedom. These ideals are, as we have demonstrated, nevertheless very important in Danish media politics, and in many ways a balance between considerations for proper funding and the independence of the media has been achieved. However, it is disputed what the proper balance should be, and particularly in relation to the governing of public service media, questions about political pressure have been raised. It can be argued that politicians and government have too much to say regarding public service media, and there is clearly a risk of abuse of power.

Danish media regulation does protect freedom of speech, which was demonstrated in the so called cartoon crises where the Danish newspaper *Jyllands-Posten* in 2003 published a number of cartoons that offended Muslims around the world. The cartoons were published in order to create public debate about self-censorship in Danish media, as the *Jyllands-Postens* editor assumed that many journalists and writers feared religious fanatics. Yet, in another case regarding the Kurdish television channel ROJ TV transmitting from Denmark the legal protection of freedom of speech is going to be tested. The Turkish government has claimed that ROJ TV is supporting terrorism, and recently the Danish public prosecutor has decided to charge ROJ TV formally for violation of The Criminal Act paragraph 214e (on terrorism). However, it is not decided whether the court will refuse the case, as the court cannot decide on licensing of radio and television. Licensing of radio and television can only be performed by the Radio and Television Tribunal.

More important to Danish media politics than freedom of speech is the balance between the various media, as market developments and the emergence of new digital media changes the old balance between electronic and print media and between public and private media. Public media have a dominant position within radio and television, and therefore media regulation primarily deals with the regulation and funding of the public service media. The actual size of public service media has a heavy impact on the economic possibilities for the private media. When DR and TV 2 expand their activities it makes it harder for private broadcasters to earn money. This is why media policy often has mixed goals. You cannot support public service broadcasting without damaging the private sector, and you cannot improve conditions for private media unless you reduce the scope of public service media.

The difficult art of achieving a proper balance between public and private media is becoming even more difficult as new media emerge and the old borders between different media types become harder to draw. One of the most important challenges to Danish media politics is how to adjust the media subsidising system in order to stimulate diversity and cultural quality in new media – and how to develop a system that has this kind of stimulation without loosening media independence and freedom. Within the next few years new ways of subsidising the media will most likely be introduced as the current system favours “old” media and makes it very hard for new online media to achieve sufficient quality.

A major challenge is how to support the printed press which finds itself in serious financial problems, as the number of subscribers declines and a growing part of the advertising market moves from the press to online services such as Facebook and Google.

Another important challenge to Danish media regulation is the implementation of the European media legislation. As a consequence of the Television without Frontiers Directive Denmark has become very open to influence from foreign media companies benefitting from operating from abroad. The principle of jurisdiction within the Directive has paved the way for a number of foreign television channels broadcasting from London to a Danish audience. This means that a huge part of Danish television is out of reach for the Danish authorities, which leads to unfair competition, as the channels do not have to fulfil programming obligations (they do not even fulfil the requirements regarding quotas for European programmes). This is the reason why questions regarding jurisdiction are quite important in current media politics.

Also worth mentioning is the challenge that comes from the European regulation of public service broadcasting in relation to competition policy and state aid. The trials against TV 2 for overcompensation are raised by the London-based channels broadcasting to a Danish audience, and they clearly demonstrate the fact that the size of the Danish media market makes co-existence of public and private media very difficult. In the beginning cases against public service broadcasters were mostly raised by private television stations and were about financing the traditional broadcasting services, but now the disputes are also about the public service media activities on the Internet and mobile media. In these cases the newspaper publishing business seems to be an important actor, as it regards strong public service media as a threat to its own activities within the field.

In Danish media politics this trend combined with the growing financial problems within the printed press will probably lead to new conflicts between public service media and the printed press. Politicians have so far been able to support both public service media and the printed press, as the two media branches were able to co-exist relatively peacefully, but in the future it is probably going to be more difficult.

There is a very strong cultural tradition in Denmark that supports regulation and public subsidising in order to maintain pluralism, diversity and national culture, as cultural politics is such an integrated part of welfare politics. The political conflict between “state” (regulation) and “market” (deregulation) is obviously also present within Danish media politics, but it is subordinated to a tension between national and international culture. So far media regulation and public subsidising of parts of the media has been seen as an important “wall” against foreign media. This is one of the main reasons why cultural policy still has a lot to say in an otherwise still more commercialised and internationalised media system.

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The case of Estonia

Urmas Loit and Halliki Harro-Loit

1. Introduction

Estonia, a small country on the Baltic Sea, has spent the past 20 years transitioning from a colonial territory within the USSR into an independent democracy; it became a Member State of the European Union in 2004. Five national and seven regional daily newspapers serve the population, which is 1.36 million. A plethora of weekly papers and magazines, six larger domestic television channels and nearly 30 radio stations are available within the 45,000 sq kms of Estonia.

The national structure of the country is comprised of two relatively detached communities: ethnic Estonians (927,000) and a Russian-speaking community (appr. 400,000), which predominantly consists of settlers from the Soviet era of various ethnical background. These two communities can be characterised by their distinctly separate media consumption patterns. Traditionally, ethnical Estonians have been avid readers, listeners and viewers. Russian-speakers tend to prefer television and watch Russia's channels. Thus the Russian language newspaper market, competing both with Russia's media and Estonian news products, is shrinking despite of a slight increase in scanty readership.

This country report examines the media policies in Estonia since regaining of the country's independence in 1991. The Estonian media market is small and fragmented by media consumers' native language. The number of Estonian-speakers is limited to about a million. Estonia has witnessed rapid development towards information society and a very liberal media policy. Therefore the analysis of Estonian media policy provides a case study concerning the problems, possibilities and paradoxes occurring in case of limited resources, a well-developed environment of information and communication technologies (hereafter: ICT) and a liberal regulatory approach to the media market.

The next section of this study examines the structure of the media market. The analysis highlights the specific situation concerning competition between traditional media channels, oligopoly and content diversity. Today competition is remarkable between the two national mixed type quality dailies: *Postimees* (owned by the Norway's Schibsted) and *Eesti Päevaleht* (a trade mark in the portfolio of the Estonia's Ekspress Group) are the newspapers with very small product differentiation. Tabloid *Õhtuleht* enjoys a sole position on the daily tabloid market, being a joint venture of two competing newspaper publishers.

Newspapers also keep producing news online. *Delfi* is the only converged online news-producing portal, which is owned by the Ekspress Group, and which maintains a wide audience in both language groups and provides visitors a popular venue for commenting on news items. Also television channels compete for audience, while the digital turn has revoked fragmentation. Radio maintains stability in listenership. Baltic News Service (BNS) is the only news agency in Estonia, and it is operating across the Baltics.

Estonian ICT development started in the late 1990s. In 1998 the Principles of Estonian Information Policy were adopted by the Estonian government. Now about 60% of the population uses Internet at least once a week.

The issue of media literacy and digital literacy are actively debated in Estonia. The Internet usage is especially high among young people, reaching 99.9 % of 11-18 year old pupils. It is partly due to the activity of the Estonian government that brought computers and internet connection to Estonian schools since 1997 (The Tiger Leap project). National curriculum includes several topics that could support media education and communicative skills but hereby the teacher education is lagging behind.

While the resources at such a small media market are limited and original news production occurs to be an expensive process, the future of professional journalism is one focal question in media policy concerning the accessibility of impartial and trustful information. On the one hand Estonia still maintains journalism curriculum at the university. On the other hand the professional community of journalists (slightly over 1,000) is loosely organised, rather loyal to their employer than to professional ideals.

The third part of this report examines the media regulatory framework and the implementation of laws, administrative acts as well as co- and self-regulatory measures. Since the beginning of the transition period (after the Soviet rule) in the beginning of the 1990s Estonian media policy has been very liberal and market-oriented: media organisations have enjoyed full freedom of expression. Hence it is difficult in Estonia to re-establish one's rights and reputation in the court when damaged by the media. Estonian courts try to avoid judging moral damages, intimating that to measure a moral damage in financial terms is rather complicated. Only substantial penalties for the moral damages would force the media owners to pay more attention to accurate and fair performance. Only since 2009 courts have started to argue more about the liability of professional content providers in case an individual has suffered severely. In addition to the courts the role of the Ministry of Culture and Parliament is discussed.

The legal protection of the rights of individuals is usually spread among different laws. Mostly these are defamation laws and the protection of privacy. In Estonia by the end of the 1990s the laws that affect individual rights, especially the right for the protection of one's honour, were in process of renewal. The protection of honour and privacy is now regulated by the recent Law of Obligations Act (passed in October 2001, entered into force on 1 January 2002). Regulation of public and private information is well elaborated in Estonia. The Public Information Act (first passed in 2000) provides access to the administrative documents, while the Personal Data Protection Act (first passed in 1996) encompasses citizens' informational self-determination.

This part of the article also offers analysis on actors who influence the media policy. Implementing a liberal media policy means that the ownership is predominantly controlled by the market (owners) and that the role of the state is restricted to minimally supervising compliance with the formal conditions of the broadcasting licence and general legislative rules for the programming output, even though the cross ownership has also been inconsistently ruled out by the corresponding law.

The aim of the fourth part is to provide a critical analysis of the Estonian media policy in the context of European media and communication policy and how it feeds the democratic processes. The economic pressure springing from the interests of media ventures could be counterbalanced by the ideology of professional

independence, but in Estonia the professional culture seems to be too weak to resist such pressure in case media organisation has its very strong content-independence (wall) policy.

The authors have analysed various statistical data retrievable from interactive databases on the Internet processed upon specific criteria and non-public databases available for pay, and have creatively processed other data publicly available.

2. The media landscape in Estonia

The media landscape in Estonia is characterised by large variety of media outlets and channels, despite the littleness of the potential audience and its segmentation supremely according to the spoken language. However, the variety has been larger in the mid 1990s when the foreign capital had yet not flown in and there was more enthusiasm among the media creators based on the recent liberation from the Soviet regime and possibilities deriving from exercising the freedom of expression.

The new innovative media emerges rapidly, too, as Estonia has been in the forefront with its e-solutions (e-banking, e-parking, e-government, e-prescriptions, etc). In the wake waters also the social media develops, although creating a different paradigm compared to the mainstream media system.

2.1 The media market

Print media

The press has fully moved away from state control and is now an independently run sector. Newspaper privatisation took place at the beginning of the 1990s on a case-by-case basis, with the government agreeing that it should no longer be involved in newspaper publishing.

The newspaper sector, like the rest of media, is characterised by heavy concentration of ownership. However, the market has stabilised since major mergers in 1998. Two major publishing groups dominate the national market: Postimees Group (part of Eesti Meedia) and Ekspress Group. In 1998, two Scandinavian media companies, Sweden's Marieberg and Norway's Schibsted, made important acquisitions in Estonia that further strengthened media concentration. Marieberg sold its possessions back to Estonian owners in 2001 – Ekspress Group – which now is a public stock company with the majority share in the hands of a local businessman. Schibsted is involved in all types of media (print, television, radio), while Ekspress Group has been focusing on print (second biggest quality daily *Eesti Päevaleht*, weeklies *Eesti Ekspress* and *Maaleht*) and Internet (the largest internet news portal *Delfi*).

Mainstream newspapers in business in 2009 were as follows: five national dailies (four in Estonian, one in Russian), eight weeklies (five in Estonian, three in Russian) and 23 independent regional papers (18 in Estonian, five in Russian). In addition, several municipalities publish their messengers (news sheets) on weekly or monthly bases; many of them craft these according to journalistic convention. The overall estimated number of newspaper titles in Estonia is 151, including newspaper-

like publications and advertising papers.¹ Circulations figures for all papers have substantially decreased. The combined daily circulation of all the member papers of the Estonian Newspaper Association in 1992 was 831,400. In 2005 it was 543,600 whilst in 2009 491,300. The circulation of the two largest national daily newspapers remains under 60,000 of each (*Postimees*, *Õhtuleht*). The circulation of the largest weeklies (*Maaleht*, *Eesti Ekspress*) is approximately 30,000 to 40,000. The circulation of regional (daily) papers is between 3,000 and 14,000. The circulations of Russian-language weeklies (dailies have ceased to appear, except for *Postimees* in Russian with circulation of 9,800) reach 15,000.

Table 2.1: Major newspapers by ownership, circulation and readership

	Newspaper	Ownership	Circulation* (Aug 2010)	Readership (Q1, 2010)
	Postimees	Eesti Meedia (Schibsted)	56,100	200,000
<i>Dailies</i>	Eesti Päevaleht	Ekspress Group	29,800	106,000
<i>Mixed type quality papers</i>	Äripäev (business)	Bonnier	12,200	42,000
	Postimees (in Russian)	Eesti Meedia (Schibsted)	9,800	59,000
<i>Tabloid</i>	Õhtuleht	Eesti Meedia (Schibsted) 50% Ekspress Group 50%	55,100	178,000
	Eesti Ekspress	Ekspress Group	32,000	93,000
	Maaleht (rural)	Ekspress Group	42,600	125,000
	Den za dnyom (in Russian)	Eesti Meedia (Schibsted)	13,000	44,000
Weeklies	MK-Estonia (in Russian)	LAT individual (Baltic Media Alliance)	10,000	49,000
	Moskovskiy Komsomolec			
	Delovye vedomosti (business, RU)	Bonnier	4,100	17,000

Circulations of March 2010 were slightly higher than those of August 2010.

Data about circulations by Estonian Newspaper Association. Data about readership by TNS EMOR. Data about ownership by Central Commercial Register and from public sources.

¹ National Library of Estonia, Statistics 2009.

Table 2.1: Major newspapers by ownership, circulation and readership (continues)

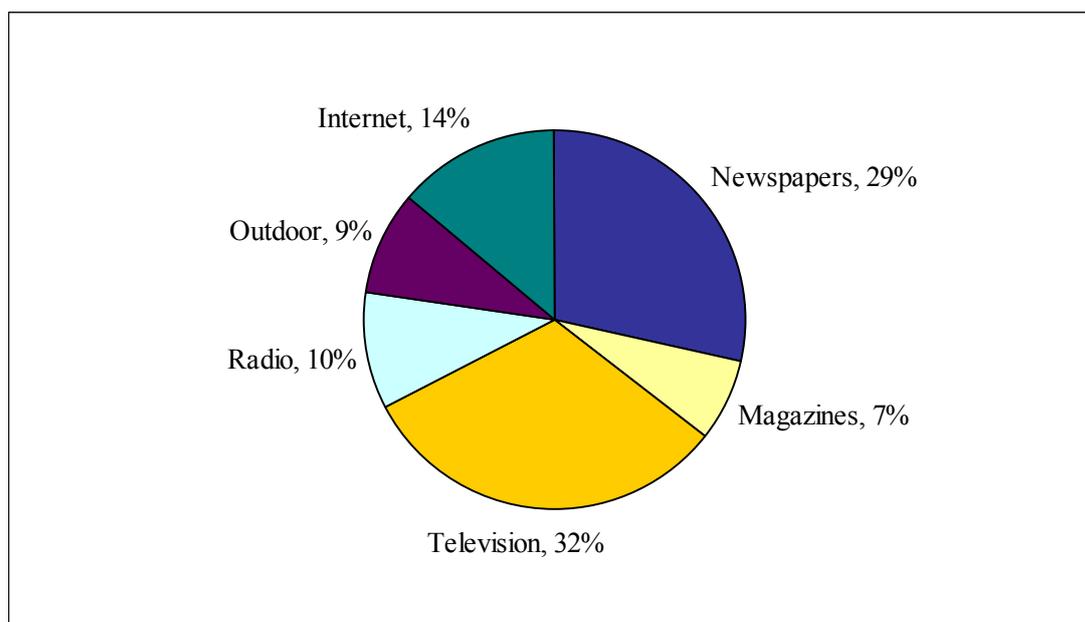
	Newspaper	Ownership	Circulation* (Aug 2010)	Readership (Q1, 2010)
	Pärnu Postimees	Eesti Meedia (Schibsted) 66% Pressinvest (EST individuals)	13,700	32,000
	Sakala	Eesti Meedia (Schibsted) 66% Pressinvest (EST individuals)	9,400	30,000
	Meie Maa	SWE individual 99.97% EST individuals 0.03%	7,300	15,000
	Põhjarannik / Severnoye Poberezhye	Luterma Ltd. (EST) 19.4% Journalists 80.6%	7,300	EST 16,000 RUS 13,000
Regional and local papers	Virumaa Teataja	Eesti Meedia (Schibsted) 66% Pressinvest (EST individuals)	7,300	25,000
	Võrumaa Teataja	Individuals (EST)	4,500	20,000
	Saarte Hääl (former Oma Saar)	An individual (EST)	4,500	12,000
	Lääne Elu	Individuals (EST)	4,100	10,000
	Valgamaalane	Eesti Meedia (Schibsted) 66% Pressinvest (EST individuals)	3,000	12,000
	Nädaline	Individuals (EST) 65% A venture (EST) 35%	3,100	9,000
	Viru Prospekt (in Russian)	Individuals (EST residents)	5,300	NA
	Tallinna Linnaleht	Eesti Meedia (Schibsted) 50% Ekspress Group 50%	27,500	52,000
Free papers (weekly)	Tallinna Linnaleht (in Russian)	Eesti Meedia (Schibsted) 50% Ekspress Group 50%	22,500	54,000
	Tartu Ekspress	EST ventures	20,000	NA

Circulations of March 2010 were slightly higher than those of August 2010.

Data about circulations by Estonian Newspaper Association. Data about readership by TNS EMOR. Data about ownership by Central Commercial Register and from public sources.

The newspaper sector has gradually lost its majority share in total advertising expenditure to television. In 2004 the newspapers' advertising share was 44.5% compared to televisions' 25.6%. By the first quarter of 2010 the proportions were equally 31% out of the total expenditure. In the second quarter of 2010 proportions turned into 32:29 percent in favour of the television industry. Still the overall print sector share exceeds the television share by four percentage points.

Figure 2.1: Advertising expenditure breakdown, Q2 2010



Data of TNS EMOR.

The print media continues to enjoy a 0% value added tax for subscriptions although single copy sales are taxed with the regular rate of 20% (up to July 2009, the rate was 18%).

Family, home and lifestyle magazines lead the magazine market; they are the most commercially oriented magazines. Publications for youth and children, comics, travel, vocation and sports are considered by the research carried out by the University of Tartu (2005) to be partially commercially oriented. The rest (including the popular science, professional, trade and hobby magazines) are considered socially oriented magazines and their circulations are low. The number of magazine titles in Estonia is 328.² According to a more stringent classification by the researchers of the University of Tartu this number might be up to 150.³

The number of popular magazines decreased considerably in 1998 when several magazines of the same type merged during a merger of two competing publishers. Also, in 2008 and 2009 a number of magazines have been either shut

² National Library of Estonia, Statistics 2009.

³ As this group considers only about one in seven periodical publications to be magazines. See P. Vihalemm (ed.), *Meediasüsteem ja meediakasutus Eestis 1965-2004* [Media system and media usage in Estonia in 1965-2004] (2004).

down or merged because of the slack economic period, and a new-coming publisher (Kalev Meedia, later renamed Luterma) seized to exist.

Radio

The Estonian audience can listen to four (plus one local in Tallinn) public and 25 private radio programmes, provided by one public service broadcaster (*Rahvusringhääling*, ERR) as well as 15 private broadcasters. Among the biggest commercial radio broadcasters are the Sky Media Group and the Trio Radio Group. Both operate six programmes, most of them distributed nationally. The two broadcasters combine to comprise about two thirds of the total radio advertising market. The third biggest player, part of the international MTG group, The Mediainvest Holding Ltd., operates two music radio programmes.

Programmes of the public radio air across nation-wide coverage areas delineated by law while private stations are limited to semi-national coverage areas provided by “regional” licences.

Along with the public service broadcaster, Radio *Kuku* is the only commercial nationwide talk-radio programme (part of Trio Radio Group). Also the two Christian radio stations – *Pereraadio* and *Raadio7* – provide talk programmes. The locally oriented radios (eight in total) do have some talk features in their formats. All radio stations broadcast terrestrially; most of them have a parallel stream running on the Internet. Digital radio has not been implemented and probably shall not be in the near future, as it provides comparatively few cost-effective advantages (especially in regard to sound quality) compared to analogue transmission.

Television

The public service broadcaster ERR runs two channels. *Eesti Televisioon* (ETV) airs general-audience programming in Estonian. ETV2, initially launched as a digital channel in August 2008, introduced specialised programming the next season after the digital switchover. It provides programmes for children, documentaries and reruns of archived audiovisual works. Although it predominantly broadcasts in Estonian, it also includes a daily newscast and some feature programmes in Russian as well as Estonian programmes with Russian subtitles.

Estonian viewers can watch several private national TV channels, the number of which has somewhat increased during the digital transition, which intensely started in 2008. Kanal 2 and TV3, which continued to broadcast also in analogue mode until the final switchover, still dominate on the television market along with ERR’s ETV1. Still digitally launched fragmentation is also taking place and the newcomers channels (TV 6, Kanal 11 and others) are increasing their daily shares.

Scandinavian operators dominate the private television sector. Norway’s Schibsted owns Kanal 2 (which also runs Kanal 11) and Sweden’s MTG Group owns TV3 (which also runs TV 6, lately turned into a pay-TV). Other channels distribute via cable networks (Alo TV, Telekanal Seitse, TV 14, TVN, Orsent and some other, locally distributed channels in cable) and have marginal daily shares.

Table 2.2: Daily share (%) of television channels, June 2009 and June 2010

Channel	June 2009	June 2010
ETV	13.5	15.8
Kanal 2	19.4	15.6
TV 3	14.4	11.5
Kanal 11	1.9	2.6
TV 6	1.7	2.4
ETV2	1.2	2.6
Seitse	0.2	0.3
PBK*	12.1	10.5
RTR Planeta*	3.5	3.9
3+*	3.0	3.0
Ren TV*	2.4	2.5
Other	23.3	27.0
Video	2.4	2.2

PBK – Pervyi Baltiskiy Kanal, the Baltic version of Russia’s Pervyi Kanal.

* - Russian language programmes mostly originated from Russia.

Processed data of TNS EMOR.

Estonians prefer domestic programmes while Russian speakers like those broadcasted from Russia. Channels from the Russian Federation (as well as other pan-European satellite channels) can be watched on cable networks. Most urban areas have been covered by cable television networks, which are being remodeled into digital networks within broadband data communication service packages.

The public service broadcaster is fully financed by allocations from the state budget, while the private broadcasters rely on advertising revenues and other business earnings. Since 2002, as a rule, the public television does not have advertising as part of programming and a source of income. The same applies for the public radio as of 2005. By the authority of the Broadcasting Council the public broadcaster may include those adverts in its programming which go together with the broadcasting rights of some major events (sports, song festivals, etc). Private broadcasters claim that ERR overuses this opportunity, allowing the sports federations act as advertising agencies for ERR.⁴ ERR has rejected the accusations, stating that ERR aired only 320 minutes of advertising in 2009 (on both channels), which is less than 0.1% of the annual advertising volume of private TV channels.⁵ Up to the end of the analogue era the large private television organisations (Kanal 2, TV 3) paid for their licences annually to the state budget. When introducing the digital mode the payment was waived and that earned criticism on behalf of newspaper publishers.

⁴ See U. Oru, “Avalik-õiguslikud kõrvalhüpped” [Public escapade], Postimees, 5/01/2010, available at: <http://www.postimees.ee/?id=207804> (last visited on 6/10/2010).

⁵ See A. Jõesaar, “Avalik-õiguslik meediamajandus” [Public media economy], Sirp, 19/02/2010, available at: http://www.sirp.ee/index.php?option=com_content&view=article&id=10226:avalik-õiguslik-meediamajandus&catid=8:meedia&Itemid=11&issue=3287 (last visited 6.10/2010).

The digital switchover in television took place as of 1 July 2010, almost two years earlier than initially planned by the government's Concept of Digital Television, adopted in 2004.⁶ The switch-off of the analogue transmission mode involved the shutdown of the only local terrestrial television station – Alo TV – as there is no local television as such in the digital era (Alo TV is now distributed by some cable networks). From that point the television players will only be either “regional” or “national” and need to be customers of the broadcasting transmission center Levira, which exclusively runs all transmission facilities over the country. The enlarged technical options (increase in available channels for transmission) have still not produced many new programmes, as the human and financial resources for television broadcasting are limited. Pay-TV's are now also terrestrially distributed.

Standing in autumn, 2010, digital television appears in the form of satellite broadcasting (Viasat), terrestrial broadcasting and also cable. The latter to a large extent is still in analogue mode, but under development to fully digital encoding. The biggest telecommunication operator, Elion, distributes the digital TV signal in the form of IPTV. The additional digital services along with streamed programming have not been yet introduced in the Estonian television market, except for some services by Elion in IPTV (e.g. pay-reruns of certain programmes). Some initial steps have been made to provide a limited selection of TV clips for mobile phones.

Media online

The rate of computerisation and Internet penetration in Estonia is comparatively high. 68% of all households have an Internet connection. 97% of offices are computerised and 99% of those have Internet connections. Around 74% of the total population of age 16-74 uses the Internet.⁷

The Internet usage is especially high among young people, reaching 99.9% of 11-18 year old pupils. This is partly due to the decision of the Estonian government to introduce computers and Internet connection to Estonian schools in 1997 (The Tiger Leap project). National curriculum includes several topics which could support media education and communicative skills. However, at this point the teachers' education is lagging behind.⁸

Web portals started as advanced search engines and www-catalogues in the late 1990s which by the turn of the century developed into several types of portals, including the news portals. The biggest, thriving and influential news portal is *Delfi.ee*, currently owned by the Express Group. This portal produces along with references to other media sources some original content (including video and podcast) with the emphasis on headlines and the opportunity to comment on the news. Comment sections have invoked several debates and court cases about the liability of the media owner for the comments left by the visitors. *Delfi.ee* runs also a portal in the Russian language. The company has subsidiaries also in Latvia, Lithuania, Russia, and Ukraine.

⁶ See U. Loit., “Estonia” in Open Society Institute (ed.), *Television across Europe: regulation, policy and independence, Volume 1* (2005) 612, at pp. 612-613.

⁷ Data by Statistics Estonia 2010.

⁸ See H. Harro-Loit and K. Ugur, “Media education as part of higher education curricula”, 47 *Informacijos mokslai/ Information Sciences* (2008) 78.

Most Estonian-language newspapers have online versions since the middle of 1990s. The bigger newspapers presently employ separate staff for their paper and online editions. Also, the contents of the two versions are, to great extent, separated. Online versions of the newspapers can mostly be accessed for free; the attempts to charge the readers a full subscription fee have as yet failed. In 2009, *Postimees*, *Eesti Päevaleht* and some other newspapers declared that they would limit the availability of the stories from the paper version online with the intention to charge for using the archive and the paper-version online. By fall, 2010 *Postimees* and *Eesti Ekspress* have launched that kind of system, however charging symbolic amounts per some articles (€ 0.06) or per day (€ 0.32).

The public service broadcaster, ERR, runs an online news portal that often serves as an agency source for radio stations, as does the Baltic News Service and dailies' online versions. The public service broadcaster, as well as Kanal 2 and TV 3, makes available its television programmes on demand.

Table 2.3: Top visited news portals, week 38/2010

News Portal	Visitors per week	Specification
Delfi	701204	
Postimees Online	647685	
Õhtuleht	319236	tabloid daily online
E24	241589	Postimees's economic news
Äripäev	88718	Business daily online
kompravda.eu/nordeurope.kp.ru	6583	Komsomolskaya Pravda (RU)
dzd.ee	48355	Estonian Russian language weekly
uudised.err.ee	35932	PSB news portal

Data of tnsmetrix by TNS EMOR

Many media organisations encourage people's media within their outlets and channels, using the best pieces in their everyday news flow. For instance Delfi has launched a special section "Rahva Hää" (People's voice) in which the portal visitors can upload photos and news items. Also both larger private televisions have enabled the viewers to upload their videos on websites. Several media outlets have accounts on Facebook and Twitter, as well as RSS feeds and clips uploaded on YouTube.

Most terrestrial radio programmes can be listened to online. The public service broadcaster, Radio *Kuku* (a talk station run by the Trio Radio Group) and some other radio stations make their talk programmes available also as on-demand archives.

Although the share of Internet advertising has been constantly rising in the total advertising expenditure (3% in 2004; 14 percent in quarter 2, 2010), experts and industry professionals often conclude the cash flow still remains insufficient for cost benefit.

Social media online

The new innovative, interactive media services have instituted themselves among Estonian Internet-users, being preferentially used by younger age groups. Private websites, blogs, facebook, twitter, news groups on commercial net providers and other utilities are commonly known and progressively employed.

The research about user patterns is making its initial steps, thus comprehensive, wide based statistics can be hardly found on social media online operating leverage. The estimated number of active blogs is (standing in spring 2010) about 6,500.⁹ This is less than a year earlier (8,000). The number on entries weekly reaches 7,300 (a year earlier – 10,000). The peak-time of blogging in Estonia was spring 2009. An average blogger in Estonia is a 20 years old woman. The proportion of men and women among bloggers is 28 to 72%.

According to Eurostat, 21% of people contribute content produced by themselves to the Internet (December 2009). 260,000 people (20.3% of the population) have been registered as Facebook users.¹⁰ During the ash cloud crisis the Ministry of Foreign Affairs, the national air company and travel agency Estravel communicated with their customers via Facebook. Resolving the acute issues over the Internet enabled to lower the workload of customer services' phone lines.

Still the research done by the University of Tartu indicates that young age groups are quite passive in producing their own content to the Internet. They would rather upload photos and pictures (88% of users) and videos (62%), rather than school-related homework (less than half of users) or poems/stories (a quarter of users).¹¹

The blogging versus journalism discussion has also instituted itself in Estonia and debates are ongoing. However, the empiric observations of “civic” journalism (often provided by former journalists) allow to note that objective content and opinion are often blurred. Sometimes the entries tend to purposely insult or offend in a provocative manner. The good practices of journalism usually do not extend to blog entries.

Another way to put blogs to use is politicians disseminating their “private” thoughts about public issues, with an intention for the mainstream media to pick these quotes up and replicate in mass media. In these blogs the politicians are often not bounded with the diplomatic phrasing they employ in their everyday jobs.

News agencies

There is one news agency operating in Estonia: the Baltic News Service (BNS), which is a regional news agency covering Estonia, Latvia and Lithuania. BNS is the possession of the Finnish company Alma Media. The domestic Estonian News

⁹ Data in this passage about the blogosphere by T. Toots (CEO, Freqmedia OÜ) “Sotsiaalmeedia statistikast” [About statistics of social media], available at: <http://www.slideshare.net> (last visited on 23/10/2010).

¹⁰ Data by facebakers.com, September 2010.

¹¹ P. Runnel, P. Pruulmann-Vengerfeldt and K. Reinsalu, “The Estonian tiger leap from post Communism to the information society: From policy to practice”, 40 *Journal of Baltic Studies* (2009) 29.

Agency (*Eesti Teadete Agentuur*, ETA) was privatised in 2000 and went bankrupt three years later.

Other media outlets

Almost every municipality (both urban and rural) publishes a messenger-type outlet, which often takes the shape of a traditional newspaper. These newspapers are usually issued as independent editions, although the mainstream media (the Newspaper Association) declares them to be non-newspapers. Occasionally these outlets are accused of political bias; municipalities inconsistently violate editorial independence, especially on the eve of elections. Municipalities often accuse the independent media of paying insufficient attention to local issues and deliberately leaving certain issues uncovered. Regardless, municipal papers in some areas have proved to be important sources of local information. In some cases they are distributed on a subscription basis.

Media ownership and concentration

The media has been comparatively highly concentrated. In a small country like Estonia the concentration is somewhat inevitable, as some experts put it: due to shortage of resources, to attain quality, to achieve cost effectiveness.¹² Two larger media companies, Ekspress Group and Eesti Meedia, exhibit large concentration both horizontal and vertical, especially the latter, whose possessions cover cross media. Eesti Meedia has shares in several newspapers (50-100%), 100% shares in nationwide television and 32% of the shares of one of the two largest radio ventures (Trio LSL). Ekspress Group owns a variety of different newspapers and the biggest news portal Delfi. In addition, the major competing publishers have joint ventures (50:50 shares) for magazines, a tabloid daily (*Õhtuleht*) and a weekly free paper (*Linnaleht*), along with the postal delivery company Express Post.

2.2 Journalists' background and education

The journalist job is considered to be an unlicensed profession, which does not need any kind of registration, qualification, or affiliation to a professional guild. It means that anyone may act as a journalist – be a reporter, a columnist, an editor. In many cases journalistic job is being done on a free-lance basis, possibly even not on a regular basis.

The majority of journalistic jobs in Estonia are mainly concentrated into three companies: Eesti Meedia, Ekspress Group and ERR. The overall number of journalistic jobs in 2009 was about 1,200.¹³ The Estonian Journalists' Union has about 800 members (including retired and former journalists, students, and freelancers). The limited number of jobs is a factor that increases the importance of the loyalty of journalists to the employer in their careers. The number of women slightly exceeds

¹² See Loit, "Estonia", pp 605-606.

¹³ The research project "Changing Journalism Cultures: A Comparative Perspective" (University of Tartu, 2008-2011) identified 1193 journalistic jobs in all the media in 2009. Freelancers are not included. Data referred to in this section have been collected and processed within the above mentioned project.

the number of men in journalist jobs (52:48%), while at the end of the 1980s the standing was reverse (44:56%).

The early 1990s were characterised by a generation shift: the inflow of young, often inexperienced journalists to the job due to restructuring the journalistic system (abandoning older generations of journalists, accruing of new jobs, etc). By 2009 the composition of journalistic jobs by age have shaped back to the model on 1988, still holding a shortfall of senior journalists – which inter alia affects the editorial boards’ ability to perceive historic contexts by having personally experienced recent past.

Table 2.4: Breakdown of journalistic jobs by age groups (%)

Age group	1988	1995	2009
under 20 years	NA	NA	0.4
20-29	12	40	28
30-39	31	28	28
40-49	27	15	25
50-59	25	14	13
60+	5	3	5

Data by the University of Tartu.¹⁴

As to the duration of job career, the mid 1990s were characterised by disposing of long-term experienced journalists – often through restructuring the industry – replacing them of very young generations of journalists. When in 1988 the share of journalists working more than 16 years in the job was 43%, it decreased to 22% by 1995. In 2009 the share was 32% – yet not reaching that of two decades earlier.

The share of people working as journalists having journalistic education or at least related training had increased by 2009 (53%), compared to the shares of 1988 and 1995 (both years 29%). This can be explained by widening opportunities for journalism and media studies (various curricula in several higher educational institutions). Also the number of graduates has increased in the recent decade.

¹⁴ See P. Tali, *Eesti ajakirjanike töö iseloomu muutumine (1988-2009)* [*Changing work practices of Estonian journalists (1988-2009)*], Bachelor’s Thesis, manuscript, University of Tartu (2010).

Table 2.5: Number of staff and graduates of the institute of journalism and communication of the University of Tartu working at media organisations in Estonia (standing at November 2009)

Outlet	Management and journalists	Journalism graduates from University of Tartu	Percentage (%) out of total
ERR	274	51	18.6
Postimees	67	26	38.8
Eesti Päevaleht	71	25	35.2
Õhtuleht	43	10	23.3
Äripäev	34	6	17.6
Eesti Ekspress	32	11	34.4
Maaleht	29	11	37.9
Regional and local papers*	114	26	22.8
Magazines**	74	19	25.7
TOTAL***	738	185	25.1

Data by the University of Tartu, institute of journalism and communication.

Statistics bases on information displayed on media organisations' homepages.

* Surveyed regional and local papers: *Pärnu Postimees, Sakala, Meie Maa, Oma Saar, Põhjarannik; Virumaa Teataja, Võrumaa Teataja, Lääne Elu.*

** Surveyed magazines: *Eesti Naine, Anne, Kodukiri, Pere ja Kodu, Kodu & Aed; Elukiri, Cosmopolitan, Kroonika, Haridus, Akadeemia, Looming, Horisont, Arvutimaailm, Director.*

*** Independent production companies, niche magazines, diminutive local papers, some cultural outlets, and outlets of particular organisations not included.

Although only 25% of all professionals in journalism have graduated from the oldest institution in the country providing degrees in journalism – University of Tartu – the general public and even the professional community still holds it responsible for low degree of professionalism in journalism and poor skills of novices.

On the other hand the media organisations demurely spend on professional training. The Estonian Media Centre (founded as a media college by the newspaper association and the association of broadcasters in 1995) failed, as the large media organisations were reluctant to sustainably finance these mid-career training courses (not to produce workforce for the competitors).

2.3 Media literacy and media status in society

Media consumption is an integral facet of everyday life in Estonia. Regular newspaper readers make up 74.3% of the population (Estonians: 76.3%, Russian-speakers: 70.2%); 58.9% (Estonians: 71.8%, Russian-speakers: 32.2%) read magazines regularly. Consumption of print media in general is decreasing. The average inhabitant of Estonia listens to radio for four hours and one minute daily, and watches TV for another four hours and nine minutes per day. 66.6% of the population

has used the Internet during the past six months.¹⁵ Internet usage seems on a permanent upswing while rates of TV consumption are stable and radio listening has decreased.

Broadcasting is a notably more trusted medium than newspapers, although it does not produce much original content. According to Eurobarometer (fall 2009), 70% of all population trust or generally trust television content, compared to 43% for print media. Public service broadcasting is trusted by about a quarter more than private broadcasting (75% versus 58%).¹⁶ The trust rating for Internet was 42% in 2009, compared to over 50% in 2003.

Estonia, in the context of media literacy, holds the best position among the Baltic countries¹⁷, since the national curriculum includes elements of media education. The cross-curricular theme “media education” was introduced to the National Curriculum in 2002 and curricula of mother language also include media education with focus on different types of written texts.¹⁸ In sum on the curriculum level the media educators have been active for about a decade.¹⁹ In 2010 the Estonian Association of Media Educators was revived. Although a whole generation has grown up within the internetised environment, the research indicates that young Estonian media users tend to be passive consumers rather than active content creators and commentators.²⁰

3. Media policy in Estonia

Media policy in Estonia is characterised by absence of any policy paper and by resolving issues on a case-by-case basis without any apparent long-term vision followed. The Ministry of Culture, the authority for working on media issues, has claimed that the policy is reflected in imposed laws.²¹ However, undermanned units merely allow sporadic supervision and cautious enforcement of media related laws makes the legislation “sleeping”. As the freedom of press is perceived as an absolute one, no official hurries to fall under resentment of the media community.

3.1 Actors of media regulation and policy

Media issues are under the governance of the Ministry of Culture. This body acts as a regulator for broadcasters: it issues licences and supervises the implementation of the Broadcasting Act [*Ringhäälinguseadus*]. It also handles copyright issues and supervises compliance with the Act to Regulate Dissemination of Works Which Contain Pornography or Promote Violence or Cruelty [*Pornograafilise sisuga ja vägi-valda või julmust propageerivate teoste leviku reguleerimise seadus*]. For the latter

¹⁵ Data by TNS EMOR (2008).

¹⁶ Data by Turu-uuringute AS (2009).

¹⁷ H. Harro-Loit, “From media policy to integrated communications policy” in B. Klimkiewics, (ed.), *Media freedom and pluralism. Media policy challenges in the enlarged Europe*, (2010) 45.

¹⁸ H. Harro-Loit, et al., “Läbivad teemad õppekavas” [Cross-curricula themes], *Haridus*, 11-12/2007, at pp. 18-24.

¹⁹ K. Ugur, and H. Harro-Loit, “Media literacy in the Estonian national curriculum”, in S. Kotilainen and S.-B. Arnolds-Granlund (eds), *Media literacy education. Nordic perspective* (2010) 133.

²⁰ P. Runnel, P. Pruulmann-Vengerfeldt and K. Reinsalu, “The Estonian tiger leap from post Communism to the information society: From policy to practice”.

²¹ English translations of Estonian legal acts can be retrieved at: <http://www.legaltext.ee/indexen.htm> (last visited on 23/10/2010).

task, the Ministry has instituted a commission to evaluate the cases under discussion. For supervision purposes the Media Division has been instituted within the Ministry. The Division employs two officials. As the latter also work on copyright and other policy-making related issues, the supervision is sporadic and usually not qualitative. The rest of the media landscape even less gets the sights of the Ministry. Yet in matters considering broadcasting the Ministry has declared that its broadcasting policy appears without a formulated policy paper.

Advertising issues are under the scrutiny of the Consumer Protection Board, which has assembled an advisory body for construing the provisions of the Advertising Act [*Reklaamiseadus*].

The technical aspects of broadcasting and other electronic media lay under superintendence of the Technical Surveillance Authority – a regulator within the governance area of the Ministry of Economic Affairs and Communications.

The Public Broadcasting Council, a body appointed by parliament, supervises public service broadcasting. In total, there are nine members in this council, five of them politicians and four from related professions.

The Estonian Data Protection Inspectorate is the supervisor for implementation of the Public Information Act and Personal Data Protection Act.

All supervisory units tend to be undermanned to fulfill their tasks sufficiently. Their attention to media related issues is usually initiated by complaints by the public.

The main non-governmental media organisations are the Newspaper Association (defining itself as a multitask organisation for newspaper publishers, editors and journalists), and the Association of Broadcasters (representing the interests of commercial broadcasters, both television and radio). The Estonian Journalists' Union plays the role of a trade union as well as that of a professional guild. Media educators have formed the Association of Media Educators. Independent producers in the audiovisual sector have a representation body as do advertising agencies. While associations of publishers and broadcasters assemble most of the players of these sectors, the most active journalists have no affiliation with a journalists' union.

Media self-regulation rests upon the press council, founded in 1991. In 2002 it went through a cataclysm which led to the creation of a new press council affiliated to the newspaper association. As the original press council also continued to operate, two press councils exist. As explained more in detail in Section 3.2.2, the contradiction lays in principles of implementing self-regulatory mechanisms, while the newspaper association reduced the issue to “mismanagement by the then chairperson”.

3.2 The media regulatory framework

3.2.1 Freedom of expression and information

The Constitution grants freedom of expression. Two comprehensive constitutional articles provide grounds for the free dissemination of ideas, opinions, beliefs and other information by word, print, picture or other means²² and for freely obtaining

²² Constitution [*Põhiseadus*], Article 45.

information disseminated for public use.²³ Although legally provided with reservations, these rights are interpreted as “first priority” rights and this is the way they are implemented by the media. Any kind of in-depth criticism or editorial processing is often considered “censorship”, although these activities contain no state intervention or sanctions. Censorship is banned by the Constitution.

The Constitution does not distinguish between press freedom and the general freedom of expression (like for instance in Germany). At the same time the media organisations have²⁴ employed the freedom of speech for most part as the specific defence right for the press, even if not “irreplaceably contributing to the political debate” (as the European Court of Human Rights has reasoned the protection of press freedom). The key problem is that special privileges for media may be in strong tension with the general free speech guarantees. The Strasbourg Court has at times come close to giving higher protection to media speech than to the expression of individuals. These cases are mostly connected to political speech and politicians. Hence, it is important to keep in mind that the Strasbourg Court affords an especially high level of protection to “political speech”. Another important point is that the Court often talks about information that “the public has a right to receive”. Hence, the Strasbourg Court is concerned with audience based, rather than speaker based values.²⁵ In debates concerning freedom of expression held in Estonia this complicated differentiation concerning the Strasbourg case law is not usually taken into consideration.

From a legislative point of view, Estonia offers a liberal environment for the media. No specific “media law” exists, except for the Broadcasting Act. The print media issues are covered by general laws, sometimes leaving unregulated areas (e.g. the person responsible for the publication and liabilities of the responsible editors). The only law that ever refers to “journalistic data processing” is the Personal Data Protection Act. No licence, permit or registration is required to set up a newspaper.

Estonia signed the European Convention on Human Rights in 1993 and ratified it in 1996. It is thus bound to respect Article 10 of the Convention. According to Freedom House, in 2010 Estonia ranks at the 19th position in the table of global media freedom, sharing the position with Germany. Estonia lies between Portugal (rank 18) and the USA (rank 24).²⁶ Estonia lags behind its Nordic neighbours (Finland, Iceland, Sweden, Norway, Denmark), but has the best position midst its Baltic neighbours -Lithuania (rank 32) and Latvia (rank 55), and among other Central and Eastern European countries.

3.2.2 Structural regulation

Statutory rules regulate the broadcasting and advertising sectors while the written press relies mostly on self-regulation.

The Broadcasting Act, passed in 1994, regulates radio and television. The law was brought in line with EU directives at the millennium shift and is currently under

²³ Constitution, Article 44.

²⁴ Until the Supreme Court case RK 3-2-1-43-09 of 10 June 2009, *Vjatšeslav Leedo vs Delfi*.

²⁵ H. Fenwick and G. Phillipson, *Media freedom under the Human Rights Act*, (2006), at p. 25, 61, 68.

²⁶ Freedom House, Freedom of the press 2010, Table of global press freedom rankings, available at: <http://freedomhouse.org/images/File/fop/2010/FOTP2010Global&RegionalTables.pdf> (last visited on 2/10/2010).

revision in the light of the recent EU *Audiovisual Media Services Directive*. Standing at fall, 2010, the draft law is under discussion by the government, after what is going to be submitted to the parliament for adoption. As of 2005 the Act on Electronic Communication entered into force. In combination with the Broadcasting Act, this law delineates competencies for the Ministry of Culture, which issues the broadcasting licences (for content), and for the Estonian Technical Surveillance Authority (known prior to 2008 as the Communication Board), which allocates frequencies and issues technical licences.

The Broadcasting Act sets up the licensing conditions for terrestrial radio and TV broadcasting. The licences are issued on contest base and reissued after at least every five years on the same conditions. The cable televisions need also to take a licence but there is no contest while issuing these. Internet television and radio does not need any licence under the current law. For the issuance of content licences the Ministry of Culture has instituted a commission to discuss the applications, the resolution of which has a character of a recommendation for the minister who makes the final call.

The Ministry has the right to refuse to issue a licence in case “a person operating as a television and radio broadcaster or the responsible publisher of a daily or a weekly newspaper would become simultaneously a person operating as a television and radio broadcaster and the responsible publisher of a daily or a weekly newspaper in the territory planned for the broadcasting activity or a part of the territory of Estonia”. This restriction shall not extend to the television guide published by a broadcaster itself.²⁷ However, this restraint has never been implemented, although the formal conditions of Schibsted’s possessions in Estonia (enjoying shares in several newspapers of 50-100%, 100% shares of nation-wide television and 32% of the shares in one of the two largest radio ventures) would require enforcement of the clause under discussion. Moreover, the Broadcasting Act provides only the grounds for refusing to issue a broadcasting licence, not for revoking a licence. Monopoly or cartel conditions are not listed as one of the reasons for which a licence may be revoked, nor is there any general statement prohibiting concentration in the market.²⁸

The probable cause for not implementing this provision lays in its declaratory nature. There are no sufficient legal definitions (e.g. “responsible publisher”) in the regulation. Furthermore, the possessions of Schibsted have been registered under different legal entities: Kanal 2 is registered as a property of Schibsted, while *Postimees* as the property of Eesti Meedia. This may allow the argument that Schibsted’s holdings do not even exhibit concentration according to the law.²⁹

Thus there is also no mono-media ownership regulation, presumably due to the liberalist viewpoints of the legislator. On the other hand, cross-media ownership is disallowed, but only in a declaration. The draft Media Services Act³⁰ limits the restraint, under which the licence issuance may be rejected, to “substantially producing of potential endamage to competition on some media markets”, which again does not provide explicit legal definitions.

As of 2007 the regulation about the public service broadcaster ERR has been separated into an individual act, enacting also the merge of the hitherto separate

²⁷ Broadcasting Act, article 40, section 4, subsection 8.

²⁸ Loit, U., “Estonia”, at p. 605.

²⁹ Ibid.

³⁰ Standing at 13/08/2010, in the stage of inter-ministerial coordination on the draft.

public radio and public television. The law specified the objective and functions of public broadcasting and reinforced the liabilities of responsible officials (members of the board and the broadcasting council).

According to amendments made in 2001, there is no advertising in public service broadcasting; as of July, 2002 it was excluded from public television. In 2005 ads were removed from public service radio. This leaves the allocations from the state budget to be the sole main source (except for own earnings from providing some services) for financing ERR.

The Competition Act [*Konkurentsiseadus*] holds a general scope of regulation and addresses no media-related specific issues. The Competition Authority has seldom processed media-related cases: there have been only four complaints during the last five years and four authorisations of concentration of media ventures since 2005.³¹

The written press has no specific laws affecting its operations and thus relies mostly on self-regulation. However, the latter tends to perform rather in favour of media organisations than the general public, meaning that self-regulatory mechanisms rather justify media behaviour than protect public interest. As a result of dissensions on principles of self-regulation,³² two press councils have existed since 2002. The majority of mainstream media organisations (including online media and TV broadcasters) only recognise the press council that is affiliated to the Estonian Newspaper Association. The original press council (the Estonian Press Council, established in 1991) works jointly with the Journalists' Union, still finding cooperation with some media outlets and channels.

The main instrument of media accountability is the Code of Ethics for the Estonian Press,³³ which was adopted on the basis of wide consensus represented by the media associations in 1997. It has never been amended since and has been adapted for the online media pursuant to applicability, i.e. as much as the provisions can be applied to online media issues.

3.2.3 Content regulation

General content requirements and quota rules

Content requirements have been set for broadcasting, while printed press and new media operate on their own. The public broadcasting has more prescriptions on content than private broadcaster and, as to the EU regulations, private televisions have more obligations than private radios. The rules have been enforced by the Broadcasting Act, which is being drafted into the Media Services Act

³¹ Data gained from the Estonian Competition Authority's website, <http://www.konkurentsiamet.ee> (last visited on 2/10/2010).

³² The newspaper association has found that the lay organisations, institutionally participating in the work of the original press council should not interfere in the self-regulatory processes which should be left solely for publishers' consideration. Estonian media hardly withstands any criticism, including academic one, towards them. Therefore, the new council avoids these potential conflicts: does not proceed complaints on general quality on media, complaints submitted for someone else, etc. For more details see E. Lauk., "How will It all unfold? Media Systems and Journalism Cultures in Post – Communist Countries" in K. Jakubowicz and M. Sükösd (eds), *Finding the right place on the map. Central and Eastern European media change in a global perspective* (2008) 193.

³³ See Estonian Press Council, "The code of ethics for the Estonian press", available at: http://www.asn.org.ee/english/code_of_ethics.html (last visited on 2/10/2010).

[*Meediateenuste seadus*]. The draft of the latter has yet not been released for the general public. According to the explanations by the Ministry of Culture,³⁴ the new law simplifies the licensing procedures and sets rules for non-linear services. The blogs and other internet-based media remain out of the scope of the draft law.

The Broadcasting Act³⁵ prescribes all broadcasters (radio and television) to provide newscasts for at least 5% of the daily transmission time. The minimum weekly transmission time is 84 hours for radio, 56 hours for television and 21 hours for cable television. In some cases this has been extended under the conditions of the broadcasting licence. Television operators along with the requirements imposed by the European directives (European audiovisual works for at least 51% of the total transmission time; works by independent producers for at least 10% of the total transmission time) must carry at least 10% of own production,³⁶ of which half must be broadcasted during the prime broadcasting time (between 19 and 23 hours).

All broadcasters need, in the case of a threat to public security or the constitutional order, promptly transmit the official announcements of the State institutions in all their programme services at their own expense. Broadcasters also must, without delay and free of charge, transmit in all their programme services information which is necessary for the protection of the life, health and security of persons or for the prevention of damage to property or of danger, or for the prevention or reduction of environmental damage.³⁷

The task list for the public broadcaster is much more comprehensive, assigned by the law. The functions *inter alia* include the following activities:

- Producing at least two television programme services and four twenty-four-hour radio programme services;
- Making available, to a reasonable extent, the programme services and the programmes' archive through electronic networks;
- Recording events and works of significant importance to the Estonian national culture or history, and guaranteeing the preservation of the recordings;
- Distributing the programmes and media services introducing Estonian culture and society all over the world;
- Intermediating the best works of the world culture;
- Transmitting programmes which, within the limits of the possibilities of National Broadcasting, meet the information needs of all sections of the population, including minorities;
- Guaranteeing the operational transmission of adequate information in situations which pose a danger to the population or the state;

³⁴ See V. Rosental., "Meediateenuste seadus hakkab asendama ringhäälinguseadust" [The Media Services Act shall replace the Broadcasting Act], *Äripäev*, 18/03/2010.

³⁵ Programming requirements contained in article 4¹.

³⁶ Under the Broadcasting Act "own production" means programmes and programme services relating to contemporary Estonia or Estonian cultural heritage, produced by a broadcaster itself or in co-operation with producers from the member states of the European Union or commissioned from an independent European producer (article 4¹, section 3).

³⁷ Broadcasting Act, article 10.

- Reflecting, to the maximum possible extent, the events which take place in Estonia in its newscasts and other programmes.³⁸

In addition to that the programme services of the public broadcaster must be diverse and balanced, promote social cohesion, include independent and appropriate news, and maintain political balance, especially during the election campaigns.³⁹

The obligation for political balance has been imposed also on private broadcasters in the way that all political parties and political movements should be granted transmission time to present their positions on equal terms, which may be set by the broadcaster.⁴⁰

Codes of conduct

The Code of Ethics for the Estonian Press (hereafter: the Code) has been accepted by all the Estonian media organisations and both Press Councils base their adjudications on this Code.

The general ideology of the Code is biased towards a teleological approach: the wording of the Code directs the media organisation or journalist towards moral reasoning that takes into consideration the result of one's decision or action. The recurrent dilemma of values is consideration of individual suffering against the importance of the information for public interest. The Code allows journalists to use ethically questionable means for getting information in cases "where the public has a right to know information that cannot be obtained in an honest way".⁴¹ For this particular article the Code has also been often criticised both by the professional community and the outsiders.

Another particularity of the Estonian Code is to lay the responsibility for the quality of journalism both on journalists and the media organisation. It particularly emphasises the responsibility of news organisations for publishing truthful and accurate information.⁴²

The Code has never been amended since its adoption in 1997. One of the reasons is the lasting opposition between the two Press Councils, and between the original press council and the newspaper association (essentially about the right to provide methodical criticism towards media). Another reason may be that journalists have not adopted the Code as the primary guide of their everyday work. This, in turn, seems to be closely related to the education of journalists. Two pilot-studies on journalists' professional values in 2009/2010⁴³ indicate that journalists without professional education tend not to value professional ethics. They are not acquainted with the Code and only have vague ideas about the basic norms of professional ethics as the interviews revealed. As mentioned above, this code is adapted also to cases concerning new media, as there is no specific code for net ethics.

³⁸ Estonian National Broadcasting Act [*Eesti Rahvusringhäälingu seadus*], article 5.

³⁹ Estonian National Broadcasting Act, article 6.

⁴⁰ Broadcasting Act, article 6¹.

⁴¹ Code, art. 3.7.

⁴² Code, art. 1.4.

⁴³ E.g. T. Ahonen, *Ajakirjanike võimalikud eetilised dilemmad ja väärtuste konfliktid Estonian Airi kajastamise näitel* [*Potential ethical dilemmas of journalists: a case study of reporting Estonian air business problems*] (2010); M. Kangur, *Eesti ajakirjanike hoiakud eetiliste konfliktide puhul* [*Attitudes of Estonian journalists in case of ethical conflicts*] (2009).

An independent code has been adopted by the business daily *Äripäev* in 1993 and amended twice. *Äripäev*'s code defines the rules for business journalists in cases of personal business interests that the general code does not provide and sets the inner rules of the company.

Advertising rules

The advertising rules are mainly set by the Advertising Act [*Reklaamiseadus*]. In addition, some specialised laws (e.g. the Medicinal Products Act [*Ravimiseadus*]) provide some special requirements for advertising in the particular sector. There is a total ban for advertising of tobacco, health services, infant formulae, gambling, services offered for satisfaction of sexual desire and some items illegal also by their nature. In addition, advocates and sworn translators, notaries and bailiffs, and patent agents cannot advertise. Advertising of plant protection products, alcohol, medicinal products, and financial services has certain restrictions – either by channel, by locating the advert, or by time. No advertising is allowed on public television and public radio, pursuant to the Estonian National Broadcasting Act.

As the Advertising Act was introduced as an imposing of good practices by legal means in 1997, Estonia is almost the only country in Europe in which the self-regulation in the advertising sector has not emerged. On the other hand the Advertising Act is the example of a sleeping law, as it is poorly and inconsistently enforced.

Rules regarding media publishing

The Law of Obligations Act [*Võlaõiguseadus*] covers defamation. Estonian jurisprudence does not itemize *libel*. In Estonia defamation appears only in the form of a civil suit – it is not a penal offence since 2002.

The defamation of a person, inter alia by passing undue judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person is, as a rule, unlawful.⁴⁴ The burden of proof rests with the person disclosing the information, i.e. with the media. In the case of disclosing incorrect information, the damaged party may demand refuting the information or publishing a correction at the offender's expense, even if the disclosure of the information was lawful.⁴⁵ However, this regulation does not favour people bringing their cases to the court, as also the burden of proof for moral damage rests with the complainant. Standing at fall, 2010 the Ministry of Justice has proposed amendments to the Law of Obligations Act to introduce “punitive damages” which the media organisations, especially the Newspaper Association completely resist, claiming it affects the freedom of speech.

Privacy protection is carried through the Personal Data Protection Act (*Isikuandmete kaitse seadus*; hereafter: PSPA) and the Law of Obligations Act. The first is the only law explicitly specifying media conduct. The PSPA provides the conditions and procedure for processing of personal data and liability for the violation of the requirements. Among sensitive personal data are the following: data revealing political opinions or religious or philosophical beliefs; ethnic or racial origin; data on

⁴⁴ Law of Obligations Act, article 1046.

⁴⁵ Law of Obligations Act, article 1047.

the state of health or disability; information on sex life; information concerning commission of an offence or falling victim to an offence before a public court hearing, etc.

Personal data may be processed and disclosed in the media for journalistic purposes without the consent of the data subject, if there is predominant public interest therefore and this is in accordance with the principles of journalism ethics. Disclosure of information must not cause excessive damage to the rights of a data subject.⁴⁶

In 2007 also the Public Information Act [*Avaliku teabe seadus*] was renewed (entered into force on 1 January 2008) and supplemented by the formerly single Databases Act. As a rule, the data processed in the database shall be publicly accessible, unless the access to which on the ground of law is restricted. Concurrently, the databases shall not publicly contain personal data, unless the imperative of disclosing of those derives from the law.⁴⁷

Copyright is under protection of the Copyright Act [*Autoriõiguse seadus*], which came into force in 1992. The effectiveness of collecting the royalties depends largely on the performance of collecting societies. For instance the Estonian Authors' Society has established a solid system collecting royalties even before the law took effect – the system of which is often critically assessed by the broadcasters for high fees. On the other hand the Estonian Association of the Phonogram Producers was established only in 1998 and is still going to law against private broadcasters to establish the degree of fair and reasonable royalties.

The State Secrets and Classified Information of Foreign States Act [*Riigisaladuse ja salastatud välisteabe seadus*] settles the grounds for the protection of state secrets and the classified information of foreign states (considering Estonia being the full member of the EU and the NATO), and liability incurring from violating the act. The distinctive feature of this law is that the restrictions of dissemination apply to any person having “accidentally” or otherwise got the grasp of any information classified under that act. It means that even in case of information unlawfully leaked to the mass media the media outlets have no right to replicate it and liability applies to anyone publicising the classified information.

Rules regarding information gathering processes

Article 44 of the Constitution provides a comparatively wide framework for access of the general public to the public information. The Public Information Act, passed only in 2000, sets rules for complying with requests for information. Also, it prescribes disclosing public information in the Internet.

The journalists' sources have been legally protected only in case of broadcasting (under the Broadcasting Act). In other respects (printed press), it has been the matter for self-regulation. Although no cataclysms have yet occurred the Ministry of Justice has initiated a law to extend the regulation in the Broadcasting Act also to journalists in all other media channels. Besides the current law obligates the journalists to reveal their sources on the request of the court of law – even in civil

⁴⁶ Personal Data Protection Act [*Isikuandmete kaitse seadus*], article 11, section 2.

⁴⁷ E. Tikk and A. Nõmper, *Informatsioon ja õigus* [*Information and law*] (2007), at p. 160.

cases. The draft law limits this only to a narrow list of serious criminal frauds. However, the Newspaper Association finds the suggested list of frauds too wide and hazardous for future sources' security, and opposes also this legal initiative.

Rules regarding social media publishing and search engines

No special rules regarding social media publishing exist in Estonia. Neither are there any rules about search-engines. The latter has yet not become topical either.

4. Media policy and democratic politics: an assessment

Newspaper subscription and reading traditions go back to the nineteenth century due to the high rate of literacy among Estonians (over 90% in the 1890s). During the nineteenth century, the press played the considerable role of educator and national and cultural integrator. These traditions were maintained during the Soviet period with the press fulfilling a dual role: on the one hand it was the Communist Party propaganda channel, on the other hand, within the framework of the same official and censored press a hidden oppositional agenda was developed.⁴⁸ Therefore, the press played a particularly significant role in the independence movement in 1989/1991.

The roots of the almost absolute press freedom lay in the totalitarian past when the mass media was strongly canonised and controlled out of the editorial boards (censorship on many levels: including hidden, pre- and post-censorship). The reasonable abandonment of external interventions has overgrown into rejecting any public regulation, including protecting the rights of persons affected by the media conduct. This also explains for example the severe reluctance of the newspaper association against the drafted law amendments to legally institute the protection of journalists' sources and introduce punitive damages for reducing endamagement.

Advantageously, the professional training in the University of Tartu started as early as in 1954, initially as part of philology curriculum. In 1978 a separate department of journalism was founded. When in the rest of the USSR the journalism training was predominantly attached to the communist party instituted higher education for ideology training, in Estonia it was bounded to scholarship of national culture. Paradoxically, the journalism education at the university⁴⁹ provides advantages also under the current situation in which the values of the professional media system have been strongly subjected to market principles. A research university by combining the resources of research and teaching is capable of continuing the critical-analytical education on journalism.⁵⁰

The media had experienced drastic structural changes by the end of the 1990s, when the market began to stabilise and foreign investments arrived. There were certain expectations that foreign owners' experience and know-how would be a good basis for the further development of journalistic professionalism and democratic

⁴⁸ S. Hoyer, E. Lauk, P. Vihalemm, *Towards a civic society. The Baltic media's long road to freedom. Perspectives on history, ethnicity and journalism* (1993).

⁴⁹ Currently the journalism related courses are held also in other universities than the University of Tartu. For instance the curriculum of The Baltic Film and Media School, affiliated to the Tallinn University includes portions of television and media studies.

⁵⁰ H. Harro-Loit, "Cost effectiveness of journalism education in a small nation-state", 2 *Journalism Research, Science Journal (Communication and Information)* (2009) 138.

media cultures;⁵¹ but this was not the case. As Peter Gross claims, “there is no indication that the Eastern European media outlets that came under Western European ownership have in any way measurably improved their journalism”.⁵² For the local managers of the media outlets and media elite, a serious conflict of interests arises: under the pressure of ensuring profit for the investors they should also be concerned about the quality of national journalism. As a consequence, commercial ideology increasingly prevails over public service ideology and aggressive commercial policies are being pursued at the expense of journalistic standards. Journalism has largely lost its traditional cultural and integrating roles. On the other hand, investigative journalism is gradually developing that was completely unthinkable under the Soviet regime.⁵³

Expanding online news provides challenge for the professional journalism. Non-limited space possibilities mean that online journalists have to produce several news items per day, therefore, often using various kinds of publicly available information such as PR news, promotional writing, translations from other online information sources, etc. rather than investing in the development of original journalism online. The colonisation of online news discourse by PR offerings is part of a wider social practice but in the context of expanding online publishing possibilities it is important to estimate how much original-professional journalistic input is provided by media organisations.⁵⁴

Concerning the question about preserving professional journalism one should keep in mind that the media organisations, which operate in small media markets (like Estonia), are generally vulnerable to the intervention of promotional materials, as they are eager to collect all the advertising money available. There are different attitudes among the news organisations towards what should be considered promotional material and whether it should be avoided, tolerated or even looked at. The counterbalance to economic pressure should be the ideology of professional independence, but in Estonia the professional culture seems to be too weak to resist such pressure in case the media organisation has its strong content-independence policy. E.g. national dailies do use various means in filtering promotional material away from their journalists such as in-house regulations, the physical separation of advertising and editorial departments on different floors or the use of specific layout software programs, though <http://bacaro.gr/live/item/531-ypovryxio-magazine-party-/-live-by-quasamodo> the editors have admitted that <http://bacaro.gr/live/item/531-ypovryxio-magazine-party-/-live-by-quasamodo> operation has sometimes happened in their organisations. Furthermore, a very small job-market makes the ideology of professional independence vulnerable. Journalists, instead of being loyal in the first instance to their professional ideals, have to be in first instance loyal to the ideology of their employer.⁵⁵

⁵¹ A. Balčytienė, E. Lauk, “Media transformations: the post-transition lessons in Lithuania and Estonia”, 33 *Informacijos Mokslai/Information Sciences* (2005) 96.

⁵² P. Gross, “Between reality and dream: Eastern European media transition, transformation, consolidation, and integration” 18/1 *East European Politics and Societies* (2004) 125.

⁵³ E. Lauk, “Reflections on changing patterns of journalism in the new EU Countries” 10/ 1 *Journalism Studies* (2009) 69, at p. 78.

⁵⁴ A. Balčytienė, H. Harro-Loit, “Between reality and illusion: re-examining the diversity of media and online journalism professionalization in the Baltic States”, 40/4 *Journal of Baltic Studies* (2009) 517.

⁵⁵ See H. Harro-Loit and K. Saks, “The diminishing border between advertising and journalism in Estonia”, 7/ 2 *Journalism Studies* (2006) 312, at pp. 312-322.

Although the current trend is to integrate media and information or communications policy, in the case of Estonia one can see paradoxes with the aim of strengthening the public sphere. The Estonian communications policy (liberalisation of the telecommunication market, decreasing prices, government initiatives e.g. Tiger Leap project for schools, development of e-banking and other e- services, etc.) has guaranteed rapid increase in the Internet usage since the end of the 1990s. Hence realisation of communication rights of citizens (e.g. access to full and fair information that affect their lives; the right to express one's views; etc.) seems to be rather well achieved. In practical terms this means, that citizens need to have competences of information processing that helps them to satisfy their needs and desires. Hence, "access to communication" is linked to the question of media literacy.

Factors that determine the content of media are mutually constituted by the size of the media market, its structure, professional journalistic discourse, accountability instruments, the regulatory and policy framework and technologies. Here the Estonian policy trend to evaluate "market neutrality" neglects the commercial pressure that affects the quality of information. Research has shown that the principle of liberal market policy has led to commercial broadcasters having certain advantages while the Public Service Broadcasting has had problems with the legal frame, leadership and financing. Still, the public service broadcaster is seen as a credible source of information and a channel of quality.⁵⁶

5. Conclusion

Socio-politically Estonia is a small but very liberal media market in the discretion of media-economic levers. Concentration is not avoidable, as the market fragmentation between numerous small and poor media organisations would also not assure professional quality of journalism inevitable for a democratic society. However, the democratic society needs endurance of professional and reliable journalism, which rather interprets than conveys the news. Especially under circumstances in which the electronic information flow causes extensive heterogeneity in media use. Therefore the role of professional journalism would create a common agenda, national identity and a trustworthy arena for the public debate. As Jane Singer says speaking about journalism during the Internet era - instead of being only gate-keepers professional journalists must become sense-makers; instead of being agenda-setters they must become interpreters of whatever is both credible and valuable.⁵⁷

This outlines the media-political paradox of a small media market: on the one hand it is inevitable to maintain a liberal media policy, which would support both economic operations and press freedom. The state interference may impoverish the market, dependant on political forces. On the other hand, the prevalence of commercial values provides apparent diversity (plenitude of news, pluralism of views), but unavoidably cheapens the content. Hence, the question of diversity and quality of journalistic content remains a vulnerable issue.⁵⁸

⁵⁶ M. Lõhmus, M. H. Tiikmaa, A. Jõesaar, "Duality of Estonian public service media", 3 /1 (4) Central European Journal of Communication (2010) 95.

⁵⁷ J. B. Singer, "The socially responsible existentialist: A normative emphasis for journalists in a new media environment", 7 Journalism Studies (2006) 2.

⁵⁸ A. Balčytienė and H. Harro-Loit, "Preserving journalism 2010", in B. Dobek-Ostrowska, M. Głowacki, K. Jakubowicz and M. Sükösd et al. (eds), *Comparative media systems. European and global perspectives* (2010) 193.

Another media quality related problem lays in the ability of individuals to protect themselves against misleading information disseminated by media which is committed to commercial value and speed. In other words, media-politically it would be predilectable to maintain a system under which the media organisations find economically motivating to check the accuracy of information prior to publication. Currently the media organisations rarely fear facing law suits by individuals.

During the two decades of regained independence the competence of law courts has increased in the field of public information and journalism-related breaches of human rights. In this regard the court case *Vjatšeslav Leedo vs. Delfi* (2009) sustained a subversive character. The adjudication of the Supreme Court on 17 pages for the first time publicly debated over liability of a media organisation in readers' generated comments to online news items. Inter alia partly the argumentation was based on economic models of particular media organisations: as the readers generated comments these were regarded to be a part of the business model. As the Supreme Court stated: the media organisation gets more profit when news get more comments. Hence, news organisations are liable for the comments.

As to the media-political discourse, until the millennium shift the analysis mainly focused on broadcasting policy. It was that way not only in Estonia but generally in academic publications about media in Central and Eastern Europe. Comprehensive analysis about court cases, shaping the public communication policies, is almost absent both in Estonia and the rest of Europe (except for Anglo-American countries). Lawyers have paid attention to communication law only recently: the textbook for students of journalism and communication about media regulation was published in 1996,⁵⁹ while the corresponding textbook for lawyers appeared only in 2007.⁶⁰

⁵⁹ H. Harro, *Ajakirjandusvabadusest kommunikatsioonivabaduse poole [From freedom of press towards freedom of communication]*(1996).

⁶⁰ Tikk and Nõmper, *Informatsioon ja õigus*.

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Broadcasting Act [*Ringhäälinguseadus*]

Competition Act [*Konkurentsiseadus*]

Constitution [*Põhiseadus*]

Estonian National Broadcasting Act [*Eesti Rahvusringhäälingu seadus*]

Law of Obligations Act [*Võlaõigusseadus*]

Media Services Act [*Meediateenuste seadus*], draft of 13/08/2010

Personal Data Protection Act [*Isikuandmete kaitse seadus*]

Public Information Act [*Avaliku teabe seadus*]

State Secrets and Classified Information of Foreign States Act [*Riigisaladuse ja salastatud välisteabe seadus*]

The case of Finland

Heikki Kuutti, Riitta Sokka and Pasi Nevalainen

1. Introduction

The purpose of this report is to describe the historical development and legal regulation of the Finnish media market and to evaluate its current status.

The introduction offers a historical summary of the Finnish media and a brief glance at media freedom. A historical review reveals the country's path from a dominion to an independent county and at the same time the development from a mostly self-regulated, political based media into a commercial system of western values. The second section explains the features of the present Finnish media market and the third section summarises the major actors in the media field and the legal regulation of the media market. We conclude the report by contemplating critically on the Finnish media market, which due to the commercial pressures of the media industry both the quantity of journalists and the quality of journalism will decline.

According to the ranking list of *Reporters without Borders* Finland has for many years, along with the other Nordic countries, been one of the countries with a high level of media freedom. Similarly, *Freedom House* ranks Finland in the category of "free countries" in political rights, civil liberties and press freedom. The overall ranking of Finland in the World Democracy Audit is fourth and in anti-corruption sixth of a total of 150 countries.¹

The circulation of dailies is the third highest in the world after Japan and Norway. Although newspapers are popular for all age groups, adults are particularly heavy users of media.² A recent study shows that Finns also have the highest media literacy skills in Europe.³ At the same time, a key characteristic of Finns is a fairly strong trust in authority, which also extends in their attitudes towards the media. According to recent Eurobarometer 72, the number of Finns who trust both governmental authorities and the media is significantly higher than European averages.⁴ These studies provide an interesting basis for review.

¹See Reporters without Borders. "Press freedom index 2009", available at: <http://en.rsf.org/press-freedom-index-2009,1001.html> (last visited on 14/10/2010) and Freedom House, "Map of freedom in the world 2010, Finland", available at: <http://www.freedomhouse.org/template.cfm?page=363&year=2010> (last visited on 14/10/2010).

² Statistics Finland, "Finnish Mass Media 2009", at p. 52. Typically, the time spent in the media varies from half an hour to an hour. Young people spend more time on the Internet.

³ European Commission, Directorate General Education and Culture, "Study on the current trends and approaches to media literacy in Europe 2009", available at: <http://ec.europa.eu/culture/media/literacy/docs/studies/country/finland.pdf> (last visited on 14/10/2010). Communication and media skills are regarded as central among the goals of learning and teaching in schools. Yet, media competence is not very explicit in subject.

⁴ European Commission, Directorate General Communication, Eurobarometer 72 (National Report figure QA10a), available at: http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_en.htm (last visited on 14/10/2010); Sanomalehti Liitto, "Medioiden mielikuvat 2010" [Report: Public opinion concerning media], Suomen lehdistö 6-7/2010, p. 5. The Finns have high degrees of trust - 74% in the judiciary, 48% in the government, compared to European averages - 43% in the judiciary and 29% in the national government. The most trusted media in Finland are radio with 79%, television with 71%, the print press with 55% and the Internet with 43%. According to a straw poll, 59% of the Finnish population find media news websites are reliable, but only 16% think that the Internet is reliable. The national and local media are active in supporting literacy campaigns in schools.

The development of the media has been firmly connected to Finland's social development. In order to understand the media field, an awareness of the historical context is necessary, particularly from the viewpoint of the freedom of the media.

Prior to becoming independent, Finland was a part of the Kingdom of Sweden, (from the 12th century until 1809) and then an autonomous Grand Duchy of the Russian Empire until 1917, when Finland declared independence. The nation building took place during the 19th century wave of European language-based nationalism. During the autonomy period, freedom of the press was restricted, most severely around the turn of the century, when the authoritarian Russian rule closed down a number of newspapers. The Finnish parliamentary reform, which introduced multiparty democracy and universal suffrage in 1907, launched a growth period of a political press system,⁵ which lasted till the 1920s but lingered in some form for the rest of the 20th century.

Since declaring independence in 1917, Finland's multi-party democracy and constitution have supported the freedom of the press. The development of Finland's society was problematic particularly during the inter War years of the 1920s and 1930s, which were marked by the instability of domestic policy largely as result of the 1918 civil war. At that time, central government was weak and the key feature of internal politics was the disagreement between the Right and the Left wings of politics. During the inter War years, opportunities for publishing communist newspapers were limited as the government banned the communist party and tried to restrain excessive radicalism.

During World War II, the content of the press, particularly war correspondence, was subject to censorship though not on a large-scale. The government directed the press through instructions but largely the press practiced self-censorship. After the Second World War, the Friendship and Cooperation Pact (1948-91) with the Soviet Union dominated Finnish foreign policy. Although the government ended press control after the war, the press continued to practice self-censorship. In 1948, the government added a section to the Finnish Penal Code, which forbade the publication of articles that "defame foreign countries or endanger external relations". In practice, the law remained a permanent deterrent until 1995 when the government abolished it. The term "Finlandisation" was used to express the habit of bypassing embarrassing foreign policy manners in the press.

Finland, nevertheless, maintained its independency throughout the Cold War period and in parallel with an increasingly neutral foreign policy developed both politically and economically towards a western style of democracy. When the ideological division of Europe ended in 1989, Finland moved to join the European Union, doing so in 1995 alongside Sweden and Austria.

The roots of almost every Finnish daily newspaper can be found in the political press system that emerged with universal suffrage in 1907: most newspapers were committed to one of the political parties. From the late 1920s onwards, the value of modern journalism and entertainment started to replace the dominance of party political journalism. In the 1950s and the 1960s, the party press system visibly declined to the extent that one party oriented newspaper in each market area gained a decisive lead over the others. At the same time, party oriented newspapers reformed

⁵ In the political press system, most of the newspapers were committed to party politics at least to some degree.

as universal newspapers offering full news services. Since the 1990s, the media has experienced changes in concentration through co-operation agreements and chain ownership. Publishers have bought other daily newspapers, cross ownership has been extended, and expenses have been cut by joint news production. Since the 1990s, the three main challenges newspapers generally face have been the declines in readership and advertising income and the expansion of broadband Internet connections. During the last two decades, the widespread use of the Internet has particularly challenged traditional media and consequently the industry is becoming increasingly integrated and interactive.

In practice, the newspaper business has been a freely accessible arena in Finland. Any individual with resources has been able to establish a newspaper. By contrast, rules regulate the licensing of radio and television communication.

Students of technology started radio broadcasts in Finland in the 1920s and established the public Broadcasting Company “Yleisradio” (YLE) in 1926, which became state owned in 1934. YLE had a monopoly on radio broadcasts from 1934 to 1985. By the beginning of the 1980s, although YLE met its public service requirements, other players sought access to the radio broadcast market. The proposal to open up the radio market was opposed by left-wing politicians until 1985, when 22 commercial local radios were granted commissions for a trial period. The licence for the first nationwide private radio channel “Radio Nova” was granted in 1997.

Television broadcast was never a state monopoly. Students active in broadcast technology started transmissions in the early 1950s, which developed into the first commercial Finnish TV channel, “Tesvisio”, in 1956. The Public Broadcasting Company YLE started regular television broadcasts two years later, with the commercial “Mainos-TV” (MTV) as a client hiring programme blocks. When Tesvisio was on the verge of bankruptcy, YLE purchased it in 1964. In spite of this MTV continued as a commercial broadcaster in Yle’s channels. As cable television and the foreign supply of programmes became more common in the urban areas in the 1980s, it caused an element of confusion in YLE’s position in the market as a Public Service Broadcaster (PSB). Eventually, in 1993, MTV started its broadcasts at its own commercial channel, while the two remaining channels became purely PSB channels. Subsequently, in 1997, the government granted a licence to “Nelonen”, another commercial channel. Since the turn of the century, Finnish television broadcasting has rapidly evolved further due to the world’s first full digitalisation programme, new ‘free distribution’ channels and pay-tv.

During the last few decades, the government has made determined efforts to develop an information society.⁶ The competitiveness strategy of the government emphasises skills and innovation policy as the solution to challenges of globalisation. As a part of its Information Society strategy, the government is actively promoting the construction of a national high-speed broadband network. In 2009 the government announced Finland to be the first country in the world to introduce a universal service obligation for broadband Internet. Every household currently has the right to have a broadband connection with a minimum speed of 1 Mbit/s.; the plan is to significantly increase the speed to 100Mbit/s by 2015. The motives behind the policy are mixed.

⁶ Ministry of Finance published the first information society program “Suomi – kohti tietoyhteiskuntaa” [Finland – Towards an information society] in 1995; SITRA (Finnish National Fund for Research and Development) published the second report “Elämänlaatu, tietotaito ja kilpailukyky” [Quality of life, knowledge and competitiveness] in 1998.

On the one hand broadband offers new potential for developing online services, on the other hand broadband opens up the way to transfer television broadcasting to the Internet and make more radio frequencies available for more profitable services.⁷ However, the Minister of Communications, Suvi Lindén, has described the new legislation as “one of the most significant achievements in regional policy by the government”.⁸

From the late 1980s onward, Finnish media and communication policy has steadily moved from the state controlled markets towards the EU-led competition policy, which is more favourable to commercial actors. In 2010, the altered status of the media is visible in three areas of media policy: broadcasting, the printed press and broadband Internet.⁹

2. The media landscape in Finland

The activities of the traditional media, the press, radio and television, are shifting towards new electronic environments, especially the Internet. At the same time, the developments are causing both new possibilities and difficulties in terms of finance and public attainment.

The total media market in Finland has grown from 3.7 billion to 4.4 billion Euros in ten years (1998-2008). The biggest growth has occurred in the electronic media whose share has grown due to television and the Internet. The media market's share of GDP has at the same time decreased to 2.4%.¹⁰

Finland has a very strong domestic production particularly in the print media due to a small language area. On the other hand, electronic entertainment media such as films and music records are often of foreign origin. The media industry is a major employer with 25,000 directly and 20,000 indirectly employed people. The domestic media industry ownership has experienced changes in recent years as the media companies have concentrated to form large businesses.¹¹

In the context of the print media, a key characteristic is the strength of regional newspapers, which provide a generic news service covering foreign, national and local topics. Typically, only one full service newspaper, with no serious competition, dominates in each province, and there are only five nationwide dailies.¹² Also, there is relatively high concentration of newspapers into chains and the trend is expected to continue.¹³ Another characteristic typical of the newspaper market structure is the high ratio of subscription to single-copy sales, which is nearly 9 to 1. Competition in single copy sales concentrates in the two evening tabloids. Although competition

⁷ See H. Nieminen, “Public interest in media policy: the case of Finland”, *Interactions* (2010) forthcoming, at p. 16-18.

⁸ “First nation makes broadband access a legal right”, CNN news, 01/07/2010, available at: http://articles.cnn.com/2010-07-01/tech/finland.broadband_1_broadband-access-internet-access-universal-service?_s=PM:TECH (last visited on 14/10/2010).

⁹ Nieminen, “Public interest in media policy: the case of Finland”, at p. 21.

¹⁰ Statistics Finland, “Finnish Mass Media 2009”, at p. 37.

¹¹ *Ibid.*, at p. 43 and p. 45.

¹² Finland has two official languages. *Helsingin Sanomat*, *Ilta Sanomat*, *Ilta-Sanomat* and *Kaupparehti* are published in Finnish while *Hufvudstadsbladet* is a Swedish language publication.

¹³ Statistics Finland, “Finnish Mass Media 2009”, at p. 169. There are 200 newspaper titles; the market share of the four biggest publishers is 56 percent; only 10 of the 53 dailies appear outside of chain ownership.

between newspapers is ambivalent with the exception of the evening tabloids, the newspaper industry does face the serious problem of declining circulation since the beginning of the 1990s, which has led to an increase in the importance of electronic media and decreasing newspaper volumes.

The Finnish government used to significantly subsidise newspapers by various means. However, since the mid-1990s, direct state aid has been drastically reduced. At one stage, the government directed aid to the party press in order to promote political pluralism, but this nominal subsidy violated EU competition legislation. Today only two forms of public subsidy remain: direct small-scale subsidy for minority language media and an indirect subsidy of zero VAT rating for standing orders (subscriptions).¹⁴

The other dominant sector of print media is the magazine market. The largest groups are consumer magazines and the trade and organisation magazines. The magazine market consists of a high level of pluralism and over 3,000 titles, however, the four largest publishers hold three quarters of the market share. In contrast to the newspaper sector the total circulation, despite declining sales of trade and organization titles, has developed steadily.¹⁵

Television in Finland is fully based on digital distribution since March 2008. As a result, the number of television channels has increased significantly. About half of the households have terrestrial television and another half cable television. The share of satellite television is just 6%.¹⁶ The state owned Finnish Broadcasting Company YLE has traditionally been a strong actor in the television market and currently attracts about half of the audience. The share of pay-tv subscribers has increased rapidly from 5% (2000) to 25% (2008).¹⁷

The state regulates the operations of YLE via the Act on the Finnish Broadcasting Company, and YLE's financing via the Act on the State Television and Radio Fund.¹⁸ YLE may not sell advertising blocks or show sponsored programmes. Instead, the state finances YLE by a licence fee that every household with a television set must pay, regardless of the use. The state has in recent years established a range of options to finance public broadcasting including the "broadcasting fee", by which households should pay the fee regardless of whether or not they use PSB and own a television set. There is an on-going debate about the role of public broadcasting and the extent to which YLE will offer the same services as commercial companies.¹⁹

YLE has six nationwide analogical radio channels distributed via the FM network and a couple of digital radio channels which the television network distributes²⁰. Ten commercial radio stations have licences for nationwide

¹⁴ Ibid., at p. 177; Nieminen, "Public interest in media policy: the case of Finland", at p. 19.

¹⁵ Statistics Finland, "Finnish Mass Media 2009", pp. 200-201. State support for cultural magazines was 1€ million in 2009.

¹⁶ Ministry of Communication and Transport, "Koko Suomi siirtyi digiaikaan" [The whole Finland proceeds to the digital era], available at: <http://www.lvm.fi/web/fi/uutinen/view/820406> (last visited 14/10/2010); Statistics Finland, "Finnish Mass Media 2009", at p. 65.

¹⁷ Statistics Finland, "Finnish Mass Media 2009", at p. 219.

¹⁸ Act on the Finnish Broadcasting Company (1380/1993) and Act on the State Television and Radio Fund (745/1998).

¹⁹ The TV licence fee cost about 235 Euros in 2010, see Law 745/1998. See also Nieminen, "Public interest in media policy: the case of Finland", at p. 10-16.

²⁰ Two of the nationwide channels are in Swedish. YLE has also 20 provincial radios and one Sami language radio in Lapland.

transmissions and 47 for local transmissions.²¹ In recent years commercial radio stations, largely foreign owned, have attracted more listeners (50% of audience) than YLE (44%)²² and while their annual revenues have increased in the last ten years to 53.2€ million, YLE spent 68€ million of television licence money on radio broadcasting in 2009.²³

The popularity of the Internet has grown rapidly in the last ten years, with a domestic penetration rate of 75% in 2008 and has challenged the traditional norms of media. Nevertheless, the most popular media websites in Finland, excluding portals, are maintained by the traditional mass media. The four most popular belong to the evening papers, *Ilta-Sanomat* and *Iltalehti*, and the broadcasters YLE and MTV. Online versions of newspapers have proliferated quite rapidly during the 2000s and all Finnish dailies publish regularly updated online versions.²⁴ However, online publishing is facing financial problems. Media houses have initially chosen to distribute free content on the Internet, which the public is not willing to pay for. Media companies have developed different strategies in order to make the Internet profitable such as selling e-copies of newspapers and commercial blocks in popular net sites. In many cases the contents of pages are meant to persuade visitors to buy products in which case the income is based on the sales of advertisements of spin-offs. Television companies are distributing programmes via the web, usually for a certain period of time after being shown on air.²⁵ Major media companies also offer mobile services. However, the type and quality of services provided varies.

Several media houses have profiles in social media in order to get hints for stories and to take part in public discussions. According to a recent study, practically all Finnish journalists use social media to some degree in their work. The main reasons are for seeking background information, topics and new points of view to the stories, and charting public opinion. Popular sites visited in the Internet are informative sites, various newsgroups, blogs and social media. However, in journalists' opinions information in the social media should be assessed critically.²⁶

Nearly half of the Finnish Internet users participate in discussion groups on the Internet. The most popular social media in 2010 is "Facebook" with a 45% penetration rate.²⁷ Politicians, political parties and various non-governmental organisations have taken advantage of social media which has been discovered as a useful media to share information on their activities. In recent years, some authorities

²¹ FICORA Toimiluvanvaraisten radioiden sisältötutkimus 2008 [Content study of licenced radio stations 2008], available at: http://www.ficora.fi/attachments/suomiry/5C7WyEjO5/Toimiluvan_varaisten_radioiden_sisaltotutkimus_2008.pdf (last visited on 14/10/2010).

²² Statistics Finland, "Finnish Mass Media 2009", at p. 94 and pp. 102-103. In 1998-2008 the reach of YLE has dropped from 54% to 44% while commercial stations have increased to 50%. Commercial radio is most popular amongst the younger generation while PSB YLE is most popular amongst the older generations.

²³ Finnish Broadcasting Company (YLE), "Annual report 2009", available at: <http://yle.fi/fbc/annualreport.shtml> (last visited on 14/10/2010).

²⁴ Statistics Finland, "Finnish Mass Media 2009", pp. 218-219. In 2008, there were 164 Internet newspapers and 248 Internet magazines.

²⁵ For YLE programmes see: <http://areena.yle.fi/>, for MTV programmes see: <http://www.katsomo.fi> (last visited on 14/10/2010).

²⁶ J. Laine, *Sosiaalisen median hyödyntäminen uutistoimittajan työssä* [*The use of social media in journalism*] (2010).

²⁷ Statistics Finland, "Finnish Mass Media 2009", at p. 219; Facebook, "Facebook statistics Finland", available at: www.facebook.com/countries-with-facebook/FI/ (last visited on 14/10/2010).

have begun to use social media in particular opportunities. In recent years for instance the police has started to join popular social media sites with “Police” profiles, the purpose being to offer a new channel to contact police, crime prevention, informing and discussion. The Ministry of Foreign Affairs has in turn started to utilise of social media by maintaining contact with Finns abroad.

3. Media policy in Finland

The Finnish Constitution is the most fundamental provider of the freedom of expression and consequently the freedom of media. There are also several rules in legislation regulating media environment structure and journalism practices. Structural regulation relates to licensing, ownership and competition of the media. Regulations about journalistic practices concern both access to information and publishing information. In addition to legislation, there are several self-regulation rules regarding journalism.

3.1 Actors of media regulation and policy

State bodies, ministries and ombudsmen work with legislation, permits and surveillance of media market. The two most important ministries concerning the media are *the Ministry of Transport and Communication* and *the Ministry of Education and Culture*. The Ministry of Transport and Communication prepares legislation on communication networks, issues of privacy protection and data security and the policy of frequencies. The Ministry also oversees telecommunications, the operating licences and the press subsidy system. An agency under the Ministry is *the Finnish Communications Regulatory Authority, FICORA*, that maintains an overview of the functionality of electronic communications networks and information security, reports of eventual information security threats, plans and administers the use of radio frequencies, communications network numbers and network addresses (e.g. FI-domain names). FICORA also collects television and licence fees to be used for PSB programme production.

The Ministry of Education and Culture deals with the content for TV, video and motion pictures, copyright matters, education, archiving and research. The Ministry also grants subsidies for cultural periodicals. The Finnish Government appoints *the Copyright Council* for three years at a time to assist the Ministry in copyright matters and to issue opinions on the application of the Copyright Act.

The Data Protection Board is an independent authority affiliated to the Ministry of Justice, and the most important decision-making agency in personal data matters. The board may grant permission for the processing of personal data, provided that the vital interests of the subject are protected. *The Data Protection Ombudsman* provides direction and guidance on the processing of personal data, supervises the processing in order to achieve the objectives of the Personal Data Act (523/1999 *begin_of_the_skype_highlightingend_of_the_skype_highlighting*), as well as makes decisions concerning the right of access and rectification.

The Supreme Court handles lawsuits of a precedent nature concerning media, e.g. freedom of speech and media freedom. *The Supreme Administrative Court* is the last resort in administrative cases, including cases relating to publicity and accessibility of the material of public authorities.

In the context of journalism, *the Parliamentary Ombudsman* and *the Chancellor of Justice* observe openness in public work and give remarks of misbehaviour of authorities in information delivery.

Thus, the Finnish communication policy aims to secure basic communication services for all citizens and promotes the transparency of decision-making of authorities by securing the accessibility of official papers. The main concerns relate to information security and privacy protection. They are secured by laws, supervision, guidance and permission procedures.

Unionisation in Finland is endemic and there are several associations and federations of media field workers, which are committed to developing the employment conditions in media industry and co-operating with decision-making state bodies. *The Federation of the Finnish Media Industry, Finnmedia*, is an umbrella organisation for the mass media and the graphic arts industry. The main purpose of the organisation is to promote the overall and economic operating environment for the media sector in Finland. Associated organisations from several sectors of the media include the Finnish Periodical Publishers' Association, the Federation of the Printing Industry, the Finnish Newspapers Association, the Finnish Book Publishers Association, and the Association of Finnish Broadcasters. The aim of *the Association of Finnish Advertisers* is to further the interests of advertisers and to promote a policy of informative advertising which conforms to the accepted practice of trade. *The Union of Journalists in Finland* is a trade organisation of Finnish journalists (including freelancers and copy editors) with the main tasks of developing the employment conditions of journalists and promoting media freedom. The code of conduct, "Guidelines for good journalistic practice", interpreted by the Council for Mass Media, was formally adopted by the Union. Several members of the union are associated with several associative associations supporting special fields of journalism, e.g. investigative journalism, political journalism, crime and court journalism, and economic journalism.

In Finland the media industry has self-regulatory bodies, which assess the ethical conduct of journalists and advertisers. The associations of publishers and journalists established *the Council for Mass Media* to act as a self-regulatory body for mass media content and to cultivate responsibility in mass media. In addition, representatives of the public sit on the Council. The Council evaluates media ethics based on the complaints of the media public. A mass media outlet, which the Council regards as having violated good journalistic practice must publish the resolution of the Council without delay and without direct comment. Resolutions are also published in the website of the Council. In addition to interpreting desirable journalistic practice and dealing with complaints, the Council gives statements on actual topics. An exceptional feature in the Finnish media field is that in practice all of the Finnish media organisations are members of the Council for Mass Media and have committed themselves to self-regulation and accepted the objectives of the Council. Advertisers have a similar self-regulatory body, *the Council of Ethics in Advertising*, which issues statements on whether or not an advertisement or advertising practice is ethically acceptable

Education of communication and journalism as well as media research is performed in several Finnish universities, of which the most important are Helsinki, Jyväskylä, Tampere and Turku along with their research institutions. Media research in Finland is conducted by universities, associations and companies. The most

important function of *the Finnish Audit Bureau of Circulations (FABC)* is to audit circulations of newspapers and periodicals that are sold by subscription or as single copies. Every year, circulation audits are undertaken for more than 400 such publications. Another important function of the FABC is research. Since 1972, the bureau has commissioned the National Readership Survey (NRS), which produces readership figures for newspapers and periodicals and information about the structure of the readership. *The Finnish Association of Marketing Communication Agencies* regularly yields marketing information, e.g. on readership and marketing expenditure. *Finnpanel Ltd* measures television viewing and radio listening. The purpose of the research is to monitor the trends of television and radio consumption in households and by individuals. Finland is also a member of *Nordic Information Centre for Media and Communication Research (NORDICOM)* with Denmark, Iceland, Norway and Sweden.

Noteworthy is, that although the media environment in Finland is lightly regulated and mainly subject to self-regulation, there are only few civic organisations in the media market. This may be due to the high degree of trust the Finns place on officials and media actors.²⁸

The purpose of *Electronic Frontier Finland (EFFI)* is to defend active users of electronic communication. EFFI influences legislative proposals concerning personal privacy, freedom of speech and user rights in copyright law. *In Favour of the Freedom of Speech* is a non-religious, non-political and independent, non-profit association to support the freedom of speech and to inform about violations of the freedom in Finland and globally.

3.2 Structural regulation

The Finnish Government issued an Information Society Programme in 2003.²⁹ The purpose of the programme was to boost competitiveness and productivity and to improve citizens' utilisation of information and new communications technologies. On the basis of this programme, the licensing regulation concerning the mobile television network (DVB-H) operations was altered.³⁰ FICORA instead of the government grants the licences and the procedure is now more straightforward. Long-term radio and television operations need a licence from the government for terrestrial digital transmissions and terrestrial antenna network.³¹ The government proclaims vacancies for licence applications, which are granted for a maximum period of twenty years.³² This procedure is due to the shortage of radio frequencies. FICORA is also

²⁸ European Commission, Directorate General Communication, Eurobarometer 72, at p. 5; Sanomalehtien liitto: "Medioiden mielikuvat 2010" [Report: Public opinion concerning media], Suomen lehdistö (2010) 6-7, pp. 5-7.

²⁹ Finnish Government, Government Policy Programmes, "Information society", available at: <http://valtioneuvosto.fi/tietoarkisto/politiikkaohjelmat/tietoyhteiskuntaohjelma/en.jsp> (last visited on 09/08/2010).

³⁰ Government Bill 98/2006.

³¹ Act on Television and Radio Operations (744/1998), section 10. A licence may be granted to an individual, an organization or a foundation, which is financially secure and has the capability to maintain regular operations in accordance with the licence. Network service providers in public authority networks are required to have the ability and professional skills needed in their field of operation.

³² Communications Market Act (393/2003), section 8.

responsible for granting short-term³³ television and radio broadcasting licences. Cable and satellite-relayed television operations do not need a licence in Finland.³⁴

As stated in several governmental bills, the aim in the media production is to safeguard the diversity of programmes and the needs of special groups of the public. Due to this the licensing authority can attach regulations to the licences. These regulations can relate to (1) the regional service area of broadcasts, (2) the broadcast time of the day, and (3) transmission technology and transfer capacity,³⁵ (4) the length of the licence period and (5) the content quota.³⁶ On average television broadcasters have to reserve a majority proportion of their annual transmission time³⁷ for European programmes and in addition 15% of their transmission time or alternatively 15% of their programming budget for programmes produced by independent producers.³⁸ The share of independent production was increased to contribute to the digital content production in Finland.³⁹ According to FICORA, the radio licences include more specific requirements concerning the content of the programmes from 2007. Nationwide radios are obliged to offer approximately 30% of spoken programme of the total broadcast time from 6 a.m. to 6 p.m. on weekdays, regional radios 20% and local radios 15%. Regional and local radio licences necessitate that programmes on the whole are directed to the population of the broadcaster's range, are of local topics or serve the interests of the special groups of the area.⁴⁰ In addition, in 2008, FICORA specified that programmes are to be identifiable⁴¹ and independent compared to other licence holders. FICORA monitors yearly how radio channels have fulfilled their licence obligations.⁴²

³³ In analogue networks for a maximum duration of 3 months or eight hours per week, in digital network for a maximum duration of 1 month. See Act on Television and Radio Operations (744/1998), section 7.

³⁴ The Act on Television and Radio Operations (744/1998) does not apply to television or radio broadcasting in the autonomous Province of Åland, where TV and radio are regulated by the Act on the Autonomy of Åland (1144/1991).

³⁵ Act on Television and Radio Operations (744/1998), section 11.

³⁶ "In the programme structure the needs of different population groups should be taken into account, as well as the aspects of communication and cultural politics. In addition, the programme has to promote the audio-visual culture. Programmes must be of a high quality and versatile, as well as including news, topical programs and entertainment." See MTV's licence, available at: http://www.lvm.fi/c/document_library/get_file?folderId=991060&name=DLFE-10002.pdf, at p.2 (last visited on 14/10/2010).

³⁷ Excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping.

³⁸ An independent producer is the share capital of whom an individual television broadcaster controls at most 25%, or several television broadcasters at most 50%, and who, during the past three years, have produced no more than 90% of its programs for the same audiovisual broadcaster. Half of the programmes of the independent producers have to have been produced within the past five years. The Act on Television and Radio Operations (744/1998), sections 2, 16 and 17.

³⁹ Government Bill 241/2001.

⁴⁰ For example, the licence of nationwide Radio Nova states that there should be at least 2 hours of news and topical material between 6 a.m. and 6 p.m. on weekdays and minimum 30% of spoken programme correspondingly.

⁴¹ A programme is identifiable if 50% of the editorial content between 6 a.m. and 6 p.m. on weekdays differs from the content of other licence holders. In this context, editorial content means the entirety of music, speech and other content, excluding advertising.

⁴² FICORA, "Toimiluvanvaraisten radioiden sisältötutkimus 2009" [Licence-dependent radio content study 2009], available at: http://www.ficora.fi/attachments/suomiry/5m2BNYf4S/Toimiluvanvaraisten_radioiden_sisaltotutkimus_2009.pdf, (last visited on 30/08/2010).

The state owned public service Finnish Broadcasting Company YLE (Yleisradio) operates under an act of its own, the Act on Finnish Broadcasting Company (1380/1993). YLE also complies with an internal constitution called “The Guidelines of Broadcasting” (Ohjelmatoiminnan säännöstö), which has the same features as the Act and the ethical guidelines for journalists combined. YLE is not required to obtain an operating licence to carry out analogue and digital television and radio broadcasting on frequencies that have been allocated to it by the government. YLE’s purpose is to produce public service programming for access by all under equal terms.

In contrast to radio and television broadcasting, the print media in Finland is far less regulated since there are no technical limitations. Therefore no licence, permit or registration is required to set up a newspaper or other publication. Anyone with the funds to start a publication is free to do so as long as periodicals and network publishers identify the publisher and responsible editor. This information is to be included in the publication with the information on its year of issue.⁴³ Similar to print media, the online media operates free of licences, permits or registration.⁴⁴

There is no legal regulation of foreign or of the quantitative nature of ownership in the media market in Finland, apart from the ownership of YLE, which is obliged to have state ownership.⁴⁵ In addition to this there are some rules related to the establishment of an audiovisual content producing company.⁴⁶ The principal rule is that a company is established in Finland, if it has its head office in Finland or if the editorial decisions about programmes are taken in Finland. Foreign ownership is allowed and it has risen in the Finnish electronic media, especially in radio companies. Major newspapers are still nationally owned. Cross-media ownership is not prohibited and is very common.

Competition on both broadcast and print media is regulated by the same laws in Finland. The Act on Competition Restrictions (480/1992) was based on the injunction principle and Finnish Competition Authority (FCA) could not forbid a merger even if it caused a monopoly. The law was altered in 1998 when merger control began in Finland, and again in 2003 when the EU’s regulatory framework for competition rules⁴⁷ was implemented in Finnish legislation. The new EC Merger Regulation entered into force in 2004, according to which the European Commission is responsible for monitoring the impacts of concentrations. If a concentration exceeds a certain turnover threshold (350€ million), the acquisition has to be notified to the

⁴³ An eligible responsible editor is at least 15 years of age, is not a declared bankrupt and their competency is unrestricted. There are no legal quota rules concerning the content of print media either, but the content is decided by the responsible editor. See the Act on the Exercise of Freedom of Expression in Mass Media (460/2003), sections 4-5.

⁴⁴ Ibid., sections 12,14 and 16 apply to private individuals, who maintain a web site with regard to e.g. criminal and tort liability, as well as the confidentiality of sources and the right to anonymous expression, but there are no provisions regarding licensing. FI- (Finland) and AX- (Åland) domain names are supplied by FICORA.

⁴⁵ “The State shall own and control the share capital of the company to an extent which corresponds to at least 70 per cent of all the shares in the company and of the votes generated by all the shares in the company.” See Act on the Finnish Broadcasting Company (1380/1993), section 2.

⁴⁶ The provisions of the Act on Television and Radio Operations (744/1998), section 5, handle, for example, a significant work force, satellite capacity and the broadcasters in European Economic Area and states who are parties of the European Convention on Transfrontier Television.

⁴⁷ EC Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJL 1, 04/01/2003, pp. 1-25.

European Commission within a week, which has the sole power to investigate. Article 101 applies to both horizontal competition restraints (cartels) and vertical agreements such as distribution agreements. Corporate acquisitions and concentrations of companies⁴⁸ have to be notified to the FCA. Also the operating licences are revaluated in corporate acquisitions.⁴⁹ Article 102 prohibits the abuse of dominant position. The Communications Market Act (393/2003) describes different actions which can be imposed on a company with a dominant market position. FICORA can force a company that holds a dominant position to transfer or lease out its communications network or communication services to another company in the same market.⁵⁰ The law was amended in 2008 because the Communications Market Act restricted the FCA's authority⁵¹ and also to alleviate the position of small and medium-sized companies in the market.

Overall, Finnish legislation is consistent with the government's point of view concerning information and media. Light regulation secures the evolution of communication technologies and emphasises a wide variety of possibilities to media users. Therefore foreign and cross-media ownership is not prohibited and licensing regulation follows closely the developments in the media industry and aims to secure diversity. The changes in competition legislation have mainly been caused by the EU regulation and will enable the access of new firms to the media market.

3.3 Freedom of expression

Freedom of expression is included in the 12th section of the Finnish Constitution (731/1999). According to the section:

Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.

(Finnish Constitution, 731/1999, Section 12)

Accordingly, preventing or censoring communication is prohibited and, therefore, authorities must not interfere in the publishing decisions of the media. The freedom of expression is surprisingly liberal in Finland. The mention of "without prior prevention by anyone" also permits the publishing of illegal messages. Interference in the dissemination of the messages would only be possible after they have been published or otherwise expressed.⁵² The only acceptable restrictions regard minors' access to videos or other pictorial programmes (including for instance violence or sex) that are suitable only for adults.

⁴⁸ EC Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger regulation), OJL 24, 29/01/2004, pp. 6-8.

⁴⁹ Act on Television and Radio Operations, section 13.

⁵⁰ Communications Market Act, section 18 and chapter 5, section 39.

⁵¹ The Communications Market Act was compulsive compared to the European Commission recommendations. See the Government Bill 48/2007.

⁵² See for example P. Tiilikka, *Sananvapaus, yksilön suoja ja lähdesuoja Ruotsissa, Norjassa ja Alankomaissa sekä Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä* [Freedom of expression, privacy and protection of sources in Sweden, Norway, Netherlands and in decisions of the European Court of Human Rights] (2010), at p. 14.

In many situations, receiving information is an essential part of anyone's freedom of expression. According to the Finnish Constitution

Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.

*(Finnish Constitution, 731/1999, Section 12)*⁵³

It is notable that the principle of freedom of expression does not automatically guarantee this right to everyone. The freedom to publish or not to publish is an essential part of journalism, and ultimately the right of every editor-in-chief.⁵⁴ However, the Internet has changed the situation dramatically. There are neither any organisations controlling the content of the Internet nor any Internet-specific laws, but the laws concerning media content do apply to the Internet. Usually authors start investigations after a complaint. In general, there are no regulations regarding search-engines although there are a few rules referring to Internet operators.⁵⁵

Journalists as media professionals have an outstanding position in pursuing the freedom of expression. Journalism has traditionally been a free profession in Finland, which explains the diverse educational background of current 16,000 journalists, of whom approximately 40% have a journalism education and 75% have a university or college education.⁵⁶ However, there is no "obligation of expression". Regardless of broad and favourable legislation, provisions of the freedom of expression do not necessarily guarantee the journalistic use of this freedom. According to a survey among Finnish journalists the majority of respondents estimated that the independence and autonomy in journalism are to be reduced in the near future, and media houses are turning towards news industrial production. Journalists have to adapt to different upheavals, which are to cause pressure on the costs and tighter production schedules, and forcing former approaches to critical evaluation and reform. Also analytical journalism, criticism, and observance of ethical rules were believed to be declining.⁵⁷ The main changes over the last two years included an

⁵³ The section refers to the special provision act: the Act on the Openness of Government Activities (61/1999) to be discussed later in this chapter.

⁵⁴ However, according to the Act on the Exercise of Freedom of Expression in Mass Media (460/2003) there are a few exceptions regarding this freedom: the duty to publish a reply to an offensive message, a correction to an erroneous information, and obligation to publish official announcements to protect human life or health or significant environment or property interests. In addition, the right of receiving only guarantees the possibility of receiving messages in some form, not the right to receive all the messages wanted or messages in some certain form. Messages have usually ownership or copyright, and publishers may charge subscriptions and television companies pay-channels.

⁵⁵ See FICORA, "Same laws apply on the internet as elsewhere", available at: <http://www.viestintavirasto.fi/en/index/internet/internetinvalvonta.html> (last visited on 18/10/2010). Recently there has been a proposal to oblige operators (a) to control the down-loading of illegal material, i.e. films and music, from the Internet (b) to inform a customer if they download illegal material from the net. However, this is at the draft stage. Finnish Internet operators have decided to filter paedophile material upon the request of the authorities and based on a "filter list" produced by the police. Filtering is based on the Act of Obstructing Dissemination of Child Pornography Material (1068/2006). According to the Act, the police is responsible for preparing and updating a list of Internet sites that include illegal material.

⁵⁶ 1500 of Finnish journalists are freelancers, 1000 students and 3000 retired seniors. Over half of Finnish journalists are female. See Suomen Journalistiliitto, "Liiton jäsenet" [The members], available at: http://www.journalistiliitto.fi/liitto/liiton_jasenet/ (last visited on 13/10/2010).

⁵⁷ Jyrkiäinen, J., *Journalistit muuttuvassa mediassa* [Journalists in the changing media] (2008), pp. 88-91.

increase in the amount of stories to be published in several media houses, an increase in the weekly number of stories required from an individual journalist and pronounced targeting of stories to specific audiences. The problem was highlighted in particular in the electronic media. Technological developments, including the Internet may affect in the future even more the journalistic work.⁵⁸ In the long-term, narrowing of income will affect opportunities for the traditional media to recruit professional journalists, and the media content will be produced by less staff. This may decrease the quality of journalism and journalists' ability to cover important issues.⁵⁹ Culturally, there are no restraints to the freedom of expression but political correctness may have a self-censorship effect on the work of journalists.⁶⁰

The most fundamental Finnish law regarding freedom of expression and media freedom is the Act on the Exercise of Freedom of Expression in Mass Media (460/2003). The Act covers the most prominent features of the media environment and refers to the responsibilities of editors and media actors, as well as the rights of those attracting media attention. However, the Act does not refer to the contents of media publishing.⁶¹

The Act brings the press, broadcasting and online media within the same framework with respect to responsibility and the exercise of freedom of expression, thus implementing technology-neutrality.⁶² However, the Act applies only partially to private individuals maintaining a web site on an electronic communications network, and operations consisting solely of the technical production, transmission, intermediation or distribution of publications or network messages. The responsibilities of operators providing online services include only technical and distributional matters. The Act includes some responsibilities considering illegal messages: to assign the sender's identification information to authorities, to interrupt the delivery, and to destroy the message.⁶³ General responsibilities for media houses exercising journalism are related to periodicals, network publications and programmes.⁶⁴

⁵⁸ Entertaining contents as well as financial accountability in own work was estimated to increase in journalism. Ibid.

⁵⁹ A potential problem in journalism is the concentration on popular topics which would not be the most important in terms of democracy and democratic participation. See K. Nordenstreng, H. Nieminen, and R. Meriläinen, R. "Sananvapaus, media ja demokratia" [Freedom of expression, media and democracy] in S. Aalto-Matturi and N. Wilhelmsson (eds) *Demokratiapolitiikan suuntaviivat, [Trends in the politics of democracy]* (2010), pp.153-163, also available at: <http://www.om.fi/1266334043714> (last visited on 17/10/2010).

⁶⁰ Public trust for authorities is high in Finland and higher than trust for journalists, for instance. This might originate from the irritating tabloidisation of journalism. Interview with Kaarle Nordenstreng, 30/08/2010 Jyväskylä.

⁶¹ The first section of the Act refers to the main principle of freedom of expression in democracies: "In the application of this Act, interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law".

⁶² The Act repealed two previous Acts, the Freedom of the Press Act (1/1919) and the Broadcasting Liability Act (219/1971). These two forms of mass communication were collected in the same Act with the addition of the Internet which did not have any regulation before the new regulation.

⁶³ Act on the Exercise of Freedom of Expression in Mass Media, section 3.

⁶⁴ A network publication means a set of network messages, arranged into a coherent whole comparable to a periodical, from material produced or processed by the publisher, and intended to be issued regularly. Ibid., section 4.

All programmes and network publications shall be recorded and retained for at least 21 days after the programme has been broadcast or the network publication provided to the public.⁶⁵ Everyone has the right of access to a programme or network publication free of charge, if they have a justified reason to consider that they are the victim of an offence arising from their contents, or that they have sustained an injury or loss from the broadcasting of the programme or the provision of the network publication to the public.⁶⁶ A private individual, who has a justifiable reason for considering a message offensive, has the right to have a reply published in the same publication or programme.⁶⁷ Erroneous information must be corrected in the media unless such a correction is manifestly unnecessary owing to the minor significance of the error. The correction is to be published in the same publication or in a programme by the broadcaster in question.⁶⁸ The reply or correction shall be published, free of charge and without undue delay, in appropriate extension and in the same manner as the message on which the demand for a reply or correction is based. The contents of the reply or correction shall not be illegal or offensive.⁶⁹

The ground for the imposition of a fine for editorial misconduct is that the responsible editor intentionally or negligently fails in an essential manner in their duty to manage and supervise editorial work. Respectively, criminal liability for an offence arising from the contents of a message provided to the public shall lie with the perpetrator or accomplice, as defined in the Penal Code (39/1889). The provisions of the Tort Liability Act (412/1974) apply to liability for, and compensation of, injury or loss arising from the contents of a message provided to the public.⁷⁰

The Act requires a media outlet to publish a judgment concerning a violation of honour and privacy. The court may at a request made by the injured party during the criminal proceedings order that a notice of the judgment be published in the said periodical or network publication, or in a programme of the same broadcaster where an offence is committed.⁷¹ The publisher and the broadcaster shall publish official announcements in a periodical, network publication or programme free of charge, if

⁶⁵ The duty to retain the record shall continue beyond the period if a matter arising from the contents of the programme or network publication is subject to pre-trial investigation, prosecutorial evaluation or court proceedings. In this event, the record may be disposed of only after it has been established that no charge will be brought in the matter or after the case arising from the contents of the programme or network publication has been finally decided by a court of law. The prosecutor or the court last seized of the matter shall notify the publisher or the broadcaster of the expiration of the duty to retain the record. *Ibid.*, section 6.

⁶⁶ The publisher and the broadcaster shall also provide access to a record, without undue delay, to an official engaged in the pre-trial investigation or prosecutorial evaluation of an offence arising from the contents of a programme or network publication. *Ibid.*, section 15..

⁶⁷ The right to reply in the act also applies to network publications and broadcast programmes that are broadcast on a repeated basis. Previously, the right to reply did not apply to radio and television programmes and there were no rules concerning network publications. Conventional cultural critique, political, economic or societal evaluation or similar presentation of an opinion do not, however, warrant the right to reply. *Ibid.*, section 8.

⁶⁸ The right to correction applies to private individuals, corporations, foundations and public authorities regarding on them or their operations. *Ibid.*, section 9.

⁶⁹ Where necessary, the editor responsible shall assist in the technical realisation of the reply. The act includes also deadline regulations for demands of reply and correction and procedures of applying if demand is rejected by the editor. *Ibid.*, section 11.

⁷⁰ *Ibid.*, sections 12-14.

⁷¹ The court may reinforce the order by imposing the threat of a fine. The notice of the judgment shall be published free of charge and it must be reasonably detailed. The responsible editor shall see to it that so is done. *Ibid.*, section 23.

this is necessary for the protection of human life or health or significant environmental or property interests, or for some other comparable important reason.⁷²

3.4 Access to information

Access to the information can be seen to be crucial for the work of journalists and the stories published. In legislation, this is guaranteed in several ways: as the access to public documents, as journalists' right to protect their sources, and as certain freedom levels in journalistic information gathering in terms of picture taking, recording and false identity.

As previously mentioned, the openness of government activities was established in the Finnish Constitution as an essential part of freedom of expression and the right to receive information. Finland among the other Nordic countries has a long tradition of guaranteeing public accessibility to official documents by legislation. The national FOIA (Act on Openness of Government Activities 621/1999) sets the principle that official documents shall be in the public domain unless there is a specific reason for withholding them. The transparency of government regards activities of authorities and not only documents they possess. Therefore, authorities have certain informing requirements.⁷³ The intention of the Act is to promote openness and good practice on information management in government, and provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority and protect their rights and interests.⁷⁴

The application of the Act is very broad: in addition to public authorities it also applies to private bodies that exercise public authority. In addition to general authorities as state administrative and municipal authorities, state agencies and institutions, the Act applies also to corporations, institutions, foundations and private individuals appointed for the performance of a public task on the basis of the Act.⁷⁵ The public right to access refers to the information of official documents regardless of their form. The document may be in a paper or electronic format, a micro film, a register entry or a collection of entries, a voice recording, etc. The Act applies to both documents in the possession of an authority and to documents prepared by an authority or delivered to an authority.⁷⁶

According to the Act, access to documents is the main principle, while secrecy is an exception. Access may thus not be restricted without a lawful reason or more than necessary for the interest that is being protected. The Finnish FOIA consists of 32 categories of secret documents that are exempted from release according to a variety of potential harm tests depending on the type of information.⁷⁷ Documents are

⁷² Ibid., section 7.

⁷³ The Act is the main provision to refer to, unless there are other laws (e.g. the Police Act, the Patient Act etc.) which may include stronger restrictions to information access. According to the 1st section of the Act "unless specially otherwise provided in this Act or another Act".

⁷⁴ Act on Openness of Government Activities, section 3. The Act, which came into effect in 1999, replaced the previous act on the publicity of official documents.

⁷⁵ Ibid., section 4.

⁷⁶ Ibid., section 5.

⁷⁷ The most central provisions on secrecy protect important public and private interests, including international relations and foreign affairs, criminal investigations and the prevention and prosecution of crimes, state security, tactical and technical plans of the police, security preparations for emergency

kept secret for 25 years unless otherwise provided by the law, with the exception of personal information which must be kept secret for 50 years after the death of the individual. If the release would “obviously cause significant harm to the interests protected”, the Government can extend the classification for another thirty years.⁷⁸

Access is limited to non-official documents which may not be archived, such as private notes and documents of the internal activity of an authority. Documents which contain information on decision-making must be stored. Preparatory documents are to be entered into the public domain at the time of any decisions, if not earlier.⁷⁹ If a document contains only partially secret information, access must be granted to the public part of it by covering the parts to be kept secret in a document. If necessary, an authority possessing the document is required to make this kind of distinction. Information seekers are not required to provide reasons for their request or to verify their identity unless they are requesting personal or otherwise secret information. Responses to requests must be made within 14 days.⁸⁰ In cases where the information requested is withheld, authorities are required to give written refusals containing the reasons for the refusal and including guidelines to appeal. Appeal to a decision made by an authority is usually made to an administrative court.⁸¹

In addition to answering document requests, authorities are under the obligation to promote access and to assist those requesting information to find it without knowing its location. Moreover, they are required to produce and disseminate information on their services and practices, as well as on the social conditions and developments in their field of competence. Authorities are obliged to produce sets of data on request. Computer systems must be planned to ensure easy access to information.⁸² Releasing the information requested does not have to be free. Authorities have the right to charge reasonable printing expenses (cost prices) of the paper documents delivered to information seekers.⁸³

However, in spite of legislative possibilities, several technical and other kinds of restrictions have been found for the access of information. Problems partly arise from inconsistent legal interpretations of public and non-public issues, partly from the negative attitudes of the authorities providing information requested and partly from uninformed journalists and busy journalism practices not giving time to apply for documents or to complain if they are not turned over. The amount of information requested may be too vast or the documents may only be partially public and separating the public part from the secret would be too difficult. Moreover, according

conditions, military intelligence and the armed forces, protection of the confidentiality of information and privacy of personal matters, and public and private economic interests, unless it is obvious that access will not compromise those interests, business secrets, and personal information including lifestyle and political convictions, except for those in political or elected office. *Ibid.*, section 24.

⁷⁸ *Ibid.*, section 31.

⁷⁹ *Ibid.*, section 5.

⁸⁰ Information on a completed document must be released even if the document refers to a matter partially completed or the document is only a part of a larger issue to be decided in future. However, access may be restricted on the basis that handling of the matter has not yet been completed, and there are no documents prepared. In these kinds of situations, authorities are advised to give at least some oral information about the matter. See Ministry of Justice: “The act on the openness of government activities”, available at: <http://www.om.fi/23963.htm> (last visited on 13/10/2010).

⁸¹ Act on Openness of Government Activities, section 33.

⁸² *Ibid.*, sections 18-21.

⁸³ In some cases authorities can also charge for especially laborious seeking of the material. Electronic delivery of information via e-mail is free. *Ibid.*, section 34.

to the authorities, they do not have enough time to look for the information, or the format of the information is problematic for access or the archives are not organised enough to find the information requested. When authorities are uncertain whether the information is public or not, they usually refuse to provide access, just to be on the safe side.⁸⁴

Finnish law affords a great many liberties for videotaping and picture taking. Watching or monitoring a person with a technical device is illegal in domestic premises, a toilet, a dressing room or other comparable place. Picture taking elsewhere is illegal only if the place is closed to the public and picture taking violates the person's privacy. According to these two restrictions, picture taking is allowed in public areas, such as streets or parks but also in many situations in so called partially public environments, such as working places, stores, schools and restaurants.⁸⁵ Journalists can also secretly record their own conversations, for instance journalists are permitted to tape their interviews without asking permission to do so from their interviewees. Eavesdropping may be judged criminal under the following conditions. First, a person has to listen to or record with a technical device a discussion or other sounds of private life, which are not intended for his or her knowledge, and which occur in private premises. Second, the circumstances are such that the persons involved in the discussion have no reason to believe that discussion can be listened to externally.⁸⁶ According to the ethical guidelines, journalists are not obliged to reveal their identity when gathering information, if the anonymous method is an essential part for the work.⁸⁷ However, according to law giving a false identity is illegal when misleading a public authority or impersonating a public official.⁸⁸

Journalists' right to protect their sources is a central part of media freedom and independence also in Finland as it supports public debate about controversial and sensitive issues and protects the source from negative consequences due to the leaking of embarrassing information. The right is included in the Act on the Exercise of Freedom of Expression in Mass Media according to which:

The originator of a message provided to the public, the publisher and the broadcaster are entitled to maintain the confidentiality of the source of the information in the message. In addition, the publisher and the broadcaster are entitled to maintain the confidentiality of the identity of the originator of the message.

⁸⁴ H. Kuutti, "Accessibility law in the journalists' work - A Finnish study", available at: <http://users.jyu.fi/~hkuutti/JULKISUUSLAKI-NETTIINEISTO/HEIKKIKUUTTI.pdf> (last visited on 13/10/2010).

⁸⁵ Penal Code (39/1889), chapter 24 (Amendment 531/2000 Offences against privacy, public peace and personal reputation), section 6. However, for instance in restaurants or stores picture-taking might cause irritation to the customers, and the owner of the property may forbid it on the basis of disturbance caused to the customers.

⁸⁶ An attempt or preparation of eavesdropping and illicit observation is punishable. *Ibid.*, sections 5-7.

⁸⁷ Council for Mass Media in Finland, "Guidelines for journalists", available at: <http://www.jsn.fi/Content.aspx?d=48> (last visited on 13/10/2010). According to section 9 journalists must aim at obtaining information openly. However, if matters of social significance cannot be otherwise investigated, journalist may gather information from human sources without revealing his or her identity or purpose.

⁸⁸ See Penal Code, chapter 16 (Amendment 563/1998 Offences against public authorities), sections 5 and 9.

(Act on the Exercise of Freedom of Expression in Mass Media; 460/2003)⁸⁹

The right refers to all kinds of information which could reveal the identity of a journalist's human source or of anyone involved in the story.⁹⁰ Separate provisions apply to the duty to disclose confidential information in a pre-trial investigation or court proceedings.⁹¹

The Personal Data Act (523/1999), which originally came to operation already in 1988 (471/87) controls the automatic processing of personal data. The Act protects personal privacy in the processing of personal data and promotes the development of and compliance with good processing practice. However, there is an exception concerning the media. The Act does not apply to personal data files containing, solely and in unaltered form, data that have been published by the media consisting of clippings, text and photo archives. Data files meant only for editorial work, i.e. files including personal data maintained by a publisher, journalist or freelance journalist, do not fall in the scope of this law either.⁹² According to the Act, data protection authorities should inspect data files and should set conditions for their content and use. As the Act was seen to contradict the freedom of speech and the interdiction of preliminary control,⁹³ the Act was altered on these parts in 1994. Personal privacy is, nevertheless, protected by specific regulation in other laws, e.g. in the Penal Code (39/1889).

3.5 Publishing regulation

The most common problems in terms of media freedom and freedom of expression relate to publishing. The restrictions of freedom of expression usually emerge from issues of privacy and from protecting different kinds of public interests, as for instance common order. Contrary to the traditional media, publishing in the Internet is very difficult to control, not to mention interfering in inappropriate or illegal practices.

Defamation relates to spreading false information causing damage or suffering to a person. Both unintentional (media publishing in *bona fide*) and intentional (insulting) motives of publishing are illegal. However, spreading this kind of information does not constitute defamation when the issue is about criticism of someone's activities in politics, business, public office, public position, science, art or in a comparable public position and which does not obviously "overstep the limits of

⁸⁹ According to the law, journalists do not have to reveal the anonymous source, but the revealing as such is not illegal. Ethically, the question is about the journalists' liability to protect their sources and about the credibility of journalism as whole. Therefore, protection of sources is a very important part of the ethical codes of journalism. A journalist has the right to conceal the identity of any person who has provided confidential information, and the editorial office should respect this principle. See Council for Mass Media in Finland, "Guidelines for journalists", section 14.

⁹⁰ See Act on the Exercise of Freedom of Expression in the Mass Media, section 16. The right refers to the mass media overall, including traditional media (the press, television and radio) and also the Internet environment, such as private blogs or internet sites.

⁹¹ Journalists as witnesses are obliged to reveal the source in court if the case refers to imprisonment of more than six years, or if the source has broken secrecy regulations. However, sources are not obliged to be revealed in preliminary investigations regarding secrecy issues.

⁹² Personal Data Act (523/1999), section 2.

⁹³ Government Bill 311/1993.

propriety”.⁹⁴ Consequently, the journalist is required to have a certain confidence and a sufficient amount of background knowledge being able to justify the reasons or motives for publishing this kind of information. How confident they must be in an individual story depends very much on the topic and its public interest. Usually cultural and other critics do not relate to the relevant section of the Penal Code. In critiques, a journalist’s subjective treatment of an issue is understood by its nature, and the issue is not about established facts but personal opinions or conceits. Aggravated defamation concerns offences committed by using the mass media or by making the information or insinuation available to a large number of people.⁹⁵ Particularly, the person injured does not have to be alive. A sentence for defamation shall be imposed also on someone who spreads false information or a false insinuation about a deceased person, so that the act is conducive to causing suffering to a person to whom the deceased was particularly close.⁹⁶

Invasion of personal reputation concerns the mass media only and forbids public spreading of information of the private life of another person, so that the act is conducive to causing that person damage or suffering. Information does not have to be false to make the spreading illegal. However, like in defamation, dissemination of the information does not constitute an invasion of personal reputation when the issue is about a person in politics, business, public office or public position, or in a comparable position, and dissemination may affect the evaluation of that person’s activities in these positions. In addition, dissemination must be necessary for purposes of dealing with a matter with importance to society. The section is provided merely to regulate media publishing of private lives of private people.⁹⁷

Public incitement to an offence is prohibited when a person through the mass media or publicly incites anyone into the commission of an offence so that the exhortation or incitement causes a danger of the offence or a punishable attempt being committed or otherwise clearly endangers public order or security.⁹⁸ Dissemination of depictions of violence denies the sale, distribution, manufacturing and imports of films or other motion picture recordings depicting brutal violence. It is important to note that the provision does not apply to normal journalistic publishing: “the depiction of violence is to be deemed justifiable because of the informative nature or manifest artistic value of the film or recording”.⁹⁹ Ethnic agitation concerns somebody spreading statements or other information among the public where a certain race, a national, ethnic or religious group or a comparable group is threatened, defamed or insulted.¹⁰⁰ In practice the aim of the provision is to protect the physical safety of minorities by forbidding aggressive publicity and disorder it may cause. Public discussion and argumentation for instance about immigration politics is considered to

⁹⁴ The Penal Code, chapter 24 (Amendment 531/2000 Offences against privacy, public peace and personal reputation), section 9.

⁹⁵ *Ibid.*, section 10.

⁹⁶ *Ibid.*, section 9. The provision refers to the protection of other people close to the person covered in the story. The close person does not have to be a close relative if he or she can be otherwise connected in public to the deceased one.

⁹⁷ *Ibid.*, section 8. The section was enacted due to the reporting practices of the yellow magazine *Hymy* in 1974. However, it does not restrict journalism in terms of covering the activities or the behaviour of politicians, business people, athletes, or celebrities having already been in the media publicity.

⁹⁸ Penal Code, chapter 17 (Amendment 563/1998 Offences against public order), section 1.

⁹⁹ *Ibid.*, chapter 17, section 17. Accordingly, dissemination of depictions of obscenity (section 18) is illegal like unlawful presentation or dissemination of pictorial recordings to a minor (section 19).

¹⁰⁰ Penal Code, chapter 11 (Amendment 212/2008 War crimes and crimes against humanity), section 10.

be normal media performance. A similar kind of protection is separately guaranteed to religious life in ‘breach of the sanctity of religion’ and in ‘prevention of worship’.¹⁰¹ Compared to ethnic agitation these might be more problematic when regulating public discussion and critics about religious life.

Previously mentioned the Act on the Exercise of Freedom of Expression in Mass Media (460/2003) relates as whole to the publishers and programmes but partially to private media actors, e.g. private web sites and blogs. Basically, the operators providing online services are responsible only on technical and distributional matters, for example to delete illegal messages if required. However, during a criminal investigation, operators are obliged to reveal technical identification information of the anonymous sender of illegal message. In social media publishing, as in the traditional media, the criminal liability for an offence arising from the contents of a message provided to the public shall lie with the perpetrator or accomplice. Thus there is no obligation to name a responsible editor for portals and discussion groups and only the Penal Code applies to these.¹⁰²

As a consequence, possible criminal action in the social media publishing concerns only the writer of an illegal message or the one who has actively supported the distribution of such a message. The media are not responsible by law for the content they do not produce, e.g. public discussions on their own websites, unless they (publicly announce to) moderate them. The Act on network messages relates merely to releasing of identifying information, ceasing the distribution, and forfeiting and destroying the message.¹⁰³

In terms of radio and television, the integrity of programmes must be ensured and commercial content (advertisements and teleshopping) distinguished from the rest of the programme by visual or acoustic signals or by the split screen technique.¹⁰⁴ Sponsoring of news and current affair programmes is not allowed.¹⁰⁵

The Finnish Copyright Act (821/2005) includes a few provisions to limit the copyright, and therefore to advance the freedom of expression in journalism. A disseminated work may be quoted, in accordance with proper usage, to the extent necessary for the purpose. An accepted purpose is usually to attest, to argue, to refer, to clarify, to criticise or to comment the author’s own conclusions with his or her quote.¹⁰⁶ Disseminated works of art may be reproduced in pictorial form in connection with the text in a critical or scientific presentation, and in a newspaper or a

¹⁰¹ Penal Code, chapter 17, (Amendment 563/1998 Offences against public order), sections 10 and 11.

¹⁰² The Act on the Exercise of Freedom of Expression in Mass Media, section 2, specifies a network publication as a set of network messages, arranged into a coherent whole comparable to a periodical from material produced or processed by the publisher, and intended to be issued regularly. Consequently, network publications contain journalistic material provided by editorial staff and supervised by the editor in charge such as in newspapers, magazines or television and radio programmes. Respectively, a network message means information, an opinion or some other message provided to the public by means of radio waves, an electronic communications network or some other comparable technical arrangement. Network messages relate to social media publishing and may be delivered in the websites of the (traditional) media or by transmission of private operators.

¹⁰³ Ibid., sections 17, 18 and 22.

¹⁰⁴ Unfair Business Practices Act (1061/1978), sections 1, 2 and 2a and Consumer Protection Act (38/1978), chapter 2, sections 1, 2 and 5. This also applies to when a cause or ideology is promoted or a person’s or advertiser’s public image, connected to an ideology or cause, is enhanced.

¹⁰⁵ Act on Television and Radio Operations, sections 27 and 28.

¹⁰⁶ There are no strict quantitative limits for quoting, and sometimes too compact quotes may mislead the public in terms of the original content. See Finnish Copyright Act (Law 404/1961), section 22.

periodical when reporting on a current event, provided that the work has not been created in order to be reproduced in a newspaper or a periodical.¹⁰⁷ The media is permitted to publish articles from other newspapers and periodicals on current religious, political, or economic topics unless reproduction is expressly prohibited.¹⁰⁸ When quoting the whole or a part the work, which is made available to the public, the name of the author shall be stated in the manner required by proper usage. Also, a work may not be altered in a manner which is libellous to the author.¹⁰⁹ There are no provisions in the Finnish Copyright Act regarding linking copyright protected material on the Internet. The legal character of linking has remained open so far. In practice ordinary hyperlinks can be considered as examples of electronic addresses, bookmarks or footnotes in order to refer to a material on the Internet.¹¹⁰

The ethical guidelines of journalism were established to support the responsible use of the freedom of speech in mass communication and to encourage discourse on professional ethics. The guidelines refer to journalistic operations in information gathering and publishing, but not to opinions presented in the media.¹¹¹ Journalists are primarily responsible to the media public, publishing decisions must be made in accordance with journalistic principles, and journalists have the right and obligation to resist pressure or persuasion that attempts to steer, prevent or limit the communication. Information sources must be approached critically, particularly in controversial issues. Any information obtained must be checked as thoroughly as possible even if the information has been published previously. Advertising and editorial material should be clearly separated, and hidden advertising must be avoided. Information in the stories does not necessarily have to be diverse or integral, and stories may be published on the basis of information that is considered limited.¹¹² Journalist must aim to provide truthful information which is obtained openly. However, other means of information gathering may be used if matters of social significance cannot be otherwise investigated, for instance by “cover operations” where journalists are not revealing their identity or motives. If the interviewee requests to read their statements prior to publication, it is generally wise to accept as long as it is possible in terms of the editorial techniques.¹¹³ Ethical codes emphasise

¹⁰⁷ Ibid., According to section 25, when a copy of a work of art has, with the consent of the author, been sold or otherwise permanently transferred, or when a work of art has been published, the work of art may be incorporated into a photographic picture, a film, or a television programme, provided such use is of secondary importance in the photograph, film or program.

¹⁰⁸ Ibid., section 23. This section was legislated merely to promote public discussion on important issues published in the media.

¹⁰⁹ Ibid., section 3. The same restriction is included in the ethical guidelines of journalism. According to section 7, it is crucial to observe good professional practice when using the work of others, and the source must be mentioned when the information has been published by another party. See Council for Mass Media in Finland, “Guidelines for journalists”.

¹¹⁰ Decision of the Parliamentary Ombudsman 14.11.2003/626/4/02, available at: <http://www.ffi.org/sananvapaus/ea-2003-11-14.pdf> (last visited 14/10/2010). However, copyright problems emerge when copyright-protected material on the Internet is copied in other websites without permission. Ethically, it is important to inform web users about moving to another website via the link.

¹¹¹ Council for Mass Media in Finland, “Guidelines for journalists”.

¹¹² Ibid., However, news events should be pursued to the end, and reports on subjects and events should be supplemented once new information becomes available (for instance producing follow-up stories in criminal and courts issues).

¹¹³ Ibid., However, the right strictly concerns only personal statements of the interviewee, and not the content, perspective or tone of the story. The interviewee’s refusal to allow the publishing of his or her statements must be complied with only if the circumstances following the interview have changed so significantly that the publication of the interview could be viewed as unjust.

respect for human dignity, and the presentation of ethnic origin, nationality, sex, sexual orientation, convictions or other similar personal characteristics in an inappropriate or disparaging manner is prohibited. Incorrect information must be corrected immediately, and a reply offered to the media should be published as soon as possible without irrelevant additions.¹¹⁴

Ethical guidelines in the Internet environment do not differ outstandingly from the rules of traditional media, press, television or radio. The media should draw up clear rules for its online discussion practices and responsibilities which also should be understood by everyone entering the sites. Online discussions should be supervised and the messages should be selected and edited before publication when necessary. If a media is committed to maintaining online discussions without filtering or editing their contents, discussions should be clearly distinguished from other material.¹¹⁵

Besides evaluating ethics on complaints received, the Council for Mass Media has given some principle guidelines on media ethics. Courts should not use ethical codes when measuring media operations. Personal matters of celebrities may be published if the information regards their professional activities and the matter is of public interest. However, journalists should take into account that celebrities do not always understand the consequences of interviews. Media houses should consider with caution participation in so-called free trips. The names of participants in crime stories may be published when a considerable public interest is involved and the following issues are considered: the nature of the offence, the role of the offender and the state in juridical processing. Subliminal advertising should be avoided in order to maintain journalistic accountability, and the original source must be mentioned when quoting the information published in another media.

4. Media policy and democratic politics: an assessment

This research has investigated the developments and characteristics of Finnish media and media policy. In this final section we collate the work we have done and provide a brief discussion of the development, current situation and reflections on the future of freedom of the media and media policy in Finland.

Traditionally a free media has had a strong position in the Finnish society. The printed press is an example of the industry, in which the actors have always been private entrepreneurs and independent from governmental control. By contrast television and radio broadcasting has been more regulated as broadcasting is subject to licensing. Radio broadcasting was for a long time the only state monopoly, yet despite this, the state owned broadcasting company YLE has not been considered as a significant tool of politics. Historically, content regulations existed before the Second World War to restrict extreme political movements and also during World War II as a form of war censorship. After the war, the press developed a tradition of self-censorship. Generally, self-regulation by the press during the Cold War era was

¹¹⁴ Ibid. Journalists are required to try to hear simultaneously the views of the parties involved, and have a comment in the same story where they are criticised. If that is not possible it may be necessary to give the party the opportunity to be heard afterwards.

¹¹⁵ Council for Mass Media in Finland, "Lausuma verkkojulkaisusta" [The statement regarding Internet publishing], available at: <http://www.jsn.fi/Statement.aspx?d=59> (last visited on 13/10/2010). It is good journalistic practice to try to identify the participants in online discussions. Anonymous discussion could contribute to the realisation of freedom of expression, so it should be allowed to the journalistic discretion.

manifest by publishing foreign news concerning Finland's foreign policy. Gradually the development of the society moved towards the political structure of western democracy and an increase in the neutral status of Finnish foreign policy, which released the tension previously placed on the freedom of speech. Nowadays the freedom of expression in Finland is exemplary and guaranteed by law.

Finnish communication policy is executed very much on the basis of technological developments and the private needs of marketing forces. Instead of regulating the content of media, regulation in Finland has for a long time focused on technical norms. In a large and sparsely populated country, the government wants to guarantee both equal rights in communication, and also business opportunities. Improving technical IT capabilities has been particularly aimed at keeping Finland as one of the leading high-technology countries. In recent years, the most highlighted objective has been the building of an information society. One of the most visible manifestations of the policy is the new broadband law which guarantees a reasonable broadband access for every household. Although Internet service providers have questioned the universal service obligation because it is still not clear who will pay for loss-making services in remote areas. It seems obvious that the driving force in the Finnish media and communication policies has not been democratically based on the cultural needs and other social values, but rather on economic values and on promoting more competition in the media and communications markets.¹¹⁶

In relation to the Finnish communication policy there is no media ownership legislation other than the state owning the Finnish Broadcasting Company (YLE). The Finnish media market is open to foreign owners and cross-media ownership. Also licensing regulation has been eased in order to enable the development of new communications technologies. Originally competition legislation in Finland has been quite rigid but not sufficiently extensive. Some provisions caused unnecessary bureaucracy and at the same time the Finnish Competition Authority (FCA) was powerless against mergers even if a monopoly ensued. The amendments to the competition legislation, e.g. merger control, have mainly been due to the EU directives and regulation as well as governments objectives to ensure a variety of enterprises participate in Finnish markets. It is notable that there is no specific competition legislation concerning the media market, but the general competition regulation also covers the media field.

The freedom of expression is secured in the Finnish Constitution and is only restricted for the protection of children. One of the most prominent features in protecting the freedom of speech is the interdiction of preliminary control, which in principle even allows the expression of illegal messages. The Finnish FOIA (Act on Openness of Government Activities 621/1999) on the other hand guarantees accessibility to public documents of authorities. Although the law has been effective for over 10 years, Finnish journalists are not very familiar with the rights the legislation offers to everyone. Journalists' ignorance and disregard for the content of legislation offer a lot of opportunities and excuses to authorities not to assign information they should give according to the law when ever requested.

¹¹⁶ Nieminen, "Public interest in media policy: the case of Finland", at p. 21; Nordenstreng, Nieminen, and Meriläinen, "Sananvapaus, media ja demokratia", at p. 156. Media policy and its directions are not widely discussed in Finland. Current policy making can be characterised as drifting with no systematic definition of policy. Interview with Kaarle Nordenstreng.

Although the Finnish legislation is generally no more restrictive than comparative legislation in many other countries, the Finnish Supreme Court has favoured privacy matters at the expense of freedom of expression which should guarantee publishing of controversial information also. Due to this Finland has received convictions in the European Court of Human Rights. According to Tiilikka, changes in the law are not necessary, but the law in its current form¹¹⁷ could be interpreted more permissively in the context of the freedom of expression. In principle, Finnish legislation does not prevent negative covering of issues of public interest, or even private lives of power holders when necessary.

When examining the actors and their tasks in the Finnish media market, a notable aspect is that although state bodies are involved in creating legislation and the development of the media market, they only oversee the legality of actions and licence procedures. Their main concerns relate to information security and privacy protection. The control of actions and content from the ethical point of view is mainly in the hands of the self-regulatory bodies of the media. They are widely represented among the media actors and publish an ethical code of conduct for journalists, but the representation of the public is exiguous and sanctions of misconduct are lenient. Recently criticism has also appeared against journalists' personal commitment to the codes and complaints they have received and the poor suitability of self-regulatory measures in the social media.¹¹⁸

Journalistic culture in Finland has not been particularly investigative nor have journalists been particularly aggressive in information gathering and consequently confrontational situations to test the openness of information in practice have been rare. The lack of investigative journalism can be explained by the relatively young tradition of journalism where journalists are not ready to question the veracity of the answers they get from authorities or other sources. Also the historical background and the fairly small size of the nation could be regarded as explanatory factors for having a media culture, which has little critique and debate. Moreover, investigative journalism requires additional resources like working time and media houses are reluctant to let journalists to engage in long-lasting investigative projects.¹¹⁹

Journalists' right to protect their sources is high-level and essential part of media freedom in Finland. However, some legislative impairments to this right were prepared in 2009 after sensitive and private information regarding preliminary crime investigations were published in the media. According to the proposal, disclosure of the source would be possible if the reporting is likely to be in breach of confidentiality. At the beginning of 2010 the Ministry of Justice considered the weakening of the protection excessive. The proposal did not coordinate sufficiently with an individual's legal protection, freedom of speech and citizens' right to know about government malpractice. Also, the presentation was invalidated by arguing that the source of protection is the cornerstone of a free media.

¹¹⁷ By the end of May 2010 the number of convictions in Finland was 12 compared to Sweden (2), Norway (2) and The Netherlands (3). See Tiilikka, *Sananvapaus, yksilönsuoja ja lähdesuoja Ruotsissa, Norjassa ja Alankomaissa sekä Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä*, at p. 11.

¹¹⁸ S. Huovinen, "Journalismin itsesääntely jäänyt ajastaan jälkeen" [The self-regulation of journalism lagging behind] in *Oikeutta ja politiikkaa. Viestintäoikeuden vuosikirja 2009* [Justice and politics. Yearbook of communication legislation 2009], at p. 44-46.

¹¹⁹ H. Kuutti, *Tutkiva journalismi: Journalistinen suuntaus ja suomalaisen journalismin tutkivuus* [Investigative Journalism: Journalistic Trend and the Investigative Nature of Finnish Journalism] pp. 284-291.

During recent decades, technology has developed rapidly and rules of regulation have become more liberal and considerably more new broadcasting licences are granted than before. Nevertheless, regulation has become more difficult in the context of television and radio licensing. In addition to a traditional receiver, television can be watched on mobile phones or on the Internet. New technology has revolutionised positions of the consumers, the service providers and the legislators.

One of the ambitions of the Information Society Programme¹²⁰ of the Finnish government was to ensure that citizens have access to fast broadband connections and to improve citizens' information society skills. The Internet has in fact facilitated a new kind of citizen journalism, with the rise of blogs and other low-threshold publishing channels. The consumer has transformed into a multimedia user.¹²¹ Traditional media companies have maintained a prominent place on the Internet, which has established itself as one of the most important media. The problem has arisen how these services are to be financed: the public is not willing to pay for media content on the Internet. Another issue to be taken into consideration in the future will be responsibilities regarding publishing in the Internet. Finnish authorities have been discussing the possibilities of authorising service providers and operators to intervene in illegal activities, e.g. racism and abusive messages in discussion groups they administrate. The media houses do not have to monitor public discussions on their own web sites if they do not see any necessity. However, at the moment, inappropriate messages are deleted after they have been published mainly due to the notification of other users. On the other hand, pre-publishing obstruction can be seen to contradict with the Finnish Constitution and there mentioned interdiction of preliminary control.

Deregulation and the new business opportunities have lead to increasing competition, and to greater economic efficiency. Even the state owned Public Broadcasting Company YLE has not escaped from this drive towards efficiency, and the issue has risen about how basic public services are to be produced and financed. There has also been debate about the quality of the media. Increasingly services are produced centrally and by fewer personnel than before. The private media companies claim that the quality of journalism improves by rationalising. Together with the concentration of ownership of the media and "efficiency seeking corporation management", globalisation has also contributed to the homogenisation of the content and hence narrowed the options available to the public. In the long-term, the narrowing of income will affect opportunities for traditional media to recruit professional journalists, and consequently less staff will produce the media content. This may decrease the quality of journalism and journalists' ability to cover important issues. Nordenstreng argues that even if the media is concentrated there are still many commercial operators in the field, for whom YLE acts as a counterbalance.¹²² According to a survey among Finnish journalists the majority of respondents

¹²⁰ Finnish Government, Government Policy Programmes, "Information society".

¹²¹ Although newspaper circulation is declining, especially among young people, entertainment consumption has continuously increased. On the other hand, the Internet and various forms of social media has meant a proliferation of user-generated information on becoming a part of everyday, as peer review of information disseminated in the Internet. See Nordenstreng, Nieminen, and Meriläinen, "Sananvapaus, media ja demokratia", pp. 156-157.

¹²² Interview with Kaarle Nordenstreng.

estimated that the independence and autonomy in journalism will decline in the near future, as media houses are turning towards news industrial production.¹²³

In conclusion the Finnish media is technologically advanced, lightly regulated and offers many opportunities to acquire and to publish information. These possibilities are yet not fully exploited. However, the media companies and authorities are increasingly using new technologies and developing new business models, which have enabled interaction between the public and the media. The Internet has made information gathering and dissemination easier and a new kind of citizen journalism is evolving. Information is no longer a monopoly of the media, but the media can have an important role in democracy as long as there are economic and structural foundations guaranteeing freedom of action.

¹²³ J. Jyrkiäinen, "Journalistit muuttuvassa mediassa", pp. 6-12.

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The case of Germany

Sebastian Müller and Christoph Gusy

1. Introduction

Three important historical and political developments have influenced the media structures¹ in Germany. At the end of the Second World War, the media landscape had to be constituted completely anew.² After the Nazi regime was defeated, the Western Allies - while thinking of new models of regulation systems – were mindful of the total state control of the media and its consequent abuse by the German propaganda system.³ The new system should constitute of an independent and pluralistic broadcasting system and allow critical discourse.⁴ The print media, on the other side, was organised thereafter by private publishers. These quite unique circumstances after the war laid the foundation for the ensuing developments, especially the shaping of public broadcasting in West Germany.⁵

Alongside a liberal economic understanding and the shift in power on the federal level in West Germany, the second phase began when conservative parties and the liberal party took control in 1982.⁶ Although private publishers had tried for decades to convince the state and federal lawmakers to establish a regulatory framework for private broadcasting, the broad and comprehensive introduction of new rules for private media operators did not take place until the 1980s.⁷ Private broadcasting in Germany was incrementally legally authorised and has been developed since then.⁸

The third phase was initiated with the emergence of new media services and the advent of digitalisation. Although the policy debate on “new” media had begun in the 1970s, especially with regard to satellite and cable television networks,⁹ the potential of new media services became apparent with the development of the Internet and digitalised transmission of broadcasting.¹⁰

As for the current situation, the convergence of the media systems, the influence of liberal economic theories on the notion of media in society, and the

¹ See as a general introduction: H. J. Kleinsteuber, “Germany”, in M. Kelly, G. Mazzoleni and D. McQuail (eds), *The Media in Europe* (2004) 78.

² Dussel speaks of a “(...) sharp break (...)” of the German broadcasting after the end of the war. K. Dussel, *Deutsche Rundfunkgeschichte* [*German broadcasting history*] (2010) at p. 179.

³ Ibid., p. 184-185; G. Vowe, “Ordnung durch Medienpolitik und der Beitrag der Wissenschaft – das Beispiel Deutschland” [Structure through media policy and the contribution of science – the example of Germany], in O. Jarren and P. Donges (eds), *Ordnung durch Medienpolitik? [Order through media policy?]*, (2007) 71, at p. 76-77.

⁴ R. Steininger, “Rundfunkpolitik im ersten Kabinett Adenauer” [Media policy in the first Adenauer Cabinet], 21 Vierteljahresheft für Zeitgeschichte (1973) 388, at p. 389-390.

⁵ Dussel, *Rundfunkgeschichte*, pp. 187-194.

⁶ See D. Schwarzkopf, “Die ‘Medienwende’ 1983” [The media turn in 1983], in D. Schwarzkopf (ed.), *Rundfunkpolitik in Deutschland, Band 1* [*Broadcasting policy in Germany, volume I*] (1999) 29.

⁷ Dussel, *Rundfunkgeschichte*, at p. 268; W. J. Schütz, *Medienpolitik. Dokumentation der Kommunikationspolitik in der Bundesrepublik Deutschland von 1945-1990* [*Media policy. Documents of the communication policy in the Federal Republic of Germany 1945-1990*] (1999), pp. 433-435.

⁸ See M. Eifert and W. Hoffmann-Riem, “Die Entstehung aus Ausgestaltung des dualen Rundfunksystems” [The development and the arrangement of the dual broadcasting system], in D. Schwarzkopf (ed.), *Rundfunkpolitik in Deutschland* [*Broadcasting politics in Germany*], (1999) 50.

⁹ Schütz, *Medienpolitik*, pp. 215-309.

¹⁰ Dussel, *Rundfunkgeschichte*, p. 300f.

constrained financial situations of public and private operators pose challenges to the existing system and form the subject of much discussion.¹¹

One of the specificities concerning media legislation and media policy throughout the whole last decades is the federal system of Germany and the differentiated system of state power that shaped the process. The Federal Republic of Germany is composed at the federal level of the Federal Government and the German Federal Parliament and the regional state level with different *Bundesländer*, hereafter referred to as states. Germany comprises of 16 states, all of which have their own governments and their own parliaments or representative bodies. The Basic Law stipulates the respective competencies of the federal lawmaker and the state lawmakers. The Federal Constitutional Court has ruled that in most subjects the state lawmakers are vested with the power to adopt legislation concerning broadcasting.¹² This historically developed political situation, together with the Federal Constitutional Court's case law, has led to a highly complex legal framework at both the federal and the state level which has formed the media structure and media law.

This background information report summarises the existing system. Particular attention is paid to those aspects that promote or hinder the free and independent media necessary for democratic processes. It is structured around the following topics: an overview of the existing media landscape, the main actors in media policy and media regulation, the main legal aspects as regards democratic processes and unbiased opinion shaping, and, finally, current issues in media policy and development.

2. The media landscape in Germany

Some figures help to depict the broader background of the German media landscape with regard to its recipients. By the end of 2008, Germany had a total population of 82 million residents according to the Federal Office for Statistics.¹³ It is estimated that some 15 million people are of foreign origin,¹⁴ taking into account persons naturalised under German immigration law, those born in Germany in the second or third generation after immigration, and foreigners under the German law relating to foreigners.¹⁵ Germany can be deemed a country of immigration and cultural diversity, which is mirrored in media outlets. The official language is German, with some exceptions for two minority groups: the Sorbs in the Eastern part of Germany and the

¹¹ See in this respect C.-E. Eberle, "Öffentlich-rechtlicher Rundfunk und Telemedienauftrag" [Public-service broadcasting and telemedia assignment], 04 AfP (2008) 329; C. Möllers, "Pressefreiheit im Internet" [Freedom of press in the Internet], 03 AfP (2008) 241.

¹² BVerfGE 12, 205 (248).

¹³ Federal office for Statistics, "Bevölkerungsstand", available at: <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Statistiken/Bevoelkerung/Bevoelkerungsstand/Bevoelkerungsstand.psm1;jsessionid=D34BDA09AFD025C40D903548BCD1F3B4.internet>, accessed 29 May 2010. Numbers are only available by December 31, 2008. See also <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=de&pcode=tps00001&tableSelectio n=1&footnotes=yes&labeling=labels&plugin=1> (last visited on 30/06/2010).

¹⁴ Federal office for Statistics, "Migration und Integration", <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Statistiken/Bevoelkerung/MigrationIntegration/MigrationIntegration.psm1;jsessionid=61311300015A11BCB49D0EAAECE31221.internet> (last visited on 31/05/2010).

¹⁵ See Die Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration, 8. Bericht über die Lage der Ausländerinnen und Ausländer in Deutschland [8th report on the situation of foreigners in Germany] (2010), p. 570f, and p. 575.

Danish minority in the Northern parts. Germany has a very potent market in terms of revenue for the private media companies and in terms of fees for the public service media. Accounting for this is, among other factors, the size of the market. In addition to the population in Germany, the neighbouring countries Austria and Switzerland also have German-speaking populations, which enlarge the German linguistic area to some 90 million persons. Many migrant communities in Germany produce and consume media outlets in their own languages. Moreover, television and radio programmes are received via Internet and satellite from practically all over the world. The German media market can thus be described as a multi-cultural and multi-lingual market, however with a major market position and range of German linguistic outlets.

2.1 The German media market

The print media in terms of dailies, weeklies and Sunday editions plays an important role in political information as well as entertainment. Some 22.7 million newspapers (i.e. dailies and Sunday editions) are sold per working day.¹⁶ Statistically, 289 products per 1,000 inhabitants are available¹⁷ and newspapers reach over 71% of the population.¹⁸ The print media is divided into national, regional and, in bigger cities, local daily newspapers, weekly newspapers, and magazines. While the number of national newspapers is relatively low, the number of regional and local newspapers is rather high. In 2009, the German print market contained 10 national dailies, 8 non-subscription dailies, including the most successful tabloids, 333 titles that covered a certain region or city,¹⁹ 27 weeklies and 6 Sunday titles. In the same year, the total number of editions, under the name of the main title, produced was 1,511.²⁰ The overall number of sold subscription and non-subscription dailies including Sunday editions has declined within the last fifteen years by some 24% (from 30 million to 22.7 million titles).²¹ Advertising revenues have also declined. Although net advertising revenues of 3.6 billion Euros in 2009 seem rather high compared to other European countries, the decline from over 6 billion Euros net in 1999 depicts the precarious financial situation of many publishers.²²

The media landscape for public magazines (as distinguished from periodicals for professionals) comprises a broad range of different titles on almost all subjects of modern life.²³ In March 2010, 1,536 titles were published regularly, among them 136

¹⁶ H. Röper, "Zeitungen 2010: Rangverschiebung unter den größten Verlagen" [Newspapers 2010: Changes in the market position of the biggest publishers], 5 *Media Perspektiven* (2010) 218, at p. 219.

¹⁷ Bundesverband Deutscher Zeitungsverleger (ed.), *Zeitungen 2009* [Newspapers 2009], (2009), p. 374. Data refer to residents older than fourteen years old.

¹⁸ H.-J. Hippler, "Sieben von zehn – Leistungswerte der Zeitungen und jugendliche Mediennutzung [Proliferation of newspapers and young readership]", in Bundesverband Deutscher Zeitungsverleger (ed.), *Zeitungen 2009* (2009) 126, at p. 129.

¹⁹ Bundesverband Deutscher Zeitungsverleger, *Zeitungen 2009*, p. 364. See on concentration and editorial units of publishers: W. J. Schütz, "Redaktionelle und verlegerische Struktur der deutschen Tagespresse" [Structures of print media editorial departments and of publishers in the Germany], 9 *Media Perspektiven* (2009) 484; W. J. Schütz, "Deutsche Tagespresse 2008" [German daily press 2008], 9 *Media Perspektiven* (2009) 454.

²⁰ Bundesverband Deutscher Zeitungsverleger, *Zeitungen 2009*, p. 364.

²¹ Röper "Zeitungen 2010", p. 219.

²² Ibid.

²³ The notion of A. Vogel of public magazines [Publikumspresse] is applied in this regard to make a distinction to magazines for specific professional groups. See A. Vogel, "Zeitschriftenmarkt: WAZ-Gruppe schließt zu dominierenden Konzernen auf" [WAZ-Group closes the gap to predominate corporations], *Media Perspektiven* (2010) 296.

titles with at least fortnightly publication²⁴ and a total circulation of some 114.6 million per publication cycle.²⁵ Concentration among the five biggest publishers is rather high in this field, as they hold 64% of the market share in total and 87% of the market share of magazines published at least fortnightly.²⁶

As well as the print media and, increasingly, the Internet, television and radio are regarded as important, if not even, the most important channels for information and entertainment. In 2009, 35.3 million households owned at least one television set and could reach digital and analogue programmes via satellite, cable, antenna, and the Internet.²⁷ As for radio, the same study counted 43.06 million receivers.²⁸ It is estimated that each viewer watches over 3 hours of television per day.²⁹

Since the 1980s, broadcasting in Germany has been organised into a dual system. Public service broadcasting,³⁰ financed mainly by fees, and private broadcasting, financed mainly by advertising revenues, co-exist with different television channels and radio station formats as well as Internet platforms. The national public service full coverage television channel [Vollprogramm] “Das Erste” is produced by a working coalition of nine state public service broadcasting corporations called the ARD [Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland]. The same broadcasters produce nine regional television channels, which focus on regional and local issues, and more than 60 radio stations.³¹ Additionally, the federal states have established a second national television public service broadcaster with one channel, the Second German Television [Zweites Deutsches Fernsehen, ZDF],³² and a national radio operator, Deutschlandradio, with three stations. ARD and ZDF cooperate to produce several specialised television channels. In 2009 they enjoyed a 38.7% market share.³³ Public service broadcasters are principally funded by a fee paid by the owners of radio and television sets.³⁴ From 2013 the system will change and then all households will be charged the fee, irrespective of whether they possess a broadcasting receiver or not.³⁵

²⁴ Vogel, “Zeitschriftenmarkt”, pp. 296-297.

²⁵ Ibid., pp. 298-299; Informationsgemeinschaft zur Feststellung der Verbreitung von Werbeträgern (IVW), *Auflagenliste, 1. Quartal 2010* [List of editions. 1st quarter 2010] (2010), p. 4.

²⁶ Ibid., p. 298.

²⁷ Media Perspektiven, *Basisdaten. Daten zur Mediensituation in Deutschland 2009* [Data on media situation in Germany 2009] (2009), p. 4. An estimated number of 94% of all households in Germany are reached. Adolf-Grimme-Institut et al. (eds), *Jahrbuch Fernsehen. 2010* [Yearbook Television. 2010] (2010), p. 278.

²⁸ Media Perspektiven, *Basisdaten*, at p. 6.

²⁹ Ibid., p. 64.

³⁰ On public service broadcasting in Germany, see C. Palzer, “Germany”, in S. Nikoltchev (ed.), *Iris special: The public service broadcasting culture* (2007) 39; W. Schulz et al., *Regulation of broadcasting and internet services in Germany* (2002), p. 5-10.

³¹ ARD, “Jahrbuch 2009” [Yearbook 2009], available at: <http://www.ard.de/intern/publikationen/-/id=8080/nid=8080/did=1292570/18o9i85/index.html> (last visited on 14/10/2010), at p. 220ff., 239ff.

³² See the legal act ZDF Interstate Treaty [ZDF-Staatsvertrag, 2009].

³³ Das Erste, ZDF, and the regional programmes [Die Dritten]. Arbeitsgemeinschaft der Landesmedienanstalten (ALM) (ed.), *Jahrbuch 2009/2010* [Yearbook 2009/2010] (2010), p. 86; Adolf-Grimme-Institut, *Jahrbuch Fernsehen. 2010*, at p. 281.

³⁴ See Art. 12, Art. 13, Art. 14 Interstate Broadcasting Treaty [Staatesvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV), 2010]; Art. 2 Interstate Treaty on Broadcasting Fees [Rundfunkgebührenstaatsvertrag, 2008].

³⁵ Press Release of 10 June 2010: State Secretary of the State Government of Rhineland-Palatine, “Ministerpräsidenten Beck und Mappus: Einfacheres und gerechteres Rundfunkfinanzierungsmodell beschlossen; Kontrollintensität der GEZ wird reduziert. Staatskanzlei Rheinland-Pfalz”, available at:

Turning to private broadcasting, ProSieben.Sat1 and RTL Group (the latter owned by Bertelsmann AG) are the main private broadcasters operating at the national level, next to various local and regional radio and television broadcasters that are partially owned by smaller groups. In 2009, private broadcasters provided 147 national television channels, including full coverage channels (14), thematic channels (37), teleshopping channels (21), paid access channels (75),³⁶ and 231 regional channels. They also maintained 244 radio stations, 19 of which were broadcast nationwide.³⁷ However, the market share regarding advertising revenue and viewers - here described only for the television market - displays the predominant position of the RTL-Group and ProSieben.Sat1. With respect to advertising revenue, in 2009 ProSieben.Sat1 and RTL Group enjoyed a market share of over 80%.³⁸ They also succeeded in drawing an average of 45.2% viewers to their television programmes.³⁹

The predominant position of free television is characteristic of the German television market. This applies for both public service broadcasting, due to its mandate, and private broadcasting, due to its advertising revenues. By the end of 2009, some 4.4 million subscribers had contracts with pay television providers.⁴⁰ Pay television operators, financed by subscription fees, are generally characterised by low profit.⁴¹

Today electronic media in Germany means Internet based services. In 2009 between 67.1% and 69.1% used the Internet regularly.⁴² In 2010 the percentage has increased to 72%.⁴³ An online peak between persons younger than thirty years and older than fifty years can be observed. While in the first group, over 90% use the Internet on a regular basis, the proliferation in the second group decreased incrementally in early 2010 from some 70% (users between fifty and fifty-nine) to some 24% (users over seventy years).⁴⁴ However, this situation has not yet resulted into a complete change in media consumption practices. Classical media outlets such as newspapers, terrestrial radio and (cable, satellite or terrestrial) television are still the main sources of information, especially as regards politics and journalism,

http://www.rlp.de/no_cache/aktuelles/presse/einzelansicht/archive/2010/june/article/ministerpraesident-en-unterzeichnen-in-berlin-den-14-rundfunkaenderungstaatsvertrag/ (last visited on 14/10/2010).

³⁶ Numbers of 1 January 2010. ALM, *Jahrbuch 2009/2010*, p. 55.

³⁷ ALM, *Jahrbuch 2009/2010*, p. 170-171.

³⁸ *Ibid.*, p. 58-59.

³⁹ ALM, *Jahrbuch 2009/2010*, at p. 86. See also Media Perspektiven, *Basisdaten*, p. 69. The channels by the two private broadcasters taken into account are: RTL, RTL II, Super RTL, and VOX (all RTL-Group), Sat.1, ProSieben, and kabel eins (all ProSieben.Sat.1 AG).

⁴⁰ ALM, *Jahrbuch 2009/2010*, p. 96.

⁴¹ According to State Media Authorities, in 2008 the revenues only covered 87% of total costs for pay-TV. ALM, *Jahrbuch 2009/2010*, at p. 96.

⁴² Media Perspektiven, *Basisdaten*, at p. 75; See also the survey published by a private, economical orientated initiative, Initiative D21 (ed.), *(N)onliner Atlas 2010* (2010), available at: <http://www.initiaved21.de/category/nonliner-atlas> (last visited on 14/10/2010), at p. 10.

⁴³ Initiative D21, *Atlas 2010*, at p. 10. Less than 70% are estimated by an online-survey of ARD and ZDF. See B. van Eimeren and B. Frees, "Fast 50 Millionen Deutsche online - Multimedia für alle?" [Almost 50 million people online in Germany - multimedia for everybody?], *Media Perspektiven* (2010) 334, at p. 335.

⁴⁴ Initiative D21, *Atlas 2010*, at p. 14. Another survey displays similar results. See van Eimeren and Frees, "Deutsche online", at p. 335.

although more than 75% of the classical media outlets are equally presented in the Internet by the same publishers and broadcasters.⁴⁵

Communication has become one of the most important applications in the Internet in Germany.⁴⁶ According to a representative survey carried out by the public service broadcaster, 34% of all Internet users are members or visitors of online social networks at least from time to time.⁴⁷ It is the younger generation that has especially embraced social network services; 81% of persons younger than twenty years and 67% of persons younger than thirty years have their own account in one of these services.⁴⁸ The culture of reading and writing blogs has not yet been fully developed.⁴⁹ Blogs, in fact, are not generally considered a main source for (political) information, neither in consumer behaviour nor with regard to its credibility.⁵⁰ However, in the election of the state parliament of North Rhine-Westphalia in 2010, it is reported that political blogs discussing the main party candidates did have an impact on the outcome.⁵¹

Several news agencies operate in Germany and provide broad and differentiated services to newspaper editors and broadcasters.⁵² Among them, the most important German news agencies are dpa (Deutsche Presse Agentur [German Press Agency]), ddp (Deutscher Depeschendienst), kna (Katholische Nachrichtenagentur [Catholic Newsagency]) and epd (Evangelischer Pressedienst [Protestant Pressservice]) and some others. News agencies from other countries, such as AFP (Agence France Press) and Reuters, maintain German offices and provide German linguistic services. The German service of the Associated Press (AP) was bought by the German news agency dpp and now operates as the Deutscher Auslands Depeschendienst (dadp). Studies show that competition among news agencies in Germany is one of the most pronounced in the Western European media market.⁵³ It has to be mentioned that dpa holds an outstanding position in the German news market with services reaching more than 95% of all newspapers in Germany.⁵⁴

2.2 Journalists' background and education

There are no official data available on how many journalists work in Germany and their educational background or training. Information supplied by representative

⁴⁵ C. Neuberger and F. Lobigs, *Die Bedeutung des Internets im Rahmen der Vielfaltssicherung [The salience of Internet in the case of ensuring pluralism of opinion]* (2010), at p. 37.

⁴⁶ Over 80% of Internet users communicate via email on a regular basis. K. Busmann and C. Gscheidle, "Web 2.0: Communitys bei jungen Nutzern beliebt" [Web 2.0. Communities are liked by young users] 7 *Media Perspektiven* (2009) 356.

⁴⁷ ARD-ZDF, "Nutzung. Genutzte web 2.0-Angebote 2009" [Accessed web services in web 2.0, 2009], available at: www.ard-zdf-onlinestudie.de (last visited on 17/07/2010).

⁴⁸ Ibid.; Busmann and Gscheidle, "Web 2.0", at p. 360.

⁴⁹ It is reported that only 12% of the users younger than 19 years read blogs. See Busmann and Gscheidle, "Web 2.0", at p. 361.

⁵⁰ Neuberger and Lobigs, *Die Bedeutung des Internets*, p. 103.

⁵¹ S. Grimberg, "Die stärkste Kraft. Politblogs in NRW" [The strongest force. Political blogs in NRW], *die tageszeitung*, 11/05/2010.

⁵² See Hans-Bredow-Institut, *Zur Entwicklung der Medien in Deutschland zwischen 1998 und 2007 [The developments of the media in Germany between 1998 and 2007]* (2008), at p. 193-198.

⁵³ Hans-Bredow-Institut, *Entwicklung der Medien*, p. 194; M. Segbers, *Die Ware Nachricht. Wie Nachrichtenagenturen ticken [News seen as goods. How news agencies function]* (2007), at p. 39.

⁵⁴ Deutsche Presse-Agentur, "Zahlen& Fakten" [Numbers& facts], available at: <http://www.dpa.de/Zahlen-Fakten.53.0.html> (last visited on 18/07/2010).

studies, employers' organisations and trade unions varies considerably, as it is exemplified by the number of full-time employees in Germany. It is estimated that between 48,000⁵⁵ and 73,500⁵⁶ persons work full-time as journalists.⁵⁷

According to the data available, journalists generally work either as employees or as freelancers working on a per-assignment basis, although broadcasters have established a legal position best described as comparable to a employee's position, whilst remaining technically freelance.⁵⁸ As well as full-time journalists, an estimated number of some additional 25,000 freelance journalists and some 2,600 persons undergoing vocational training in the media (print media, broadcasting or other media) exist.⁵⁹ Publishers appear to employ more journalists than broadcasters. In 2009 they employed more than 14,000 individuals.⁶⁰

It is estimated that over 60% of journalists hold a university degree in journalism or another subject area (usually history, political science, or economics) or a degree from a private journalism school.⁶¹ More than 60% have undergone an additional vocational training programme up to two years.⁶² Despite the presumably high quality education and training received, several media actors (unions and scientists alike) request more comprehensive and detailed training, so as to guarantee a high level of quality journalism.⁶³

2.3 Media literacy and media status in society

The fostering of media literacy, understood as a "(...) individual's capacity to interpret autonomously and critically the flow, substance, value and consequence of media in all its many forms (...)"⁶⁴ has been part of the mandate of several public institutions as well as the school syllabus in Germany. The State Media Authorities, established in the 1980s, conduct programmes and activities to promote media literacy. Despite these endeavours, media literacy levels in Germany are not as high

⁵⁵ S. Weischenberg, M. Malik and A. Scholl, *Die Souffleure der Mediengesellschaft* [*The prompters in current media society*] (2006), at p. 36.

⁵⁶ Deutsche Journalisten-Verband, "Arbeitsmarkt und Berufschancen" [Labour market and job opportunities], available at: <http://www.djv.de/Berufschancen.2572.0.html> (last visited on 24/08/2010).

⁵⁷ Deutscher Journalisten Verband, "Journalist/in werden?" [Becoming a journalist?] (2008), p. 53. Numbers differ because several areas of journalism are excluded in one statistic, while included in the other.

⁵⁸ J. G. Reitzel, *Arbeitsrechtliche Aspekte der Arbeitnehmerähnlichkeit im Rundfunk* [*Aspects of labour law tailored for employees in public service broadcasters*] (2007), at p. 21ff.; see also Weischenberg, Malik and Scholl, *Mediengesellschaft*, at p. 37-39.

⁵⁹ Deutsche Journalisten-Verband, "Arbeitsmarkt und Berufschancen".

⁶⁰ Bundesverband Deutscher Zeitungsverleger, *Zeitungen*, at p. 106.

⁶¹ Weischenberg, Malik and Scholl, *Mediengesellschaft*, p. 68-69. Numbers refer to 2005.

⁶² *Ibid.*, p. 66-67.

⁶³ Survey published by the Deutsche Journalisten Union, *Gute Ausbildung dringend notwendig* [*The need for a good qualification*], available at: http://mmm.verdi.de/archiv/2008/03/journalismus/gute_ausbildung_dringend_notwendig (last visited on 14/10/2010). See also: Der Beauftragte der Bundesregierung für Kultur und Medien, "Medien- und Kommunikationsbericht der Bundesregierung 2008" [Media and communication report by the Federal Government] (2008), at p. 85-86.

⁶⁴ European Commission, Directorate General Information Society and Media, "Study on assessment criteria for media literacy levels", available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 23/7/2010), at p. 4.

as one would have expected. According to an independent study⁶⁵ commissioned by the Directorate General Information Society and Media of the European Commission, Germany achieves a medium level of media literacy, not uncommon for highly populated countries in Europe.⁶⁶

According to a “Eurobarometer” survey, published in 2008, around 46% of the German population trusts print media, though perceptions vary considerably in the western and eastern parts of Germany.⁶⁷ Where 49% of the western population trusts print media as an information medium, 60% of the eastern German population reported distrust.⁶⁸ Radio receives much better results: 67% of the German population trusts the radio with comparable figures in eastern and western Germany. Television reaches lower results and is trusted by 56% of the population overall. As for online media services, despite its gradual uptake, only 29% of the German population, primarily young people, trust the Internet as an information medium.

3. Media policy in Germany

3.1 Actors of media policy and media regulation

The German media policy scene is characterised by a multiplicity of actors, due, amongst other factors, to the fact that competencies for media legislating are divided between the state and federal legislatures. While press regulations and broadcasting laws, together with the regulation of some content aspects for the online media, fall within the remit of the state legislature, the technical aspects of cable television, telecommunications and to some degree the regulation of the online media are addressed at the federal level.

The most important actors are those at the state level. The states are, as mentioned earlier, assigned with the competence to propose and adopt legislation for public service broadcasting, as well as the licensing and ownership rules in relation to private broadcasters. They can also adopt rules on the content of broadcasts and online content.

The public service broadcasters can also be considered actors. The working coalition ARD, the Second German Television and single state broadcasting corporations all commission scientific research programmes or expert opinions, publish on media policy and - mainly the directors of the broadcasters - publish statements on current developments.⁶⁹

When it comes to the organs of the public service broadcaster, the following shall be highlighted. Each of the nine state broadcasting corporations, the national public service radio “Deutschlandradio” and the “ZDF” comprise three organs: the director of the corporation [Intendant], the broadcasting council [Rundfunkrat]⁷⁰ and the

⁶⁵ Ibid.

⁶⁶ Ibid., p. 68-69.

⁶⁷ This refers to the former inner-state boarder of East- and West Germany.

⁶⁸ European Commission, Directorate General Communication, Eurobarometer 69 (2008), at p. 27.

⁶⁹ Expert opinion commissioned by public service broadcasters see: P. Kirchhoff, “Gutachten über die Finanzierung des öffentlich-rechtlichen Rundfunks” [Expert opinion on the financing of public-service broadcasting] (2010), available at: <http://www.ard.de/intern/kirchhoff-gutachten/-/id=1886/nid=1886/did=1456538/1kmjjsr/index.html> (last visited on 14/10/2010).

⁷⁰ Called ‘Television Council’ in the case of the Second German Television.

administrative council [Verwaltungsrat].⁷¹ In accordance with the paradigm of state independence in public service broadcasting, the final decision of the content aired lays with the director.⁷² He or she is accountable for the programme and has to ensure that broadcasts adhere to the statutory programme mandate, the basic programme guidelines, the applicable media law and the common laws.⁷³

The broadcasting councils are the main supervision and operation organs in the public service system, ideally representing with their members the main groups of the German society and vested with the competence to decide on basic matters.⁷⁴ They were established to ensure a state-free, competent body responsible for controlling the activities of the broadcasters in accordance with statutory programme mandates and the applicable media law. However, they cannot adopt legally binding decisions. According to the applicable legislation, their members are nominated and elected by the state parliaments, state governments and also by representatives of different societal groups, who enjoy a legally guaranteed right to delegate single members and who constitute the majority.⁷⁵ Administrative councils are responsible for scrutinising the broadcasting corporations' financial activities and therefore cannot directly influence programming.⁷⁶ However, in times of financial constraints, budgetary cuts can impel directors to close down particular aspects of programming and as such diminish broadcasts' pluralism.

In the field of private broadcasting, currently fourteen State Media Authorities (SMAs) operate under different labelling, though with the same core duties.⁷⁷ They maintain a joint body, the Association of State Media Authorities (ALM). The SMAs are established as public bodies based on statutory regulations adopted by state lawmakers and are deemed to be independent.⁷⁸ Two organs within each of the SMA are responsible for supervising and regulating the private broadcasters: the director and the media commission⁷⁹ or - as the composition can vary - body of experts.⁸⁰ While the body of experts consists of experts elected by state parliaments,

⁷¹ See as legal basis only Art. 13 para. 1 West-German-Broadcasting Act [Gesetz über den »Westdeutschen Rundfunk Köln« (WDR-Gesetz), 2009].

⁷² C. Hahn, *Die Aufsicht des öffentlich-rechtlichen Rundfunks* [Supervision of public service broadcasting] (2010), at p. 52 with further remarks.

⁷³ A. Hesse, *Rundfunkrecht* [Broadcasting law] (2003), at p. 163.

⁷⁴ See for further information: Hesse, *Rundfunkrecht*, p. 161-162; Hahn, *Aufsicht*, p. 49-72.

⁷⁵ See only Art. 21 Interstate Treaty on 'Deutschlandradio' [Staatsvertrag über die Körperschaft des öffentlichen Rechts "Deutschlandradio" (DLR-Staatsvertrag), 2006]; Art. 6 Bavarian Broadcasting Act [Gesetz über die Errichtung und die Aufgaben einer Anstalt des öffentlichen Rechts "Der Bayerische Rundfunk" (Bayerisches Rundfunkgesetz – BayRG), 2009]; Art. 15 West-German-Broadcasting Act.

⁷⁶ See as an example Art. 21 West-German-Broadcasting Act; Hahn, *Aufsicht*, p. 75; Hesse, *Rundfunkrecht*, p. 166. The ZDF administrative council is an exception in this regard, as it co-decides on the position of the chief editor. See Art. 27 para 2b) Interstate Treaty on Second German Television [ZDF-Staatsvertrag].

⁷⁷ See ALM, *Jahrbuch 2009/2010*, p. 380ff. See also: P. Widlok, "Die Landesanstalt für Medien NRW (LfM NRW) [1987]" [State media authority for North-Rhine Westphalia], in W. R. Langenbucher, H. Pöttker and C. Schicha, *Handbuch Medienselbstkontrolle* [Manual for media self-regulation] (2005), 329.

⁷⁸ According to the relevant law, the State Media Authorities are public legal bodies and have the competence of self-governance. See only Art. 2 and Art. 38 para 1 State Media Law Rhineland-Palatine [Landesmediengesetz Rheinland-Pfalz (LMG), 2010]; ALM, *Jahrbuch 2009/2010*, p. 356.

⁷⁹ See only Art. 90, Art. 93, and Art. 94 State Media Law North-Rhine Westphalia [Landesmediengesetz Nordrhein-Westfalen (LMG NRW), 2009].

⁸⁰ As it is the case with the Media Council Berlin-Brandenburg. Art. 9 para 1 Interstate Treaty of Berlin and Brandenburg on Broadcasting [Staatsvertrag über die Zusammenarbeit zwischen Berlin und Brandenburg im Bereich des Rundfunks, 2009].

commission members are elected and delegated by state parliaments and state governments, as well as representative organisations such as the unions or the church.⁸¹ They reflect Germany's main societal groups.

Complementary to the SMAs, the Regulatory Affairs Commission (ZAK) was established in late 2008 and is now charged with the licensing and supervision duties of national broadcasters.⁸² In essence, the SMAs retain responsibility but relinquish discretionary powers to the ZAK, in which all fourteen authorities work together. Those structures became necessary in order to guarantee equal treatment for all private broadcasters in the various states and to prevent operators from deliberately establishing themselves in the state with the lowest legal requirements.

The Commission on the Concentration in Media (KEK) also fulfils an important duty, as it ascertains operators' market shares in the licensing procedure, so as to avert one media company holding a monopoly of the market and consequently of opinion shaping. In 2006, it dismissed an application of the publisher Axel Springer AG to purchase shares of the private broadcaster ProSieben.Sat1.⁸³ The KEK was reorganised by the heads of the various states after this decision, presumably in order to mitigate the so far effective and strict implementation of concentration regulations.⁸⁴

Finally, federal actors have to be mentioned. The Federal Government Commissioner for Culture and Media plays an important role at the federal level. The main tool of the Commissioner is to formulate media policies as non-binding recommendations to the legislature. This is done in a regularly published comprehensive report called "Media and Communication Report by the Federal Government". The report was last published in 2008 and is based on a thorough scientific experts' report covering all aspects of media developments and advancements in Germany.⁸⁵ Additionally, the mandated Federal Ministry and the Federal Parliament are responsible for the legal framework conditions of the media. These cover technical infrastructure, the protection of minors, data protection, and criminal law. When it comes to the courts as media policy actors, mention should be made of the European Court of Human Rights and the Federal German Constitutional Court. The former addressed the notion of public persons in Germany with practical repercussions for photograph journalism.⁸⁶ The latter established the legal space for the broadcasting system in Germany, in which the federal and state lawmakers can adopt their legislation.

⁸¹ See only Art. 13 Bavarian Media Law [Gesetz über die Entwicklung, Förderung und Veranstaltung privater Rundfunkangebote und anderer Telemedien in Bayern (Bayerisches Mediengesetz BayMG), 2009].

⁸² ALM, *Jahrbuch 2009/2010*, p. 365.

⁸³ Kommission zu Ermittlung der Konzentration im Medienbereich, *Beteiligungsveränderung bei Tochtergesellschaften der ProSiebenSAT.1 Media AG*, AZ: KEK 293-1 bis 5 decision of 10 January 2006.

⁸⁴ See the critical appraisals G. Gounalakis and G. Zagouras, *Medienkonzentrationsrecht. Vielfaltssicherung in den Medien [Law of media concentration, ensuring pluralism in the media]* (2008), at p. 166-167 and p. 212; D. Westphal, "Abschied vom Original. Zur Deformation der KEK durch den 10. Rundfunkänderungsstaatsvertrag" [Parting of an original. About the deformation of KEK], ZUM (2008) 854, at p. 856.

⁸⁵ Der Beauftragte der Bundesregierung für Kultur und Medien, "Medien- und Kommunikationsbericht der Bundesregierung 2008".

⁸⁶ European Court of Human Rights, judgment of 28 July 2005, *von Hannover v. Germany*, n. 59320/00.

As well as the KEK, the Federal Cartel Authority controls whether an intended merger complies with the Act Against Competition Constraints.⁸⁷ The Act foresees a specific provision for media enterprises, which aims to preserve the market situation and simultaneously the pluralism of opinions in the media.⁸⁸ The Federal Cartel Authority has adopted two negative decisions regarding media enterprises, both of which triggered wide discussion. One concerned the intended purchase of the “Berlin Publisher” (editor of one of the most sold newspapers in Berlin) by the publisher Holtzbrinck-Group⁸⁹ (editor of another much sold newspapers) and the other addressed the proposed merging of broadcaster ProSieben.Sat 1 AG with publisher Axel Springer AG.⁹⁰

As for self-regulatory bodies, the “German Press Council” plays an important role. It was established in 1956 as a self-control mechanism which pursues two main objectives: to organise the complaint commission as control organ for press outlets and to foster the freedom of press and unimpeded access to news sources, both through political means. The press council individual complaint procedure ensures, among other things, that print media outlets adhere to basic ethical principles, called the Press Code.⁹¹ As for political means, the Press Council employs different approaches. This includes political lobbying aiming to enhance the legal framework conditions for journalists and the Press Code that can in general ensure the credibility of print media outlets. However, the Press Council was and still is criticised for its complaint procedures, first because it has not changed the journalistic practices of German tabloids overall,⁹² and secondly because it does not create legally binding decisions that the publishers concerned must follow.⁹³

Two main journalists unions merit attention: the German Journalists Union [Deutsche Journalisten Union, dju] and the German Journalists Association [Deutscher Journalisten Verband, DJV].⁹⁴ Both associations are accepted as representative organisations in tariff treaty negotiations. Whilst the dju is affiliated with the union coalition “Ver.di”, one of the largest unions in Germany, the DJV presents itself as a combination of independent unions and professional organisations.⁹⁵ The dju aspires, among other things, to foster the professional, social, and economic interests of its members, and contributes to the protection of the basic

⁸⁷ Act Against Competition Constraints [Gesetz gegen Wettbewerbsbeschränkungen (GWB), 2009].

⁸⁸ Gounalakis and Zagouras, *Medienkonzentrationsrecht*, p. 198.

⁸⁹ Bundeskartellamt, decision of 2 February 2004. No.: B 6 - 22121 - U - 120/03. Bundeskartellamt, decision of 10 December 2002. No.: B 6 22121 - U - 98/02.

⁹⁰ Bundeskartellamt, decision of 19 January 2006. No.: B 6 - 92202 - Fa - 103/05.

⁹¹ Deutscher Presserat, *Publizistische Grundsätze (Pressekodex) “Richtlinien für die publizistische Arbeit nach den Empfehlungen des Deutschen Presserats”* [Guidelines for the journalistic work according to recommendations of the German Press Council] (2008).

⁹² See the critical appraisal by A. Baum, “Lernprozess und Interessenkonflikt. Die freiwillige Selbstkontrolle der Presse dient der ganzen Gesellschaft” [Independent self-control of print media serves the whole society], in W. R. Langenbacher, H. Pöttker and C. Schicha (eds), *Handbuch Mediensebstkontrolle [Manual for media self-regulation]* (2005) 112, at p. 120-121.

⁹³ See the critical appraisal by H. Pöttker, “Der Deutsche Presserat und seine Kritiker. Playdoyer für eine transparente Selbstkontrolle des Journalismus” [The German Press Council. For a transparent self-regulation of journalism], in W. R. Langenbacher, H. Pöttker and C. Schicha (eds), *Handbuch Mediensebstkontrolle, [Manual for media self-regulation]* (2005) 125.

⁹⁴ See for the role of unions in media policy: S. Nehls, *Mitbestimmte Medienpolitik. Gewerkschaften, Gremien und Governance in Hörfunk und Fernsehen [Co-governed media policy. Unions, committees, and governance in broadcasting]* (2009).

⁹⁵ According to its self presentation: Deutsche Journalisten-Verband, “Der DJV – Porträt” [The portrait of the DJV], available at: <http://www.djv.de/UEber-uns.17.0.html> (last visited on 26/07/2010).

right of the freedom of press.⁹⁶ DJV, with 38,000 members,⁹⁷ fosters and pursues very similar political and ethical aims.⁹⁸ Both organisations are members of the organisational board of the German Press Council.

The private broadcasters have established the “Association Private Broadcasting and Telemedia” to represent the interests of its members. Currently, some 160 companies stemming from private broadcasting and private electronic media (such as the Internet) are members of the association. The Association is a lobbying actor which addresses all relevant media policies at the national and European (EU) level. It utilises mainly statements, press releases and talks with decision-makers as levers to pursue its members’ interests. Newspaper publishers have created a comparable institution, the Association of German Newspaper Publishers [Bundverband Deutscher Zeitungsverleger]. The association represents more than 300 daily newspapers and fourteen weeklies⁹⁹ before governmental bodies and parliaments. It defends their economic interests and serves as a representative organ in tariff treaty negotiations. The Association of German Magazine Publishers serves as an umbrella organisation of more than 400 magazine publishers and is mandated with comparable tasks.¹⁰⁰

Many non-governmental organisations operate in the field of media policy either as political actors or as members of one of the regulatory bodies, i.e. the broadcasting councils. The list of the organisations represented in the broadcasting council of the West-German-Broadcaster [WDR] is a case in this point. According to Article 15 para. 3 of the West-German-Broadcasting Act, members of the Protestant and Catholic Church, the Jewish community, the German Union Association, the German Civil Servant Association, employers’ associations, the Free Social Association, the Sport Association, the Trade Association, and other individuals from the areas of media, culture, arts, and science shall be delegated and appointed. Two of the organisations shall be named here. “Network research” [netzwerk recherche] was founded in 2001 by journalists and editors to foster investigative journalism. Through publications,¹⁰¹ seminars for journalists, conferences and political lobbying, it pursues its aim of improving investigative journalism, developing educational concepts, and mentoring young journalists.¹⁰² “Reporters Without Borders” [Reporter ohne Grenzen] operates worldwide with its main office in Paris and a network of additional nine sections in other countries. In Germany, it is represented with an own section organised by an own office, which was founded in 1994.¹⁰³

⁹⁶ Ver.di, “Aufgaben und Ziele” [Assignments and objectives], available at: http://dju.verdi.de/ueber_die_dju/selbstdarstellung/aufgaben_und_ziele (last visited on 26/07/2010).

⁹⁷ Deutsche Journalisten-Verband, “Der DJV – Porträt”.

⁹⁸ Deutscher Journalisten-Verband, “Grundsatzprogramm des Deutschen Journalisten-Verbands” [Basic policy programme] (2009).

⁹⁹ According to its self-description: Bundverband Deutscher Zeitungsverleger, “Im Auftrag der Zeitung” [On behalf of the newspaper], available at: http://www.bdzv.de/im_auftrag_der_zeitung.html (last visited on 27/07/2010).

¹⁰⁰ Verband Deutscher Zeitschriftenverleger, “Aims”, available at: <http://www.vdz.de/keyfacts-keyfacts.html> (last visited on 28/07/2010).

¹⁰¹ See T. Leif (ed.), *Trainingshandbuch Recherche [Practical manual. Journalistic research]* (2010).

¹⁰² See the self-description: Netzwerk recherche, “Ziele des Netzwerks Recherche” [Objectives of the network research], available at: <http://www.netzwerkrecherche.de/Verein/Ziele/> (last visited on 27/07/2010).

¹⁰³ Reporter Ohne Grenzen, “National und international aktiv” [Active nationally and internationally], available at: <http://www.reporter-ohne-grenzen.de/ueber-uns/rog-in-deutschland.html> (last visited on 16/08/2010).

The scientific research landscape regarding the media is broad and diverse. Single researchers from universities, mainly professors in media law, communication science or affiliated fields, are commissioned to probe into specific media related questions and write in depth analysis on the results. Additionally, single institutes were established with the clear mandate to serve as research organisations with a clear inclination towards policy formulation. Other institutes tend to act as mediator between science and politics. Although many of the researchers and institutes deserve to be mentioned, due to the limited space only some shall be described here. The probably most influential research institute is the “Hans-Bredow-Institut for Media Research of the Hamburg University”, which covers a broad scope of media related issues.¹⁰⁴ The “Mainzer Medien Institute”, established by a private association, focuses on legal research activities relevant to current media political developments. Finally, the “Institute for Media and Communication Policies” is positioned on the cusp between scientific research institute and political think tank.

3.2 The media regulatory framework

3.2.1 Communication rights: Freedom of expression and information, freedom of the press and broadcasting in the German Basic Law

The federal constitution, the German Basic Law,¹⁰⁵ enshrines in its human rights section freedom of expression, the right to receive information and the freedom of press and broadcasting. The text itself, however, provides only very little information on how those rights and freedoms shall be interpreted legally. Article 5 para. 1 of the Basic Law stipulates:

"Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

All those rights can be broadly summarised as the notion of communication rights.¹⁰⁶ However, the German courts and the legal literature developed a very detailed understanding of the scope of the protections afforded.¹⁰⁷

The Federal Constitutional Court ("the Court") has shaped the media law in over 190 judgments and decisions, although the key foundations for the media structure in Germany were laid down in just a few judgments.¹⁰⁸

Important, especially for the evolving understanding of broadcasting in terms of technical developments and the media's role in a democratic society, is the Court's

¹⁰⁴ Hans-Bredow-Institut, “Mitarbeiterinnen und Mitarbeiter” [Staff], available at: <http://www.hans-bredow-institut.de/de/mitarbeiter/mitarbeiterinnen-mitarbeiter> (last visited on 28/07/2010).

¹⁰⁵ Basic Law for the Federal Republic of Germany [Grundgesetz für die Bundesrepublik Deutschland, 2010].

¹⁰⁶ See for instance: Fechner, *Medienrecht [Media law]* (2010), at p. 19.

¹⁰⁷ See: Hoffmann-Riem, “Art. 5 (Kommunikationsfreiheit)” [Freedom of communication], in E. Denninger, et al., (eds) *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland [Commentary on the basic law of the Federal Republic of Germany]* (2001), at para. 24ff. and 123ff. with further remarks also on the discussion among legal scholars.

¹⁰⁸ W. J. Schütz, “BVerfG-Entscheidungen zum Medienrecht” [Decisions of the Constitutional Court on media law], in P. Schiwy, W. J. Schütz and D. Dörr (eds), *Medienrecht [Media law]* (2010) 56. See for the role of the privately organized press: BVerfGE 20, 162 (174-176).

interpretation of Article 5 Basic Law. According to the Court, Article 5 Basic Law should be interpreted in the classical way, that is, as offering protection to the bearer of the right against wrongful interceptions. This interpretation was generally adopted in cases concerning the freedom of press. However, the Court has added another dimension to this notion: that the state is simultaneously obliged to adopt actively organisational, fiscal and procedural regulations to guarantee free and independent *broadcasting*. In the words of the Court: “The legislator has to adopt in particular regulations which make sure broadcasting is not at the mercy of one or single groups, relevant social forces get a chance to speak in the whole programme and freedom of reporting remains untouched.”¹⁰⁹ The Court has upheld the opinion and has reiterated in many decisions that the media and namely broadcasting play a crucial role in a democracy by allowing the discursive development of different opinions.¹¹⁰ Thus, it is not an individual right to protect operators from wrongful interceptions, but an obligation of the lawmakers to establish and ensure a well functioning broadcasting system.¹¹¹ As to private broadcasting, the Court has reiterated throughout the years that the pluralistic broadcasting necessary for a democracy would be endangered under the sole regime of market forces.¹¹² Thus the Court recognises indirectly the failure of the market to guarantee a pluralistic media.¹¹³ It places therefore the public service broadcasters in the position of fulfilling the duty of ensuring public discourse.¹¹⁴

Furthermore, the Court referred to the principle of democracy enshrined in the German constitution, which essentially prevents state organs from exerting control on the content that is broadcast. According to the Court,¹¹⁵ the process of opinion forming should be “bottom-up”, that is, shaped by societal groups and not by the state.

3.2.2 Structural and content regulation through federal and state law: some general remarks

The decisions of the Court mentioned above led to the question of structural regulation of the responsible state organs, namely the lawmaker. Although the media outlets converge more and more, it is still helpful to distinguish between different media in order to discuss the structure of German media regulation. In this regard,

¹⁰⁹ BVerfGE 57, 295 (322), unofficial translation.

¹¹⁰ Recently: BVerfG, MMR 2007, 770 (771).

¹¹¹ Hoffmann-Riem, “Art. 5”, para. 40; F. Kübler, *Medien, Menschenrechte und Demokratie* [Media, human rights and democracy] (2008), at p. 89-92. This convincing concept has triggered a broad reception and is still contested. See M. Bullinger, “Freiheit von Presse, Rundfunk, Film” [Freedom of press, broadcasting, film], in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band VII. Freiheitsrechte* [Handbook of constitutional law of the Federal Republic of Germany. Volume VII. Liberties] (2009) 909, at p. 964-965; M. Cornils, “Rundfunk-Grundversorgung durch subventionierten Privatrundfunk?” [Basic provision of broadcasting through subsidised private broadcasting?], *Deutsches Verwaltungsblatt* (2006) 789.

¹¹² See only BVerfG, MMR 2007, 770 (772).

¹¹³ See for further information on negative economic influence on media: M. L. Kiefer, “Medien und neuer Kapitalismus” [Media and new capitalism], in G. Siegert and F. Lobigs (eds), *Zwischen Marktversagen und Medienvielfalt* [Between market failure and media pluralism] (2004) 169, at p. 181; M. L. Kiefer, “20 Jahre privater Rundfunk in Deutschland” [20 years of private broadcasting in Germany], 12 *Media Perspektiven* (2004) 558.

¹¹⁴ BVerfGE 83, 238 (297); BVerfG, MMR 2007, 770 (771).

¹¹⁵ BVerfGE 44, 125 (140).

three different, though interconnected, areas can be ascertained: broadcasting, print media including books, and new media services, especially through the Internet.

Structural regulation is particularly pronounced in the broadcasting area. Here, the state lawmaker adopted rules actually *establishing* the dual broadcasting system. The core legal instrument, the Interstate Treaty on Broadcasting and Telemedia (Interstate Broadcasting Treaty),¹¹⁶ which was adopted by all sixteen state lawmakers, contains provisions for public service and private broadcasting as well as basic rules for new media activities, mainly through the Internet. Besides this, the state lawmakers have adopted legislation on the nine different public service broadcasters, the Landesrundfunkanstalten,¹¹⁷ the financial regulation of fees for public service broadcasting,¹¹⁸ and on advertising time.¹¹⁹

In addition, every state has adopted laws applying to private broadcasting.¹²⁰ These acts comprise provisions for the licensing of radio and television operators, some content requirements and the supervision of private broadcasters through the creation of independent bodies for that purpose.

In contrast, no provisions were adopted to establish print media. The press was left to the market and is organised privately. However, legislation, adopted solely by the states, does exist to cover print media outlets' accountability, the right to reply and the right to information.¹²¹

In the area of electronic media services, limited regulation exists. The provisions concerning public service broadcasters exhibit the most detailed prerequisites.¹²² The regulations for private broadcasters do not have the same depths, and when it comes to online services of newspapers and private persons, only some basic rules, mainly regarding accountability, are in place (for example, one has to publish the name and the address on the website).

As well as these specific regulations concerning broadcasting, press, and new media services, some general provisions apply in variations to all areas. These include the protection of young people, criminal provisions concerning libel, discrimination or hate speech crimes, criminal proceeding provisions such as telephone tapping and online searching, market concentration provisions, intellectual property provisions, and data protection provisions to name the most important of them. Particularly provisions for the protection of young people and intellectual property shape the regime and the practice regarding Internet content.

¹¹⁶ [Staatesvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV), 2010].

¹¹⁷ See only for the Northern regional broadcaster NDR-Staatsvertrag adopted by the state parliaments: Interstate Treaty on the Northern-German-Broadcasting [Staatsvertrag über den Norddeutschen Rundfunk (NDR-Staatsvertrag), 2005].

¹¹⁸ Broadcasting Fees State Treaty and Broadcasting Financing State Treaty [Rundfunkfinanzierungsstaatsvertrag, 2008].

¹¹⁹ Art. 7, Art. 7 a), Art. 8, Art. 15, Art. 16, Art. 17, Art. 44, Art. 45, and Art. 45 a) Interstate Broadcasting Treaty.

¹²⁰ See only State Media Law North-Rhine Westphalia.

¹²¹ See only the Press Law of Baden-Württemberg [Landespressegesetz, Baden-Württemberg, 2009].

¹²² See only the Art. 11d) and 11f) Interstate Broadcasting Treaty. See for the implementation further details in: WDR, “Telemedienkonzept für das Internetangebot des WDR gültig ab 1 Juni 2009” [Online concept for the web services of the West-German-Broadcaster], available at: http://www.wdr.de/unternehmen/senderprofil/pdf/gremien/rundfunkrat/WDR_20090513_Telemedienkonzept_Internet.pdf (last visited on 11/10/2010).

3.2.3 Structural regulation for public service broadcasting: state independence and general public interest

After the Second World War, the Allied Forces espoused the idea of establishing a broadcasting system that would be independent from the state, although established by it, and controlled by representative groups of society.¹²³ The different state legislations, accompanied by the rulings of the Federal Constitution Court, created a system of public service broadcasting, in which the broadcasting organisations can operate with internal self-control mechanisms and limited legal supervision by the relevant state government. Accordingly, the lawmakers are responsible for establishing and maintaining the basic framework, without the competence to influence programming. These governing structures are also known as co-regulation or regulated self-regulation.¹²⁴

Two aspects merit attention in this context, in particular as regards operators' independence from undue state influence. These are the composition of the broadcasting councils and the finance regime.

The basic function of the broadcasting councils is exemplified in the Bavarian Broadcasting Act, which stipulates: "The broadcasting council represents the interests of the general public in the field of broadcasting."¹²⁵ Comparable provisions can be found in other state broadcasting acts.¹²⁶

The media laws stipulate that besides the members elected by state parliaments, which are party members, delegates of representative groups have to be in the council as well.¹²⁷ Representative groups enjoy the right to appoint and delegate representatives, without interference by state organs.¹²⁸ Basically, the broadcasting council's composition aims to ensure a plurality of opinion. However, the majority of acts admit, in general, one representative of state governments as member in the broadcasting councils.¹²⁹

Most of the public broadcasting acts also stipulate that no member of the broadcasting council representing a societal group can hold simultaneously a position in a state government or be a member of an electoral body (European, Federal or state

¹²³ Steininger, "Rundfunkpolitik", p. 389-390.

¹²⁴ I. Stapf, "Mediensebstkontrolle - Eine Einführung" [Introduction to media self-control], in W. R. Langenbucher, H. Pöttker and C. Schicha (eds), *Handbuch Mediensebstkontrolle [Manual for media self-regulation]* (2005) 17, at p. 29-30. For the concept see: W. Schulz and T. Held, *Regulated self-regulation as a form of modern government* (2001), p. 6-7.

¹²⁵ Art. 6 para. 1 Bavarian Broadcasting Act.

¹²⁶ See only Art. 12 para. 2 Broadcasting Interstate Treaty Berlin-Brandenburg [Staatsvertrag über die Errichtung einer gemeinsamen Rundfunkanstalt der Länder Berlin und Brandenburg, 2009]; Art. 15 para. 1 Interstate Treaty on South-West-Broadcasting [Staatsvertrag über den Südwestrundfunk, 2000].

¹²⁷ See only Art. 14 Interstate Treaty on South-West-Broadcasting.

¹²⁸ The Second German TV is an exception, as it is the state governments prime minister who appoints the members of the television council. See Art. 21 para. 3 Interstate Treaty on the Second German Television.

¹²⁹ See Art. 6 para. 3 no. 2 Bavarian Broadcasting Act; Art. 5 para. 2 no. 1 Hesse Broadcasting Act [Gesetz über den Hessischen Rundfunk, 2007]; Art. 19 para. 1 no. 1 Interstate Treaty on the Middle-German-Broadcasting [Staatsvertrag über den Mitteldeutschen Rundfunk (MDR), 2002]; Art. 9 para. 1 no. 17 and no. 18 Radio Bremen Act [Radio Bremen-Gesetz, 2010]; Art. 27 para. 1 no. 1 Saarland Media Act [Saarländisches Mediengesetz, 2008]; Art. 14 Interstate Treaty on the South-West-Broadcasting; Art. 21 para. 1 a) and b) Interstate Treaty "Deutschlandradio"; Art. 21 para. 1 a) and b) Interstate Treaty on Second German Television. The "Deutschlandradio" treaty as well as the Interstate Treaty on the Second German Television stipulates that three representatives of the Federal level can be delegated by the Federal Government.

Parliament).¹³⁰ Furthermore, all public service broadcasting acts include quotas for members of state parliaments and governments, so as to ensure societal groups hold the majority of positions in the councils.¹³¹ Although representatives of societal groups always hold a majority of votes, critics contest the independence of the broadcasting councils referring to the parliaments' and governments' representatives¹³² and the alleged affiliation of most of the remaining members to one of the political parties in Germany.¹³³ Presumably party and state influence played a role, for instance, in the nomination and election of the new director of the broadcasting corporation "Bavarian Broadcasting." The recently elected incumbent had been working for the conservative-liberal Federal Government in the position of Speaker before he was elected by the broadcasting council.¹³⁴

Crucial for the independence of public service broadcasters from the state is also the budget autonomy of operators.¹³⁵ The financing regime of German public service broadcasting implies a rather demanding three step procedure with the aim of minimising state influence as much as possible.¹³⁶ In the first step, the public broadcasting corporations submit their estimated financial needs. An independent body of sixteen experts (appointed by each state), the Commission to Determine Financial Needs [Kommission zur Ermittlung des Finanzbedarfs, KEF], scrutinises the submission of the public service broadcasters and determines the financial need for a period of generally four years. The Commission then proposes a concrete amount of fees, which need to be adopted by all state parliaments.

3.2.4 Structural regulation for private broadcasting: ensuring pluralism of opinion and independence through licensing and supervision proceedings

Safeguards for media pluralism and independence in the field of private broadcasting rest on a differentiated legal system, which essentially relies on external control mechanisms.¹³⁷ The supervision authorities can only resort to appointing an additional internal body, should the private broadcaster gain a dominant position.¹³⁸ Furthermore, the pluralism of opinions has to be ensured with regard to all private broadcasters, which means the law pursues at first external pluralism of different operators and resorts to a single channel only complementarily (see Article 25 para. 2; Article 26 Interstate Broadcasting Treaty).¹³⁹ These basic principles have led to a

¹³⁰ Art. 21 para. 5 Interstate Treaty "Deutschlandradio".

¹³¹ See only Art. 14 Interstate Treaty on South-West-Broadcasting.

¹³² See the analysis by Hahn, *Aufsicht*, p. 164-190; Hesse, *Rundfunkrecht*, p. 159-160 with further remarks.

¹³³ Hahn, *Aufsicht*, p. 181-184.

¹³⁴ The election is likely to contradict the Resolution 1636 (2008) "Indicators for media in a democracy" of the Parliamentary Assembly of the Council of Europe, stipulating under no. 8.20 that senior management positions should be refused to people with clear party political affiliations.

¹³⁵ BVerfG, NJW 1994, 1942 (1946f.); BVerfG, MMR 2007, 770 (773ff.).

¹³⁶ See Art. 14 Interstate Broadcasting Treaty and Interstate Treaty on Broadcasting Financing.

¹³⁷ See ALM, *Jahrbuch 2009/2010*, p. 356ff.; C. Bamberger, "Sicherung der Meinungsvielfalt durch die Landesmedienanstalten" [Ensuring pluralism of opinions through state media authorities], ZUM (2000) 551; Hesse, *Rundfunkrecht*, p. 244f.

¹³⁸ See only Art. 32 Interstate Broadcasting Treaty; Art. 33 c) State Media Law North-Rhine Westphalia.

¹³⁹ B. Holznagel and A. Grünwald, "§ 25 Rundfunkstaatsvertrag" [Art. 25 Interstate Broadcasting Treaty], in G. Spindler and F. Schuster (eds), *Recht der elektronischen Medien [Law of electronic media]* (2008), marginal no. 5. A more differentiated approach sees M. Kühn, *Meinungsvielfalt im Rundfunk* [Pluralism of opinions in broadcasting] (2003), p. 86-87.

regime of structural provisions regarding ownership. In essence, these take the form of rules on incompatibility and market dominance adopted to ensure private broadcasting is not controlled or influenced by state interests and that a single company does not gain a market dominant position potentially threatening the process of impartial opinion shaping. The State Media Authorities and, in the case of national private broadcasters, the cooperation bodies implement the rules.

The applicable licensing provisions in the Interstate Broadcasting Treaty (on national private broadcasting) stipulate, among other things, that a licence must not be issued to any legal person established according to public law (for example the Federal Republic of Germany or the states), legal representatives of those legal persons or to political parties.¹⁴⁰ The same applies for foreign public bodies.¹⁴¹ State media legislation for regional broadcasters¹⁴² contains comparable provisions with occasionally more detailed requirements.¹⁴³ Thus, the media law prohibits any public body and any political party from holding or being part of a private broadcaster.

The Federal Constitutional Court discerned, however, that skewed public discourse could be the result of a dominant market position.¹⁴⁴ Consequently, the state lawmakers included in the Interstate Broadcasting Treaty specific regulations on national broadcasting to fulfil the constitutional requirements as stipulated by the Court. The law refers to market shares of viewers to ascertain whether a dominant market position exists and, in doing so, considers all channels of all enterprises of the operator at issue.¹⁴⁵ A dominant position is gained in the market in cases of a 30% or higher annual market share of viewers or a 25% share in cross media conjunctures.¹⁴⁶ The law covers several measures to address market dominance, including the prohibition to merge, the divestiture of programmes or shareholdings, and finally the adoption of measures to ensure opinion pluralism through an independent Programme Board representing different representative societal groups or airtime concession to an independent third party.¹⁴⁷

Moreover, according to federal antitrust law, the Federal Cartel Authority is entitled to scrutinise whether an intended merger leads to a market dominant position regarding sole economic aspects and not opinion domination.¹⁴⁸ The same legislation contains a special provision determining when market dominance is achieved, which is only applicable to newspaper publishers and television operators.¹⁴⁹ In essence, it facilitates the application of the prohibition to merger in those cases. This system leads in conclusion to a two level merger and market dominance control, one based on state media law focusing on opinion dominance and one based on federal law focusing on economical market dominance.

¹⁴⁰ Art. 20 a) para. 3 Interstate Broadcasting Treaty.

¹⁴¹ Ibid.

¹⁴² Art. 20 para. 1; Art. 39 Interstate Broadcasting Treaty.

¹⁴³ See only Art. 13 para. 3 and para. 4 State Media Law Baden-Württemberg [Landesmediengesetz Baden-Württemberg (LMedienG), 2010].

¹⁴⁴ BverfGE 57, 259 (323); BVerfG, NJW 1987, 239 (244).

¹⁴⁵ Art. 26 para. 1 and 2 Interstate Broadcasting Treaty.

¹⁴⁶ Art. 26 para. 2 Interstate Broadcasting Treaty. This is the case when a market dominant position in the other media market already exists or the cross-media activities are comparable to a television market share of 30%.

¹⁴⁷ Art. 26 para. 3 and 4; Art. 30 Interstate Broadcasting Treaty.

¹⁴⁸ Art. 36 para. 1 Act against Competition Constraints.

¹⁴⁹ Art. 38 para. 3 Act against Competition Constraints.

3.2.5 Structural regulation of print media

As already mentioned, the Basic Law enshrines in Article 5 the freedom of the press. Legal doctrine understands this right as an individual protection right against unlawful state interference, which simultaneously protects the press as an institution constitutive for democracy.¹⁵⁰ Furthermore, the Court has ruled that the state has to intercept in developments threatening the impartial opinion of print media organs and thus the impartial process of opinion building by readers.¹⁵¹ This legal interpretation obliges the state to avert a publisher monopoly. As this is not the case yet, no legislation exists establishing the press or requiring a licence procedure,¹⁵² because the press is organised privately without state funding or specially tailored state aid. Press outlets must include a legal notice [Impressum] for the person accountable, with further information in the case of a periodical outlet (name and address of chief editor). Additionally, the responsible editor must reside permanently in Germany.¹⁵³

As for cross-media activities of publishers, the Interstate Broadcasting Treaty,¹⁵⁴ the State Media Acts¹⁵⁵ as well as the Act against Competition Constraints¹⁵⁶ contain provisions to impede dominant market positions and thus structure the press market.¹⁵⁷

Another aspect of structural regulation pertains to the distribution system in Germany. The Federal Constitutional Court has stated that press related activities, including press distribution, are protected by the Basic Law.¹⁵⁸ The press distribution system is thus based on the principle that every print media outlet must be disclosed by the distributor who is obliged to act in a neutral manner. Several large-scale distributors have organised the German market in such a way that every publisher can reach every retailer offering print media products to customers. As such, every publisher can more or less access the whole press market via the distributor and have the same chance to be purchased.¹⁵⁹

3.2.6 Structural regulation of new media services

The legal framework for new media services is still developing in Germany,¹⁶⁰ though federal¹⁶¹ and state legislation,¹⁶² influenced by European law already apply.

¹⁵⁰ BVerfG, NJW 2007, 1117 (1118).

¹⁵¹ BVerfGE 20, 162 (175-176).

¹⁵² See for many Art. 2 Hamburg Press Act [Hamburgisches Pressegesetz, 2009].

¹⁵³ See Art. 8 and Art. 9 Hamburg Press Act.

¹⁵⁴ Art. 26 para. 2 sentence 2 Interstate Broadcasting Treaty.

¹⁵⁵ See only Art. 24 para. 2 sentence 3 State Media Act Baden-Württemberg.

¹⁵⁶ Art. 38 para. 3 Act against Competition Constraints.

¹⁵⁷ See for further information: Bretschneider, *Bewertung crossmedialer Verflechtungen im Medienkonzentrationsrecht* [Assessment of cross-media mergers in the view of law on media concentration] (2010), p. 71-81; W. Schulz and T. Held, *Die Zukunft der Kontrolle der Meinungsmacht* (2006) [The future of control of opinion domination], p. 13-36.

¹⁵⁸ BVerfG, NJW 1988, 1833 (1833-1834).

¹⁵⁹ Presse-Grosso, "Grosso-Vertriebssystem [Press distribution system], available at: <http://www.presse-grosso.de/bereiche/recht/grosso-vertriebssystem.html> (last visited on 3/08/2010).

¹⁶⁰ See only W. Hoffmann-Riem, "Gesetzliche Gewährleistungen der Freiheit der Kommunikation im Internet?" [Legally ensured freedom of communication in the Internet?], in W. Hoffmann-Riem (ed.), *Wandel der Medienordnung* [Change of the media order] (2009), 237; Fechner, *Medienrecht*, p. 339.

In general, online-activities (as part of the German legal notion “telemedia”)¹⁶³ are not subject to any licensing procedure.¹⁶⁴ As such, every private person, private enterprise or public body can place and receive content online, provided that generally applicable legislation (i.e. rules for the protection of young people, Penal Code provisions, etc.) is respected. The existing legal framework for media outlets likewise shapes online activities. As a result, the Interstate Broadcasting Treaty obliges private broadcasters transmitting television programmes on the Internet to submit an application for a licence, with the exemption of Internet radio that can be broadcast without a licence.¹⁶⁵ On the other hand, public service broadcasters are explicitly entitled to provide their programmes online,¹⁶⁶ though strict content requirements exist, as will be shown in the next passage. Private publishers are similarly entitled to offer an online version of their papers. No licensing procedures apply, and content requirements are comparable to those applicable in the case of paper publications.

Other rules relevant to new media services are those contained in the contested¹⁶⁷ legislation on block lists that impede access to websites with incriminated content, mostly child pornography,¹⁶⁸ and those imposing data retention obligations, as laid down in the Directive 2006/24/EC.¹⁶⁹ The latter obliges the German lawmaker to adopt rules for data retention stipulating that Internet providers must 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.¹⁷⁰ Journalists’ organisations argued that potential information sources would retreat if the German legislation were to be implemented and supported a constitutional complaint.¹⁷¹ Although the Federal Constitutional Court quashed the provisions and required the federal lawmaker, the German Parliament, to amend the law,¹⁷² it is not clear whether journalists will benefit from it.

¹⁶¹ Act on the Usage of Telemedia [Gesetz über die Nutzung von Telemedien, 2009]. See T. Hoeren, “Das Telemediengesetz” [Act on telemedia], *Neue Juristische Wochenschrift* (2007) 801. Telecommunication Act [Telekommunikationsgesetz, 2010].

¹⁶² Art. 54-Art. 61 Interstate Broadcasting Treaty.

¹⁶³ According to the legal definition in Art. 1 para. 1 Act on the Usage of Telemedia, the term telemedia refers to all information and communication services, as long as they cannot be considered as broadcasting or sole one-to-one telecommunication. Fechner, *Medienrecht*, p. 346ff.

¹⁶⁴ Art. 4 Act on the Usage of Telemedia.

¹⁶⁵ Art. 20b) Interstate Broadcasting Treaty.

¹⁶⁶ See Art. 11d) Interstate Broadcasting Treaty.

¹⁶⁷ A. Marberth-Kubicki, “Der Beginn der Internet-Zensur. Zugangssperren durch Access-Provider” [The advent of Internet censorship. Access barrier of providers], *Neue Juristische Wochenschrift* (2009) 1792.

¹⁶⁸ Act to Fight Child Pornography in Communication Networks [Gesetz zur Bekämpfung der Kinderpornographie in Kommunikationsnetzen, 2010].

¹⁶⁹ OJ L 105 of 13 April 2006, p. 54.

¹⁷⁰ Art. 113a; Art. 113b Telecommunication Act. Art. 100g para. 1 Criminal Code of Procedure [Strafprozessordnung, 2009].

¹⁷¹ Joint expert opinion for the public hearing at the German Federal Parliament on telecommunication surveillance, B. H. Pöppelann, German Journalists’ Association, 19/07/2007, available at: <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1251&id=1134> (last visited on 30/8/2010), at p. 4.

¹⁷² BVerfG, NJW 2010, 833 (843; 849); critical appraisal by N. Forgó and T. Krügel, “Vorschriften zur Vorratsdatenspeicherung verfassungswidrig: Nach der Entscheidung ist vor der Entscheidung” [Provisions on data retention unconstitutional], 4 *Kommunikation & Recht* (2010) 217.

3.3 Content regulation

Different content regulations apply, depending on the medium used. The legislature has adopted tailored content regulations to shape basic programme principles for broadcasters and has also laid down rules for the online activities of public service operators. Publishers are required to respect basic journalistic principles and private websites are not bound to comply with specific content requirements.

Besides these specific rules, general rules apply stemming from different areas of law regarding personal rights, libel, protection of young people and others.

3.3.1 Content regulation for public service broadcasting

According to the Federal Constitutional Court case law, the basic provision of broadcasting services [Grundversorgung] lays with the public service broadcasters.¹⁷³ This implies a duty of impartiality and the provision of unskewed information necessary for democratic decisions. The state lawmakers adopted content regulation in response to the case law. Articles 3, 10, and 11 of the Interstate Broadcasting Treaty stipulate important basic rules for the programmes. These are complemented and specified by the state Acts on the state broadcasting corporations¹⁷⁴ and self-regulatory guidelines.¹⁷⁵ The Interstate Treaty for “Deutschlandradio” and the Second German Television contain comparable provisions.¹⁷⁶

The legislation clarifies the mandate of public service broadcasting. According to Article 11 Interstate Broadcasting Treaty, the public service broadcasters are required to serve through their programming as a medium for free and independent public opinion shaping and thus meet the democratic, social and cultural needs of the society. Furthermore, public service broadcasters must provide comprehensive information on international, European, national, and regional events on all relevant aspects of life. When fulfilling these duties they are obliged to adhere to the principles of objectivity and impartiality of reporting and take pluralism of opinions and a balanced approach into account. They must also include in their programmes educational, informational, counselling and entertainment content.¹⁷⁷

As well as these requirements, public service broadcasters must respect the dignity of human beings and all other rules protecting the esteem of persons, such as libel.¹⁷⁸ When transmitting information programmes, the applicable law stipulates they must be produced in accordance with commonly accepted journalistic principles,

¹⁷³ BVerfG, NJW 1987, 239 (241); BVerfG, NJW 1987, 2987 (2988); for further information Hesse, *Rundfunkrecht*, p. 120-130; M. Stock, “Duales System: funktionsgerecht ausgestaltet?” [Dual system: effectively working?], in C.-M. Ridder, et al. (eds), *Bausteine einer Theorie des öffentlich-rechtlichen Rundfunks* [Components of a theory on public service broadcasting] (2005) 54, at p. 64ff.

¹⁷⁴ See only Art. 4, Art. 5, Art. 6, Art. 7, and Art. 8 Interstate Treaty on Northern-German-Broadcasting.

¹⁷⁵ See only Art. 15 para 3.4 Interstate Treaty on the South-West-Broadcasting. See as example the self regulatory guidelines of the public service operator’s working coalition ARD: ARD, *Bericht 07/08. Leitlinien 09/10* [Report 07/08. Guidelines 09/10], available at: <http://www.daserste.de/service/allround.asp?uid=106t3n7ad1lm6l8x&name=leitlinien> (last visited on 14/10/2010), at p. 72ff.

¹⁷⁶ Art. 5 Interstate Treaty on Second German Television; Art. 6 and Art. 7 Interstate Treaty on “Deutschlandradio”.

¹⁷⁷ Art. 11 para. 1 sentence 4 Interstate Broadcasting Treaty.

¹⁷⁸ Art. 3 para. 1 Interstate Broadcasting Treaty.

especially regarding independent and objective reporting.¹⁷⁹ Specific regulations for advertising and protection of young people also apply.

The broadcasting councils monitor whether the state broadcasting corporations adhere to the content regulations or they act on the basis of complaints received.

Online activities complementing traditional broadcasting are subject to more detailed rules. Public service broadcasters can also provide websites with additional information and can transmit their programmes online. However, these activities can only take place within the framework stipulated in Article 11d) Interstate Broadcasting Treaty as well as the detailed self-regulatory concepts of each of the state broadcasting corporations. This is the result of a state aid procedure with the European Commission on public service broadcasters.¹⁸⁰ Private publishers and broadcasters have a strong interest in public services broadcasters being circumscribed, due to market share considerations, and as such submitted a complaint with the European Commission. This influenced the core legal provisions on online activities, as public service broadcasters are only entitled to provide online content that refers to their traditionally broadcast, journalistic initiated¹⁸¹ programmes produced by them. Furthermore, several online services are prohibited, such as broad regional news coverage, video-on-demand of purchased films or series as well as a list of other services laid down in law.¹⁸² The legal situation, especially the legal notion of journalistic or editorially initiated programmes, seems rather vague and unsatisfactory. It will be interesting to follow the forthcoming legal developments in this regard.

3.3.2 Content regulation for private broadcasting

Contrary to public service broadcasting, private broadcasting exhibits a clear inclination towards economic interests. While the Federal Constitutional Court espouses the concept that private broadcasting must also fulfil public duties it recognises that due to market forces private broadcasters do not have to fulfil all programme principles to the same degree of public service broadcasters.¹⁸³ While, for instance, public service broadcasters must abide by the content regulations concerning information and culture, private operators *shall* contribute broadcasts with informational, cultural and educational content in order to present the diversity in Europe and in Germany.¹⁸⁴ Furthermore, private broadcasters are bound by the

¹⁷⁹ Art. 10 para. 1 Interstate Broadcasting Treaty.

¹⁸⁰ So called “Three-Step-Test” and Telemedia concepts. See only B. Peters, “Der ‘Drei-Stufen-Test’: Die Zukunft der öffentlich-rechtlichen Onlineangebote” [The three-step-test: The future of public service online offers], 1 *Kommunikation & Recht* (2009) 26; W. Schulz, *The public service broadcasting mandate seen as the process of its justification. Some suggestions on the implementation of the three-step test to make the remit of public service broadcasters in Germany more precise* (2008), p. 13ff. For a very general account of the online offers by public service broadcasters see: H. F. Schäfer, *Neue Betätigungsfelder des öffentlich-rechtlichen Rundfunks* (2004) [New areas of action for the public service broadcasting], p. 110-137.

¹⁸¹ See Art. 11d) para. 1 Interstate Broadcasting Treaty.

¹⁸² According to Appendix 4 of Art. 11d) para. 5 sentence 4 Interstate Broadcasting Treaty those services are prohibited which mainly can be commercialised in the Internet.

¹⁸³ BVerfG, NJW 1987, 239 (240); BVerfG, NJW 1994, 1942 (1944); B. Holznagel and D. Krone, “§ 41 Rundfunkstaatsvertrag” [Interstate Broadcasting Treaty] in G. Spindler and F. Schuster (eds), *Recht der elektronischen Medien* [Law of electronic media] marginal no. 13.

¹⁸⁴ Art. 41 para. 2 Interstate Broadcasting Treaty. See for the programme principles: H. Gersdorf, *Grundzüge des Rundfunkrechts. Nationaler und europäischer Regulierungsrahmen* [Basic structures of

constitutional order, including the Human Rights chapter of the Basic Law, and general rules on issues such as personal rights, human dignity and criminal law.¹⁸⁵ Article 3 (respect of dignity) and Article 10 (journalistic requirements) of the Interstate Broadcasting Treaty are also applicable for private broadcasters. Furthermore, all state Media Acts have comparable and complementing provisions for regional television and radio broadcasting.¹⁸⁶

Like public service broadcasters, private operators must apply all general rules on protection of personal rights, discriminatory behaviour and other criminalised forms of content. The state Media Authorities and their cooperation bodies scrutinise whether the private broadcaster adhere to the programme basic principles.

3.3.3 Content regulation of press outlets

The legal enactments of the federal states regarding print media established the legal framework for print media outlets, accompanied by a self-regulating Press Code and general provisions which also apply to print media providers. Accordingly, print media organs are obliged to verify for all news that they want to publish whether the sources are credible and the facts correct.¹⁸⁷ The same applies for journalistic publications online.¹⁸⁸ Furthermore, no published content is permitted to violate Penal Code provisions. The legislature has not adopted any further content regulations to complement these basic principles.

However, the Press Code entails a detailed set of rules applicable for print media journalists. Those rules require, among other things, the recognition of truth and the dignity of human beings, journalistic accuracy when publishing facts, the respect for private life and the intimate sphere and protection of honour. Furthermore, in the Code the print media relinquishes inadequate sensational presentation of violence and suffering.¹⁸⁹ However, being self-regulating provisions, it is contested they are implemented sufficiently, especially with regard to the tabloids.¹⁹⁰

3.3.4 Content regulation of new media services, especially the Internet

In short, no specific content regulation exists for Internet publications in cases of individual private websites. In cases of websites offering a service, a basic legal notice with details of the accountable person or legal entity is required.¹⁹¹ The applicable Act on Telemedia does not stipulate further requirements. However, the general rules applying in all other outlets must also be considered in online publications, especially as regards fraud and hate speech.

broadcasting law. National and European regulation framework] (2003), p. 183-186; Hesse, *Rundfunkrecht*, p. 234-239.

¹⁸⁵ Art. 41 para. 1 Interstate Broadcasting Treaty.

¹⁸⁶ See only Art. 31 State Media Law North-Rhine Westphalia; Art. 4 and Art. 5 Bavarian Media Act; Art. 47 Interstate Treaty on Berlin-Brandenburg Broadcasting.

¹⁸⁷ See for further information: J. Soehring, *Presserecht [Print media law]*, (2010) p. 10-23.

¹⁸⁸ Art. 54 para. 2 Interstate Broadcasting Treaty.

¹⁸⁹ See: Presserat, *Publizistische Grundsätze (Pressekodex)*, 2008.

¹⁹⁰ See the differentiated appraisal made by Pöttker, "Der Deutsche Presserat", at p. 127ff.

¹⁹¹ Art. 5 Act on the Usage of Telemedia.

Additionally, the Interstate Broadcasting Treaty stipulates basic requirements in cases of online journalistic services, namely the requirements of accuracy in journalistic reporting.¹⁹²

3.4 Other media policy tools

3.4.1 Protection of information sources

In practice, journalists are dependent on information sources working in the particular area of interest.¹⁹³ These may be in a ministry or in the parliament. The law respects the special position of journalists and their relationship to sources and gives journalists a right to refuse to give evidence in a criminal court proceeding.¹⁹⁴ It also expands the protection of journalists relating to data storage by prohibiting the police from confiscating material.¹⁹⁵ However, journalists can commit a crime, namely betrayal of state secrets, when publishing certain information. As journalists are not secret bearers in the sense of the law, this is only possible if the journalist acts in consent with an informant (who is, for example, someone working in a ministry). Under such circumstance, the journalist loses the legal protection and the material can be confiscated.

This construction may undermine journalists' work, as informants cannot be sure whether such confiscation may lead to them facing criminal charges.¹⁹⁶ The Federal Constitutional Court has recognised this conflict of interests and ruled that protection of sources must be ensured for editors and journalists.¹⁹⁷ The sole publication of classified material does not alone mean state prosecutors can assume a criminal act and justify confiscation. However, if specific evidence shows the secret bearer intended a publication of the classified information, state prosecutors are entitled to carry out a search to confiscate evidence and thus reveal the identity of the informant.¹⁹⁸ The legal situation remains somewhat uncertain and leaves journalists in a limbo situation. It will be interesting to see in the future whether the relatively vague requirements avert searching of editors' and journalists' offices and private premises. Critics have pointed out the problems with the legal circumstances and have advocated excluding journalists from criminalisation in such cases.¹⁹⁹

3.4.2 Libel and other forms of violation of personal rights and freedom of the press

While it is true that a free and independent media landscape is important for democratic discourse, it is equally true that despite safeguarding in content

¹⁹² Art. 54 para. 2 Interstate Broadcasting Treaty.

¹⁹³ BVerfG, NJW 2007, 1117 (1118).

¹⁹⁴ Art. 53 para. 1 no. 5 Criminal Code of Procedure.

¹⁹⁵ Art. 97 para. 5 Criminal Code of Procedure.

¹⁹⁶ T. Starke, "Informantenschutz zwischen Pressefreiheit und staatlichem Strafverfolgungsinteresse" [Protection of informants between freedom of press and state interests of effective criminal prosecution], 02 AfP (2007) 91, at p. 92.

¹⁹⁷ BVerfG, NJW 2000, 55.

¹⁹⁸ BVerfG, NJW 2007, 1117 (1120).

¹⁹⁹ See only K. Kühl, *Strafgesetzbuch. Kommentar [Penal Code. Commentary]* (2007), Art. 353b Penal Code, marginal no. 13a; D. Dunkhase, *Das Pressegeheimnis. Wandel und Perspektiven gesetzlicher Sicherungen der Pressefreiheit gegen strafprozessuale Zwangsmaßnahmen [Protection of the print media secret. Change and perspectives of ensuring freedom of press]* (1998), p. 174-183.

regulations, media outlets do on occasion disregard individuals' personal rights and must be held accountable for this. The German legal system contains several criminal and civil legal provisions in this regard. The civil law provides a very differentiated legal regime of claims against the media based on the protection of individual personal rights [Persönlichkeitsrecht], which is regarded a human right under German law.²⁰⁰ Furthermore, the Penal Code criminalises libel, defamation, certain forms of publication and distribution of pornography as well as certain forms of disregard towards state representatives and institutions. Due to Germany's history, the Penal Code also criminalises certain allegations concerning the Nazi regime, such as denying the Holocaust.²⁰¹

3.4.3 Right to reply

The right to reply is applicable to broadcasting, print media and journalistic publications in the Internet. It is recognised in various acts, such as the State Press Acts, the State Broadcasting Acts, the State Media Acts, and the Interstate Broadcasting Treaty.²⁰² This right can only be resorted to in cases of factual assertion, when the person or the body concerned has a justified interest. In general, the scope of this right is rather broad.²⁰³ The right is only excluded in cases of factual assertions that are publicly known, in trivial cases, or if the factual assertion implies itself a criminal act.²⁰⁴ To facilitate reporting about lawmakers and parliamentary organs, the right to reply is also excluded for factual true reporting about those organs.²⁰⁵

4. Media policy and democratic politics: an assessment

4.1 General remarks

Thus far, the description of the media landscape in Germany, the regimes and the actors has focused on a summary of single aspects. Not much has been said on the principal features and characteristics of media policy in Germany. The first topic shall be termed here as cognitive sovereignty of interpretation. Television, radio, print media, and Internet are used by persons to entertain themselves, but also to form a picture of the world we live in, to shape an opinion and to gain an understanding of the ongoing regional, national and global developments. This aspect correlates with the fight for attention in the media. The underlying currents of several conflicts in media policies are to an extent influenced by the ongoing tensions between the commercialisation of the media and contrariwise the idea of a space free of sole market forces but shaped by the diversity of cultures and pluralism of opinions. Finally, technical developments very much shape media policies and debates regarding how they are to be used. The Internet and its repercussions for traditional media pose new political and legal challenges. Admittedly, these topics may sound

²⁰⁰ See only Fechner, *Medienrecht*, p. 63ff.; Soehring, *Presserecht*, p. 257ff.

²⁰¹ See Art. 130 para. 3 Penal Code [Strafgesetzbuch, 2009]; Soehring, *Presserecht*, p. 254.

²⁰² See only Art. 11 Hamburg Press Act; Art. 11 State Media Act Rhineland-Palatine; Art. 9 West-German-Broadcasting Act; Art. 56 Interstate Broadcasting Treaty.

²⁰³ Fechner, *Medienrecht*, p. 110; Soehring, *Presserecht*, p. 630.

²⁰⁴ Soehring, *Presserecht*, p. 632-636.

²⁰⁵ See only Art. 56 para. 4 Interstate Broadcasting Treaty; Art. 44 para. 6 State Media Law North-Rhine Westphalia.

rather vague and abstract. Essentially, the question is: what characteristic media policy developments can be ascertained?

4.2 The dual broadcasting system

The most far-reaching political decision regarding the media field was to establish private service broadcasting.²⁰⁶ The whole media system was changed with this decision for a dual broadcasting order and the actors are still fighting today to expand their influence or market share or to protect their position. This was apparent as early as the 1950s, when private publishers tried to get a hold in broadcasting.²⁰⁷ Mainly due to technical reasons, they did not succeed. However, it was not only the private publishers who contested public service broadcasting's position. The circumstances changed, politically and technically, during the 1980s.²⁰⁸ The liberal-conservative federal government came into power and supported private broadcasting. And on state level, several governments planned to conduct cable projects to investigate the technical advancements of cable networks.²⁰⁹ The first German private television channel was transmitted via cable in 1984²¹⁰ and state parliaments began, rather hastily in some cases,²¹¹ to adopt media legislation to regulate private broadcasting.²¹² The reasons for this development may be manifold. However, two basic points can be made. Politically, mostly conservative politicians asserted that the public service broadcasters, especially the state broadcasting corporations, with their common national channel, "Das Erste", were too critical of conservative politics.²¹³ They hoped to receive better coverage by private broadcasters. Economically, publishers and private broadcasting companies saw the possibility to make business. It was assumed private radio and television would be very profitable, if only enough advertising revenues were to be generated.

What are the repercussions of this development for democratic politics and citizen participation? It is admittedly rather difficult to gauge the impact of private broadcasting on democratic processes. While some argue private channels enrich options available to the public and as such increase pluralism, others contest that private broadcasting significantly fostered media pluralism, due to media concentration and exchangeable content. However, an important feature of the democratic processes lays in the unskewed provision and receipt of information and reporting. The question arises as to whether private broadcasting still fulfils this task, taking into account, for instance, the fact that in 2008 RTL averaged twenty minutes a

²⁰⁶ See the description of the dual system by M. Stock, "Noch einmal zum Reformbedarf im 'dualen Rundfunksystem': Public-Service-Rundfunk und kommerzieller Rundfunk - wie können sie koexistieren?" [As for the need of reforms in the dual system: how can public service broadcasting and commercial broadcasting co-exist?], Heft 244, Arbeitspapiere des Instituts für Rundfunkökonomie an der Universität zu Köln (2008).

²⁰⁷ Eifert and Hoffmann-Riem, "Entstehung", at p. 51; R. Steinmetz, "Initiativen und Durchsetzung privat-kommerziellen Rundfunks" [Initiative and implementation of privat-commercial broadcasting], in J. Wilke (ed.), *Mediengeschichte der Bundesrepublik Deutschland* [Media history of the Federal Republic of Germany] (1999), p. 168ff.

²⁰⁸ Schwarzkopf, "Medienwende", p. 36-38.

²⁰⁹ Steinmetz, "Initiativen", pp. 179-180.

²¹⁰ Steinmetz, "Initiativen", p. 182.

²¹¹ Steinmetz, "Initiativen", p. 181.

²¹² Eifert and Hoffmann-Riem, "Entstehung", p. 60.

²¹³ Schwarzkopf, "Medienwende", p. 30 with further remarks.

day covering political events or politically relevant information.²¹⁴ According to other sources, RTL provided fifteen minutes per day on political relevant information in its news-broadcastings, and eleven minutes in other formats.²¹⁵ Not surprisingly, it is conceded that after twenty-five years have passed since the introduction of private broadcasting, the results in form of channel concepts and content can not necessarily be deemed advantageous for the viewer and the political sphere.²¹⁶

An ongoing debate between public service and private broadcasting can be discerned in the remit of public service broadcasting regarding online activities. This area is highly contested, as it is assumed that Internet television and other services available via Internet will predominantly shape the media market in the future.²¹⁷ The state aid procedure with the European Commission, initiated by the Association of Private Broadcasters, led to very detailed legislation and self-regulating guidelines (also referred to as online concepts) for the Internet activities of public service broadcasters. This regulation basically constrains the online services of public service broadcasters in certain areas. In a complex procedure called the three step test, involving mainly broadcasting operators and the broadcasting councils, the operators prepare their online concept focusing particularly on the basic guidelines laid down in the law.²¹⁸ These prescribe, among other things, that online services must be prompted by journalistic or editorial work, meet the democratic or cultural needs of the society and contribute qualitatively to journalistic competition. These content prescriptions are the background for the online concepts (so called telemedia concepts), in which each public service broadcaster has to describe what it wants to place online and how this meets the legal requirements.²¹⁹ Shortly afterwards all broadcasting councils adopted the relevant online concept for each public service broadcasting corporation, triggering the reaction of the Association of German Magazine Publishers which claimed that these concepts threatened the balanced system of private and public service media.²²⁰

4.3 Convergence and the relationship of Internet and traditional media

The whole system is facing a challenge posed by new media services via the Internet regarding the technical aspects of media services and legal developments. As for the

²¹⁴ H.-J. Weiß, "Nachgesehen: Politische Publizistik in privaten Fernsehvollprogrammen" [Scrutinized: Political journalism in private national TV channels] ALM (ed.), *Fernsehen in Deutschland. 2008 [Television in Germany]* (2009) 62, at p. 62-63.

²¹⁵ U. M. Krüger and T. Zapf-Schramm, "Politikthematisierung und Alltagskultivierung im Infoangebot" [Political themes in information programmes], 4 *Media Perspektiven* (2009) 201, at p. 218-219.

²¹⁶ Kiefer, "20 Jahre", p. 558 with further remarks. Krüger, "Entwicklungen des Politikangebots im Fernsehprogramm" [Developments of political information programmes in television channels], in C.-M. Ridder, W. R. Langenbacher, U. Saxer and C. Steininger (eds) *Bausteine einer Theorie des öffentlich-rechtlichen Rundfunks [Components of a theory on public service broadcasting]* (2005) 252, at p. 268. See also with a critical appraisal: Weiß, "Nachgesehen", p. 64-65.

²¹⁷ The Council of Europe has postulated this development in a recent recommendation: Recommendation Rec(2007)3 of the Committee of Ministers to the member states on the remit of public service media in the information society, 31/01/2007, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1089759> (last visited on 12/10/2010).

²¹⁸ Art. 11 d) and 11 f) Interstate Broadcasting Treaty.

²¹⁹ See as an example: WDR, "Telemedienkonzept für das Internetangebot des WDR, 2010".

²²⁰ Verband Deutscher Zeitschriftenverleger, "Absage an ein ausbalanciertes, faires System" [Rejection of a balanced, fair System], 24/06/2010, available at: <http://www.firmenpresse.de/pdf-pressinfo216387.pdf> (last visited on 12/10/2010).

technical convergence, it can be observed that newspapers offer online versions of their papers in the Internet. Private broadcasters maintain their own websites with programmes and offer additional services such as video-on-demand. Public service broadcasters transmit their programmes - partly - via the Internet as live stream. Finally, private blogs gain more and more influence. As described above, these developments have also influenced the media law. The question arises, however, whether the existing differentiation of outlets (print media, broadcasting and online services) in the applicable law still meets the media's needs. As this legal area develops very fast, it seems impossible to predict whether the differentiated legal system will prevail or the basic and decisive definitions will be revised.²²¹

Some issues regarding the relationship between Internet services and traditional media, however, can already be mentioned. Currently, publishers assert they do not make profits with their online services. While some resort to paid content (such as *Hamburger Abendblatt*) or the online donation system Flattr (such as *die tageszeitung*), the publishers' organisation together with the journalists' union follows an additional policy strategy, seeking to convince the Federal Government to amend the existing intellectual property law and oblige any search engine that cites an online version of a newspaper or any commercial or professional reader of such a website to sign a contract in advance and pay for the service. Critics argue that this would impede the free flow of information and could commercialise single words or phrases unduly. As the drafted protection clause would cover very short sentences or even short phrases, common sayings or even single words could no longer be used without paying for them, once included in a newspaper online. It is unclear, at this moment, under which circumstances and with which amendments such protection clause will be introduced into the intellectual property law. The existing draft, however, seems impractical and exemplifies the connections between commercialisation and control of content.

4.4 The democratic potential of the Internet

The Internet provides a democratic space in which new forms of participation can evolve.²²² Firstly, due to its decentralised structure and the still existing access neutrality, it seems much more difficult to influence, let alone, control the stream of information. Secondly, organisations, be it political parties or independent non-governmental organisations, are no longer necessarily major actors shaping political developments.²²³ It is not yet clear, whether Internet based participation will replace

²²¹ See in this regard the illustrative article: C. Möllers, "Pressefreiheit im Internet", 03 AfP (2008) 241.

²²² See for instance C. Leggewie and C. Bieber, "Demokratie 2.0 - Wie tragen neue Medien zur demokratischen Erneuerung bei?" [Democracy 2.0. How can new media services foster a democratic renewal?], in C. Offe (ed.), *Demokratisierung der Demokratie - Diagnosen und Reformvorschläge* [Democratisation of democracy - diagnosis and reform suggestions] (2003) 124. With a more critical appraisal: T. Meyer, "Gewöhnung an die Mediokratie?" [Customisation to mediocracy?], 190 *vorgänge* (2010) 92, at p. 98-99; B. Witte, K. Rautenberg and C. Auer, "Marketing statt Mitmach-Netz? Web 2.0-Nutzung von Bremer Parteien und Medien" [Marketing instead of participation], in J. Wolling, M. Seifert and M. Emmer (eds), *Politik 2.0?* [Politics 2.0] (2010), 241. See for instance the conference of the political foundation Heinrich-Böll-Stiftung, "Citizen 2.0: Gesellschaftliche Teilhabe im Netz kein Selbstläufer" [Citizen 2.0: Societal Participation in the Web does not work automatically], available at: <http://www.boell.de/demokratie/foerderung/demokratiefoerderung-citizen20-digitale-gesellschaft-demokratie-partizipation-9124.html> (last visited on 14/10/2010).

²²³ See for this J. Hoff and H. K. Hansen, "Conclusion - perspectives on politics and democracy", in J. Hoff and H. K. Hansen (eds), *Digital governance:// Networked societies* (2006) 329.

traditional forms of political participation and how it will shape forms of governing. However, the evolving participative tools seem to point in the direction of a complementing form of political participation with the potential to alter basic structures.²²⁴ Thirdly, the access via the Internet to credible information allows individuals to partake in democratic processes differently, especially on local or regional matters. Much more information than before can be diffused via the Internet and this is much easier to access than printed information on a similar scale. This development poses the question as to whether complementary decision structures will come into place to alter the common understanding of representative democratic processes.²²⁵

However, these possibilities are faced with challenges posed by private companies and state authorities. The technical advancements to a certain degree threaten access neutrality or Internet neutrality. Internet providers like the large telecommunication networks can establish different speed standards or quality classes. If a company wants to use a faster transmission of contents, additional fees shall be paid. This development may even lead to cooperation between large Internet providers and companies such Google, essentially creating their own Internet and thus shaping users' online consumption significantly and presumably based on market interests. Such developments would, however, question the intrinsic character of the Internet, which lies in the opportunity that everybody with Internet access and a contract with a provider can publish and access contents. This means that, within the legal framework, any actual or legal person can transmit its own online programmes (such as films) or blogs. The European Commission grants technical developments of broadband optical networks an important place in the next decade and stresses the importance of equal access to such optical networks.²²⁶ This does not directly concern the Internet neutrality discussed here, but points to the civil engineering infrastructure that forms the backbone of the Internet. Furthermore, technical data-gathering tools render the Internet prone to inappropriate data-retention mechanisms by state authorities and low or almost no data-protection provisions compelling state authorities and private companies threaten the right to privacy.

If the communicative prospects of the Internet concerning democratic participation will actually flourish depends also on the attitude of its users. It is asserted for instance that online users do not necessarily participate in political forums and that it is mainly the existing media operators who provide politically relevant information content.²²⁷ The websites of, for example, public service or private broadcasters tend to be viewed in preference to unknown blogs. If this hypothesis is true, the possible effects of receiving information from different sources would be diminished.

Another aspect must also be highlighted. Typically, one either knows the exact URL of the site one is seeking, one uses Twitter or other online information services, or one seeks information with the help of search engines. Most Internet activity in Germany involves the use of search engines to receive information on a certain topic.

²²⁴ This is endorsed by O. Winkel, "Electronic Government und politische Beteiligung" [Electronic government and political participation], in S. Brink and H. A. Wolff (eds), *Gemeinwohl und Verantwortung* [Public weal and responsibility] (2004) 811, at p. 827.

²²⁵ Hoff and Hansen, "Conclusion - perspectives on politics and democracy", p. 330.

²²⁶ European Commission, Commission Recommendation of 20.9.2010 on regulated access to Next Generation Access Networks (NGA), C(2010) 6223 final, Annex II.

²²⁷ Neuberger and Lobigs, *Die Bedeutung des Internets*, p. 37, p. 41ff.

The estimated market share of Google in this is some 90%.²²⁸ Taking into account the typical user behaviour of only scrolling the first pages with hits, the listing executed by Google determines to a great portion what information is imparted and thus shapes opinion. Furthermore, Google can edit the ranking websites on their own account and exclude thus basically content provided. Critics are however legitimately more concerned with data-protection provisions,²²⁹ as Google stores all search requests and filters them to create a user profile.²³⁰ Those refined data are then employed to create tailored search results or advertisements.²³¹ The influential position of search engines and the possible misuse of such data have prompted experts to think about the regulation of search engines.²³² Others, however, cannot discern a severe problem²³³ and espouse the idea of transparency criteria of search engines to enable users an appraisal of the search results.²³⁴ The questions of search engines' market dominance, influential position on journalistic research work,²³⁵ and information administration are not resolved and form part of an ongoing discussion in Germany. The European Union is most likely to act in this regard, if new rules will be adopted. Interestingly, the European Union data protection body "Article 29 Data Protection Working Party" assumes that Google, Yahoo and Microsoft did not comply with data protection rules.²³⁶

4.5 Media and manipulation

Different forms of critical media influence ranging from undue impact to deliberate targeted manipulation can be observed in the German media, which has been the

²²⁸ B. Danckert and F. J. Mayer, "Die vorherrschende Meinungsmacht von Google" [The predominant opinion power of Google], 4 MMR (2010) 219, available at: <http://www.webhits.de/deutsch/index.shtml?web> (last visited on 6/08/2010), at p. 219.

²²⁹ S. Ott, "Schutz der Nutzerdaten bei Suchmaschinen. Oder: Ich weiß, wonach du letzten Sommer gesucht hast..." [Protection of user log files in search engines], *Multimedia und Recht* (2009) 448, at p. 448f.; T. Weichert, "Datenschutz bei Suchmaschinen" [Data protection in search engines], in D. Lewandowski (ed.), *Handbuch Internet-Suchmaschinen* [Handbook Internet search engines] (2009) 285.

²³⁰ See for technical details only Ott, "Nutzerdaten", p. 450ff.

²³¹ S. Meyer, "Aktuelle Rechtsentwicklungen bei Suchmaschinen im Jahre 2009" [Legal developments regarding search engines in 2009], 4 *Kommunikation & Recht* (2010) 226, at p. 233-234; Ott, "Nutzerdaten", p. 452; Google Germany, "Privacy policy", available at: <http://www.google.de/intl/de/privacypolicy.html> (last visited on 6/08/2010).

²³² It asserted for instance that Google has a strong influence on the journalists' research work. See H. Maurer, *Report on dangers and opportunities posed by large search engines, particularly Google* (2007), at p. 13-14; S. Ott, "Marktbeherrschende und öffentlich-rechtliche Suchmaschinen" [Market dominant and public service search engines], 7 *Kommunikation & Recht* (2007) 375, at p. 377-379; W. Schulz, T. Held and A. Laudien, *Suchmaschinen als Gatekeeper in der öffentlichen Kommunikation* [Search engines as gatekeeper for public discourse] (2005), p. 111ff., p. 119.

²³³ J. Kühling, "Internetsuchmaschinen als Hüter des Wissens? Tatsächliche Probleme für den freien Informationszugang und rechtlicher Handlungsbedarf" [Internet search engines as knowledge keepers?], in G. F. Schuppert and A. Voßkuhle (eds), *Governance von und durch Wissen* [Governance through knowledge] (2008) 202, at p. 214.

²³⁴ J. Kühling and N. Gauß, "Suchmaschinen - eine Gefahr für den Informationszugang und die Informationsvielfalt?" [Search engines - a threat to access to information?], *ZUM* (2007) 881, at p. 888-889.

²³⁵ Discussed for instance with regard to journalists' investigations see the summary published under: "Internet-Suchmaschinen 'kein Ersatz für primäre Recherche'" [Internet search engines, no replacement for original inquiry], in: *epd medien* 53 (2006), p. 20-21.

²³⁶ European Commission, Article 29 Data Protection Working Party, "EU data protection group says Google, Microsoft and Yahoo! do not comply with data protection rules", 26/05/2010.

subject of research attention.²³⁷ Firstly, the media system is perceived as a political actor itself and no longer as an observer or interpreter of political events.²³⁸ Seen as political actors, media outlets can lose their credibility, as they do not inform impartially but instead try to influence political decisions intentionally. This has happened before in federal elections in the form of implicitly or explicitly postulated election endorsements.²³⁹ Media outlets have also advanced open and, it is assumed, intentional political positions in debates.²⁴⁰ Moreover, the whole interaction of media and the democratic system is analysed to ascertain to what degree the process of democratic decision-making is unduly influenced by the laws of media coverage.²⁴¹ As the concept of differentiated interdependencies points out,²⁴² journalists and politicians may act in an interdependent relationship that can influence, depending on their respective positions, either the media coverage or the work of the politician. Another aspect was highlighted regarding media concentration and the potential actual manipulative influence of a media oligopoly.²⁴³ It is assumed that media concentration acts to the detriment of opinion pluralism.²⁴⁴ While the possible skewed results of media coverage stem from internal factors, external interests also can lead to partial and sometimes manipulative coverage. Another form of manipulation can be seen in intentionally agenda-setting mechanisms in both directions: to place something into the public discussion²⁴⁵ and, contrariwise, to prevent a subject from becoming a topic²⁴⁶ or to omit information.

²³⁷ As for visualisation of politicians: M. Maurer, “Der Einfluss verbaler und visueller Informationen auf die Urteilsbildung über Politiker” [Influence of verbal and visual information in forming an opinion about politicians], in C. Schemer, W. Wirth and C. Wunsch (eds), *Politische Kommunikation: Wahrnehmung, Verarbeitung, Wirkung* [Political communication: perception, process, and effect] (2010) 53, at p. 66. See also the documentation of the high level conference: T. Leif (ed.), *Dokumentation zum 13. MainzerMedienDisput - Schweigen, Lügen und Vertuschen - Wenn die Wahrheit nicht mehr öffentlich wird* [Hush, lies and camouflage. When truth is no longer made public] (2008), available at: <http://www.mainzermiedendisput.de/index.php> (last visited on 14/10/2010).

²³⁸ B. Pfetsch and S. Adam, “Die Akteursperspektive in der politischen Kommunikationsforschung - Fragestellungen, Forschungsparadigmen und Problemlagen” [Perspective of the actors in the political communication science], in B. Pfetsch and S. Adam (eds), *Massenmedien als politische Akteure* [Mass media as political actor] (2008) 9.

²³⁹ See the short analysis of F. Brettschneider and B. Wagner, “‘And der winner should be...’ Explizite und implizite Wahlempfehlungen in der *Bild-Zeitung* und der *Sun*” [Explicit and implicit election endorsements], in B. Pfetsch and S. Adam (eds), *Massenmedien als politische Akteure* [Mass media as political actor] (2008) 225.

²⁴⁰ This happened during the financial crisis in Greece by the news magazine Focus: See Focus, Issue 8 of 22 February 2010, p 120ff.

²⁴¹ P. Baugut and M.-T. Grundler, *Politische (Nicht-)Öffentlichkeit in der Mediendemokratie. Eine Analyse der Beziehungen zwischen Politikern und Journalisten in Berlin* [Political (non-)publicity in the media democracy] (2009), p. 173ff.; P. Donges and O. Jarren, *Politische Kommunikation in der Mediengesellschaft* [Political communication in the media democracy] (2006), p. 279-286 with further remarks. See also T. Meyer, *Mediokratie* [Mediocracy] (2001), p. 85ff.; T. Meyer, “Mediokratie - Auf dem Weg in eine andere Demokratie?” [Mediocracy – on the road to another democracy?], B 15 - 16/2002 Aus Politik und Zeitgeschichte (2002) 7, at p. 8-11. The term political communication is used in this regard. See for further clarification of this term: Donges and Jarren, *Politische Kommunikation*, at p. 20-22.

²⁴² Baugut and Grundler, *Mediendemokratie*, p. 345.

²⁴³ W. A. Meier, “Gesellschaftliche Folgen der Medienkonzentration” [Societal repercussions of media concentration], B 12-13/2004 Aus Politik und Zeitgeschichte (2004) 3, at p. 5.

²⁴⁴ Meier, “Medienkonzentration”, p. 4.

²⁴⁵ See only M. Maurer, *Agenda-setting* (2010), at p. 86 with further information on empirical studies.

²⁴⁶ Initiative Nachrichtenaufklärung, “Top-Themen 2009”, available at: <http://www.nachrichtenaufklaerung.de/index.php?id=190> (last visited on 9/08/2010); Ver.di, “Weiße

It seems, nevertheless, that whilst manipulation of media outlets is not a structural, endemic problem in Germany, it does occur and cannot be denied.

5. Conclusion

Currently, the main structure of the media system constitutes of a dual broadcasting regime with nine different state broadcasting corporations and many private broadcasting operators. Private publishing companies provide a wide range of print media outlets and magazines, implicating over 300 different papers with a circulation of 22 millions dailies and Sunday editions per working day. Despite these numbers, critical developments of media concentration can be observed. Furthermore, all traditional media operators provide websites and maintain different offers online. Finally, the digital developments and the convergence of media shape the media landscape significantly.²⁴⁷

Besides these structural characteristics, several main aspects of current media policy can be discerned. Private broadcasting companies and associations sought to restrict the online activities of public service broadcasters through a state aid complaint with the European Commission, because of the likely development that Internet television and radio will become core means of media transmissions. While this procedure has so far led to a confined online framework for public service broadcasters that is additionally subject to regular supervision by the broadcasting councils, this might only be an intermediary step. In the long run, it is very likely that private broadcasters and other private media companies will seek to contest the existing financing regime, at least aiming to reduce the services of public service broadcasters to some basic functions or to participate themselves in fee revenue.

Another interesting and also concerning development can be seen in the discussion on Internet neutrality. Existing network providers in Germany support the idea of additional fees for specific services, usually those that are most demanding of data. This kind of traffic shaping questions, however, the core principle of the whole Internet. The demand of private publishers to alter the current intellectual property law to give them a specific protection right for mainly press outlets is linked to the same question of how to make more profit with the Internet.

More organisational questions could be discerned regarding the public service broadcaster organs and the State Authorities in supervising private broadcasting. Firstly, the question of whether broadcasting councils work efficaciously in order to fulfil the supervision task demands further attention. Secondly, the influential position of state representatives and political parties mentioned here merits a deeper analysis. Taking the supervision of private broadcasters into account, the question has to be raised as to whether the responsible State Authorities fully implement the existing provisions. Furthermore, it is very likely that state governments and state lawmakers will revise and alter the existing programme supervision currently comprising joint bodies and fourteen Media State Authorities. Whether a single, autonomously

Flecken im Journalismus" [White spots in journalism], available at: <http://mmm.verdi.de/archiv/2010/01-02/journalismus/weise-flecken-im-journalismus> (last visited on 9/08/2010).

²⁴⁷ See only ZAK, Kommission für Zulassung und Aufsicht der Landesmedienanstalten (ed.), *Digitalisierungsbericht 2009 [Report on digital developments]* (2009).

working body will be vested with a more sufficient structure and a more efficacious remit and discretionary power must also be addressed.

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The case of Greece

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1. Introduction

The development of the media in Greece has been inseparably linked to the country's political system and the various social and economic interests that are represented in it. Throughout the 20th century, the Greek press became a pre-eminent field of political antagonism, with newspapers tied to different active political parties or opposition forces. In the post-World War II period, the dominance of the right in Greek politics and the exclusion of the left were also reflected in the press through the banning of left-leaning newspapers. The transition from a military regime to democracy in 1974 put an end to the censorship of political views that were critical of the government, and restored fundamental rights, including freedom of expression. Yet, the partisan character of the press, although starting to decline, continued to significantly define a large number of newspapers. This phenomenon is specific to the clientilistic nature of political relations broadly prevailing in South Europe.¹

Generally, the evolution of the Greek media has been subject to strong politicisation and its regulation has been characterised by haphazard policy attempts carried out by successive governments from the 1980s until the present. The degree and nature of the interconnections between the political system and the media in Greece have substantially transformed over time, as the political dynamics and economic conditions changed along with the possibilities opened by technological advancements. Exploring the specific characteristics of the media in Greece and the policies that have been adopted to regulate them, must first place the media in the country's political, economic and social context. By doing so, the purpose of this report is to depict the emergence of the legal and regulatory framework defining the Greek media, and then identify the main factors that have shaped it. What are the policies pertaining to the media and is there a coherent set of provisions and government interventions that can be seen to make up "media policy"?

Following the fall of the junta, the Greek media, comprising of the press, state radio and television, exhibited continuity with a number of features that had been acquired under the semi-democratic and authoritarian governments of the post-war period. At the same time, democratisation created the preconditions necessary for reducing state intervention in the media, in addition to enhancing its diversity and independence. First of all, public radio and television were released from the tight control of the colonels. Nonetheless, they remained under the directorship of the state and they continued to serve as a means for the centre-right governing party, New Democracy (ND), to project its views and gain support from the public. What made this possible was that the state completely financed and controlled the state television channels by appointing or dismissing directors who were thought to be in favour of the government or against it, respectively.²

¹ D.C. Hallin and S. Papathanassopoulos, "Political clientilism and the media: Southern Europe and Latin America in comparative perspective", 24 *Media, Culture and Society* (2002) 175, at p. 176-177.

² It is notable that the government changed the Director General of national television on average every twelve months. See S. Papathanassopoulos, "The politics and the effects of the deregulation of the Greek television", 12 *European Journal of Communication* (1997) 360, at p. 364.

In juxtaposition to the government-controlled television and newspapers supporting the centre right government, a number of newspapers were closely associated with the left and centre-left opposition parties. They served as a medium for those parties to promote their views and influence upon voters. In the second half of the 1970s, an unprecedented shift of readership from the newspapers of the right to those supporting the centre and the centre-left mirrored the imminent reconstitution of the electoral power of the main political parties.³ It culminated with the landslide victory of the socialist party of PASOK that came to power in 1981. In this light, while the end of censorship allowed the press to become more diverse and independent, these two qualities were compromised by the fact that many newspapers still served as the mouthpiece of particular political parties.⁴

Although state intervention in the media declined following the democratic transition, it was far from actually ending. The state's ability to intervene was shaped by the fact that it continued to provide newspapers with extensive financial benefits, such as tax exemptions and loans.⁵ Such assistance was vital for the survival of newspapers that were for most part published by small or medium-sized enterprises, which were not profitable enough to sustain themselves on their own. Dating back to the pre-junta period, such dependency of the press on state support had enabled the government to effectively direct its views upon publishers and decide what was "fit to print". In turn, though, this dependency also allowed publishers to exert influence over government policies.

The transition to democracy and the emergence of various social movements at its aftermath challenged the overwhelming power that publishers had and forced them to somewhat diversify their views and newspaper content.⁶ Still, both the state's control over public television and the alignment of most newspapers with political party views continued unabated, if not intensified, in the early 1980s. Eventually, they thoroughly restricted the ability of social actors who were not attached to a political party to influence the views and content of the media.⁷ The overall weakness of a non-politically affiliated civil society has also been evidenced in the sphere of journalism, which did not develop as an autonomous profession. The ability of journalists to represent themselves as an independent social group and to enforce journalism ethics through self-regulation have been undermined by conflicting partisan ties.

In the 1980s, the international trend towards liberalisation and Greece's membership in the European Economic Community, combined with important domestic developments, undermined state monopoly over the audiovisual sector.⁸ It was clear that the drive to establish a common market where goods, services, persons and capital could circulate unhindered would not allow state monopoly of radio and television to persist much longer. At the same time, liberalisation was the result of a

³ M. Komninou, "O rolos tw n MME stin triti dimokratia 1974-1994" [The role of the media in the third republic 1974-1994], in C. Lyrintzis *et al.* (eds), *Koinonia kai Politiki [Society and politics]* (1996) 219, at p. 230.

⁴ For a detailed discussion, see S. Papathanassopoulos, "The decline of newspapers: the case of the Greek press", 2 *Journalism Studies* (2001) 109.

⁵ Komninou, "O rolos tw n MME", p. 231; A. Skamnakis, "Mesa mazikis epikoinwnias kai politiki eksousia stin Ellada" [The media and political power in Greece], *Oi ekselikseis ston chwro tw n meswn epikoinwnias [Developments in the media]* (2009) 109, at p. 113-114.

⁶ Skamnakis, "Mesa mazikis epikoinwnias", p. 113.

⁷ Komninou, "O rolos tw n MME", p. 233-235.

⁸ S. Papathanassopoulos, "Broadcasting, politics and the state in socialist Greece", 12 *Media, Culture and Society* (1990) 387, at p. 392.

domestic political and economic crisis in the second half of the 1980s. The eruption of a major scandal that involved the press and the government (the so-called “Koskotas” scandal), the general climate of discontent with the socialist government, but also the inability to elect a new one (it took 3 rounds of elections in 1989-1990 to do so), were all signs of a growing disillusionment with the political system.⁹ The demand for liberalisation of Greek broadcasting went hand in hand with a quest for its autonomisation from political partisanship and state tutelage.

Compounded by major economic difficulties, the political crisis contributed to bolstering the demands and pressures from the centre-right opposition forces, publishers and business interests to be granted licences for private radio and TV channels. Following the 1986 elections that returned the socialists to power (though their electoral power was substantially reduced), direct action on the part of the mayors of Athens and Thessaloniki, who were from the opposition, and who started to transmit programmes received from the satellite channels, led to the establishment of the first private radio stations.¹⁰ The first private television channels were also created alongside state broadcasting. Similarly, the intermeshing between political parties and newspapers progressively weakened with the economic crisis of the 1980s, which paved the way for a more commercial orientation and the expansion of advertising as a source of revenue. Despite its small dimension in terms of size and population, the Greek market has a large number of media outlets both in the print and the audiovisual sectors. This multifaceted and densely filled media landscape is described in the first section of this report.

Since the 1980s, the commercial shift in orientation was marked by the entry of business entrepreneurs in the press, who together with established publishers, were also the first to expand their activities in the deregulated audiovisual sector.¹¹ From the late 1980s onwards, the commercial shift in the press and the deregulation of the audiovisual media in Greece further undermined state intervention in the media and the ability of the government and other political forces to direct information and influence the content of news. They did not, however, bring an end to the multiple dependencies and interconnections between the various media outlets on the one hand, and the government and the large political parties on the other.

Instead, the attempts of the political class to influence the media moved to the legislative and regulatory processes, as well as to the process of granting licences to private media outlets. Successive governments have used the latter to favour, or conversely disadvantage, radio and television channels, which they consider to be friendly or critically predisposed to them, respectively. As a result of the political favouritism driving the process of licensing, and with successive governments showing preference for particular media outlets, the granting of licences is still pending to this day. It is an astounding (and possibly rarely encountered elsewhere) phenomenon that nearly all private television channels with analogue transmission operate without proper licences, and have done so since deregulation in the late 1980s. The failure of successive governments to accomplish the licensing process has been part and parcel of a legal and regulatory framework comprising norms and provisions that lack underlying strategic and policy goals, they are often contradictory and apparently unenforceable. An overview and analysis of the legal and regulatory

⁹ Komninou, “O rolos tw n MME”, p. 236.

¹⁰ Papanthanasopoulos, “Broadcasting, politics and the state”, p. 393.

¹¹ Papanthanasopoulos, “The politics and the effects of the deregulation”, p. 360.

frame is provided in the second part of this report. The final part of the report assesses the conduct of Greek media policy and examines its effects on democratic politics.

2. The media landscape in Greece

Despite the continuous decline in circulation figures, especially since the broadcasting deregulation in the late 1980s, Greece has an extremely large number of newspapers. In 2009 there were 76 national newspapers and around 420 local/regional newspapers, though many of them are not viable in economic terms.¹² Athens-based nationally circulated political dailies have suffered the greatest losses in terms of sales. The advent of free newspapers and online media in the early 2000s intensified the decline of paid circulation, resulting in decreasing profits from advertising. The Sunday press on the other hand remains strong and has managed, over the same period, to increase its sales considerably. Despite their declining revenues or their loss of ability to be profitable, many newspapers are sustained through funds from other economic activities of their owners. They are maintained because of their perceived capacity to influence public opinion, and are thus used to exercise political pressure for the benefit of other business interests rather than as a profitable business venture.

Meanwhile, the Greek print media is supported by considerable indirect state subsidies in the form of distribution subsidies, reduced value added tax, preferential rates for telecommunications services and lower social security contributions.¹³ The policy of indirect subsidies contributes to the sustainability of smaller circulation newspapers and can be justified on the basis of support for the right of freedom of information and media pluralism, especially in relation to the geography of the country. State advertising is another staple source of finance for Greek newspapers. An array of criteria has been established for its “fair” distribution,¹⁴ also in support of the regional press. However, doubt still exists as to whether these criteria are actually fully respected.¹⁵ In addition, Greek governments have displayed remarkable lenience towards the debts accrued by major publishers towards the state (e.g. debts to the national social security system), raising even more questions about the role of the state and the media houses’ independence from it.¹⁶

Since liberalisation in 1989, Greece has a dual broadcasting system. There are currently 4 public TV channels and around 130 private channels, 8 of which are of national range and offer free-to-air analogue television services under some kind of

¹² 39 of the national newspapers were daily, 14 weekly newspapers and 23 Sunday newspapers. Athens Daily Newspaper Publishers Association, “Statistical information on newspaper circulation”, available at: http://www.eihea.gr/default_gr.htm (last visited on 23/7/2010).

¹³ For example, approximately 40,000 million euro in annual press distribution subsidies are granted to around 3,500 titles. See Secretariat General for Communication-Secretariat General for Information, “Diakinisi tou typou” [Circulation of the press], available at: http://www.minpress.gr/minpress/aeroporiki_diakinisi-2.pdf (last visited on 23/7/2010).

¹⁴ See Presidential Decree 261/1997, “Transparency in government and wider public sector advertising in the print and electronic media”, FEK A’ 186/1997, as amended by Law 3688/2008, FEK A’ 163/2008, and Law 3548/2007, “Public bodies advertising in the regional and local press and other provisions”, FEK A’ 68/2007.

¹⁵ The previous government of New Democracy that spent 83 million euro for advertising in the press only, has been alleged to have manipulated the distribution of state advertising by rewarding friendly outlets with government spots. See “I kratiki diafimisi sti xwra twn thaumatwn” [Public advertising in wonderland], *Eleftherotypia*, 26/10/2008.

¹⁶ See “Fesi 90 ekat. euro apo ta MME sta tamia” [Media’s debt of 90 million euro to social security funds], *Kathimerini*, 30/10/2008.

provisional licence.¹⁷ In regards to the radio, there are 24 public stations and about 960 in private (or municipal) ownership that have some kind of permission to air.¹⁸ Most of them are entertainment-oriented. Cable television is virtually non-existent due to poor infrastructure. In 2006, however, IPTV (Internet Protocol Television) was introduced and there are currently 4 IPTV service providers in operation. Pay-TV began in 1998 but, for reasons related to the balance of power in the analogue-TV market, did not manage to establish a significant presence.¹⁹

Deregulation of the audiovisual sector was a watershed in so far as it paved the way for a fundamental restructuring of existing ownership patterns from small and medium-sized enterprises to large conglomerates and business-like ventures, which also extended to the traditional press. Despite the existence of restrictive provisions (which are subsequently discussed in detail), a high degree of concentration has prevailed, particularly with respect to the media of national range: 6 publishers own the biggest nationally circulated newspapers, many magazines, a handful of broadcast media, as well as press distribution agencies.²⁰

Public radio and television are run by the Hellenic Broadcasting Corporation (ERT). ERT currently operates 5 television stations, 2 of which are of national coverage, 1 worldwide satellite broadcast and 24 radio stations. ERT's profile has not changed much since 1987 when it became legally "autonomous" from the state. The government still controls ERT's Managing Board by appointing the majority of its members. Moreover, the Board changes every time the administration changes, reflecting the limited development of a truly "public service" broadcaster in Greece. In addition, ERT was not prepared to compete with the private broadcasting sector and able to keep up with its evolution. As a result, the major private television channels have enjoyed a dominant position over public broadcasting in terms of audience and advertising share. These are solely funded by advertising while ERT receives income mainly through a mandatory licence fee imposed on every electricity bill, state subsidies and to a lesser extent, by advertising. Despite the multiple sources of funding it enjoys, ERT has accumulated a sizeable deficit. In fact, due to its high operating costs and ineffective business plans, ERT has never managed to avoid cost overruns.²¹

Greece is currently under digital switchover. Since 2006, ERT is active in digital terrestrial television without any subscription cost. In 2009, a second digital provider (DIGEA) was established by the seven major private television channels, in

¹⁷ See Secretariat General for Communication-Secretariat General for Information, "Tileoptikoi Stathmoi periferiakoi-topikoi [Television channels regional local], available at: http://www.minpress.gr/minpress/index/mme_gr/list_tvlocal.htm (last visited on 23/7/2010).

¹⁸ See National Council for Radio and Television, "Adeiopotithentes R/T stathmoi" [Licenced R/T channels], available at: http://www.esr.gr/arxeion-xml/pages/esr/esrSite/view?section=e5f2cfb3c0aa1e7683571826e98263e5&categ=00bc3beed0871e7683571826e98263e5&last_clicked_id= (last visited on 23/7/2010).

¹⁹ Currently Multichoice Hellas (Nova) is the only pay-TV provider. See S. Papanthanasopoulos, "The development of digital television in Greece", 14 *Javnost - The Public* (2007) 93, at p. 96-102.

²⁰ These are the Lambrakis Press Group, the Pegasus Group (owned by the Bobolas family with interests in construction), Tegopoulos A.E., Kathimerini-Skai (owned by the Alafouzos family with interests in shipping), the Vardinogiannis family (with interests in energy) and the Ant1 Group (owned by Minos Kyriakou with interests in telecommunications).

²¹ See indicatively, "Isologismos ERT A.E. 2009" [ERT A.E.'s 2009 balance sheet], available at: <http://www.ert.gr/keep/anakoinoseis/isologismos-ert-ae-2009.htm> (last visited on 27/3/2010), and "Sok kai deos apo ta kratikodiaita MME" [Shock and awe from the state-dependent media], *Imerisia* 31/01/2010.

order to undertake the digital transmission of their programmes and those of any other station that would choose to use its services. Digital Union is the third provider set-up by 16 local and regional television stations. Currently digital TV services are partly available in major Greek cities. Full digital transition is expected to be finalised in 2012, but concerns have been expressed as to whether it will be completed on time due to insufficient legal preparations, as will be demonstrated below.

During the past few years, the importance of the internet has significantly grown in the domestic media market.²² Most print media outlets provide some or all of their content on the internet, free of charge, and many also offer breaking news in a timelier manner. While the sales figures of national newspapers have been declining, web traffic reports reveal that their online versions are becoming extremely popular among Greek internet users.²³ Nevertheless, major national newspapers' websites are mainly built upon their print versions and offer significantly low levels of interactivity to their users, showing that online journalism culture is still in its infancy.²⁴ Few news portals that do not have a print counterpart exist. Among them, the ones that enjoy significant popularity are those that belong to prominent publishing groups which own print newspapers too.²⁵ Additionally, all major national private television channels and the public broadcaster offer both audiovisual and written news services on their websites for free.

The Greeks seem to have embraced social media services. One notable example of the use of social media in Greece, especially among teenagers and young adults, has been their use as a communication tool for the organisation of the major riots and protests, as well as for the relay of the events that took place in December 2008.²⁶ International and Greek media then used that information for their own reporting. According to a study commissioned by the Institute of Communication,²⁷ facebook was the most popular service in 2008. As to blogs, more than half of internet users visited blogs frequently, mainly for news and information, but only 10% owned their own blog. Although online content production in the form of blogging is

²² Internet use in Greece was at 42.4% of the population in the first trimester of 2009, showing an average annual growth rate of 17.4% since 2005, but with significant variation among different age groups and between lower- and higher-educated users. See Hellenic Statistical Authority, "Ereuva xrisis texnologiwv pliroforisis kai epikoinwnias apo ta noikokuria" [Research on the use of information and communication technologies by households], available at: http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/A1901/PressReleases/A1901_SFA20_DT_AN_00_2009_01_F_GR.pdf (last visited on 23/7/2010).

²³ See "Top sites in Greece", available at: <http://www.alexa.com/topsites/countries;0/GR> (last visited on 23/7/2010).

²⁴ L. Spyridou and A. Veglis, "Exploring structural interactivity in online newspapers: a look at the Greek web landscape", 13 *First Monday* (2008), available at: <http://firstmonday.org/article/view/2164/1960> (last visited on 23/7/2010).

²⁵ In.gr and Pathfinder.gr of Lambrakis Press Group are the most popular portals.

²⁶ See "Protesters rule the web in internet backwater Greece", Reuters, 18/12/2008, available at: <http://blogs.reuters.com/global/2008/12/18/protesters-rule-the-web-in-internet-backwater-greece/> (last visited on 23/7/2010).

²⁷ 88.2% of internet users made use of some social media service(s) at least once a month in 2008. Among 18-34 year-olds the share of social media users was even higher. See Institute of Communication, "Social media research", available at: <http://drop.io/ioc2009/asset/ioc-social-media-research-pdf> (last visited on 23/7/2010).

gaining ground, administering a blog is still an activity largely confined to a certain demographic profile.²⁸

News agencies act as sources of information and from this perspective are important for pluralism of output. In Greece, however, there is only one leading national news provider, the Athens News Agency-Macedonian Press Agency (ANA-MPA), which is state owned.²⁹ Nearly all newspapers are subscribers of ANA-MPA, so it can be regarded as the primary source of news information.³⁰ ANA-MPA represents the international voice of Greece and collaborates with many international news agencies. It receives income through subscriptions and other commercial services, advertising and state subsidies, yet, it has accumulated a sizeable debt.³¹

Journalists' working conditions merit attention to the degree that they can have an impact on journalists' professional autonomy. However, up until this day, there is no official data available on the exact number and profile of journalists in Greece. Data from journalists' trade unions are not disclosed. Even if they were disclosed, they would not have been reliable since not all journalists are affiliated with trade unions. This is mainly attributed to the peculiarities of journalists' work status and employment conditions, which do not usually match the requirements for union membership. Moreover, journalism as a profession has never been regulated and no formal licence is required to qualify for the profession.

According to an independent study, the estimated number of journalists in Greece, including "related" professions, was around 17,000 in the period 2003-2004.³² According to the same study, 63% of journalists declared having relevant theoretical training, despite the fact that journalists in Greece, contrary to most qualified occupations, are not required to follow a certain formal course of study. Concerning working conditions, the study reveals that many journalists experience financial insecurity due to lack of definition of their occupational status and low wages. It is notable that half of the sample reported working more than one jobs. This figure also includes journalists who are employed in the press offices of public institutions and media enterprises in parallel.³³

At this point it should be noted that despite the long history of the press and the advancement of electronic media, Greece has a low media literacy development. According to a study commissioned by the European Commission, media literacy

²⁸ Blog owners are usually highly educated males between 26 and 45 years old of centre-left political ideology. See in this respect, "I politiki kouloura tw'n blog" [The political culture of blogs], 43 Monthly Review (2008), available at: http://www.monthlyreview.gr/antilogos/greek/periodiko/arxeio/article_fullstory_html?obj_path=docrep/docs/arthra/MR47_erevna_FS/gr/html/index (last visited on 23/7/2010).

²⁹ ANA-MPA is under the supervision of the Minister of Culture and Tourism. The Minister appoints 4 out of the 9 members of its Board of Directors, supervises the legality of its decisions, and has the ability to request a financial audit.

³⁰ Other regional news agencies (e.g. the Cretian News Agency, the North Aegean News Agency, and the Peloponnesian News Agency) are complementary sources.

³¹ See "Sok kai deos", Imerisia.

³² VPRC Public Opinion Institute, "I domi tou dimosiografikou epaggelmatos" [The structure of the profession of journalism], available at: http://www.vernardakis.gr/uplmed/33_press.pdf (last visited on 23/7/2010).

³³ According to Article 5 of the 1998 Code of conduct of the Panhellenic Federation of Journalists' Unions, the latter is "accepted", unless it challenges journalists' professional integrity and independence.

levels in the country are estimated lower than the EU average.³⁴ The concept of media education has not been sufficiently explored and there are no state institutions devoted to media education, nor concrete integration of media education in school curriculums. Media literacy initiatives are fragmentary, coming mainly from independent actors, such as Safenet, which is the self-regulatory body for internet content, and the Hellenic Audiovisual Institute.

3. Media policy in Greece

Since the late 1980s, when the Greek audiovisual market was liberalised, a series of legislative acts have been adopted as part of the state's media policy to regulate the domestic media market. Successive governments, each one with its own agenda and media favourites, have sought to dictate the conditions of electronic media performance. One legal act has followed the other, leading to an overregulated and extremely detailed, albeit complex, legal framework. By contrast, the press, traditionally recognised as a bulwark for democracy, has not been heavily regulated. It has only be subject to general applicable laws, relating to such matters as defamation, privacy and the protection of public security and public order, limited regulation regarding ownership structures and self-regulation.

Aware of the need to codify Greek media legislation, an *ad hoc* working group of the National Council for Radio and Television (NCRT), the independent authority which is primarily charged with media rules enforcement, has recently produced a report, suggesting 2/3 of national media-related legislation to be revoked, modified or simplified.³⁵ The following sections seek to present and explain the Greek regulatory framework for the media, placing it in the socio-political context in which it has emerged and currently operates. The analysis focuses on both structural and content regulation, following a brief discussion of the major actors involved in media policy-making and the constitutional provisions that govern the process.

3.1 Actors of media policy and regulation

Contrary to the press, whose freedom is explicitly recognised by the Greek Constitution (as will be explained in more detail below), radio and television are under the “direct control of the state”.³⁶ One significant characteristic of the Greek regulatory regime is that since the liberalisation of the broadcasting market, competences for the regulation of the sector have regularly been transferred from one state body to the other without any substantial planning. This has resulted in the fragmentation of regulatory duties, an array of bureaucratic procedures and deficient coordination between actors, which has unavoidably undermined institutional stability for the formulation of a concrete media policy with clear objectives and aims.

One notable example is the evolution of what is now the Secretariat General of Communication-Secretariat General of Information (SGC-SGI), the body that is

³⁴ European Commission, Directorate General Information Society and Media, “Study on assessment criteria for media literacy levels”, available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 23/7/2010).

³⁵ See “Rizikes allages sti radiotileoptiki nomothesia eisigountai meli tou ESR” [Proposals for radical changes in radio and TV legislation by members of the NCRT], *Eleftherotypia*, 20/4/2010.

³⁶ Art. 15(2) of the Greek Constitution.

primarily responsible for media affairs. Introduced in 1974, it functioned as the General Directorate for Press and Information,³⁷ until 1994, when a proper ministry was established, the Ministry of Press and Mass Media. Ten years later, in 2004, the ministry was dissolved and two General Secretariats were created to incorporate its activities, both transferred to the Ministry of Interior (MI) in 2008. Through a variety of acts, the MI retained supervision over the functions of the SGI and transferred the monitoring of others to other ministries, such as the Ministry of Culture.³⁸ It remains to be seen whether a clear-cut plan for the reformulation of media policy lies behind the described re-allocation of competences. At present, such restructuring can only be interpreted as part of the broader attempts of the incumbent government, the socialist party PASOK, to reorganise the public sector.

The SGC-SGI collaborates with the Ministry of Infrastructure, Transport and Networks, the body responsible for planning and implementing national telecommunications policy and promoting the information society. Cooperation between the two has intensified during the last couple of years on account of the much awaited passage to digital terrestrial broadcasting.

The Greek National Council for Radio and Television (NCRT), an independent body since the constitutional revision of 2001, is the Greek administrative authority which has exclusive competence for the control of the broadcast media. It was set up in 1989 and its initial responsibilities illustrated the wish of the political majority of the time to retain control of the newly liberated broadcasting sector. In fact, the NCRT was not granted substantial autonomy and its role remained mainly consultative, also regarding the “hot” topic of awarding licences for broadcasting, until 2000, when Law 2863/2000 upgraded its functions.³⁹ The NCRT has the mandate to secure that public and private broadcasters comply with domestic legislation, and can impose administrative sanctions in case of violations. Its operation is under parliamentary control, and its decisions are subject to judicial scrutiny by the Council of State.

The gradual expansion of the competences of the NCRT, especially following the 2001 constitutional revision, has not matched an equivalent increase in its resources. The effectiveness of NCRT’s activity is substantially hindered by the lack of personnel, outgrowing premises and insufficient information technology equipment,⁴⁰ in addition to unwieldy bureaucratic mechanisms and limited coordination with other authorities, such as the National Telecommunications and Post Commission (NTPC) and the Hellenic Competition Committee (HCC). The NTPC is the authority responsible for the regulation, supervision and monitoring of electronic communications. In view of the digital switchover, its role has gained

³⁷ Law 216/197, “On the establishment of the Ministry of the Presidency”, FEK A’ 367/1974.

³⁸ The Ministry of Culture was entrusted with the supervision of ANA-MPA, the supervision of public service media and the supervision of the National Audiovisual Archives. At the beginning of 2010, the duties of the SGI were bestowed to the Deputy Minister to the Prime Minister and currently also government spokesman.

³⁹ Law 2863/2000, “National Council for Radio and Television and other provisions”, FEK A’ 262/2000. See R. Panagiotopoulou, “20 xronia ellinikis idiotikis tileorasis (1989-2009): enas apologismos” [The 20 years of Greek private television (1989-2009): an account], 10 *Zitimata Epikoinwnias* (2010), p. 13.

⁴⁰ See in this respect, National Council for Radio and Television, 2009 activity report, available at: http://www.esr.gr/arxeion-xml/pages/esr/esrSite/list_docs?section=035516d6c0ab1e7683571826e98263e5&categ=716aa0d6d0861e7683571826e98263e5&last_clicked_id=link6 (last visited on 23/7/2010).

importance, as it is responsible for the provision of general authorisations to operators providing electronic communication networks and/or services to content providers (i.e. broadcasters). The HCC, in turn, is the authority responsible *inter alia* for the application of competition rules in the media sector.⁴¹

A variety of journalists' organisations and other media industry organisations have been established in order to promote their professional and business interests, as well as to influence state action in the field of the media. There are currently five trade unions of journalists that are organised regionally. The Union of Journalists of Daily Newspapers of Athens (ESYEA) and the Union of Journalists of Daily Newspapers of Macedonia-Thrace (ESYEMTH) are among the most significant ones. Grouped under the Pan-Hellenic Federation of Journalists Unions (POESY), the principal aim of the unions is to represent, protect and defend the journalistic profession, which also involves negotiating collective work agreements for journalists with the state and the employers. In lieu of a press council for journalists' self-regulation, the unions are responsible for the supervision of journalists' ethical performance. In order to enforce these ethical standards, various codes of conduct have been adopted and disciplinary councils have been created; however the effectiveness of the latter has been substantially challenged.⁴²

Greece does not have a strong tradition of civil society organisations with influential advocacy activity in the field of the media. Mention is only worth being made of the Hellenic League for Human Rights, an NGO devoted to human rights protection, which follows media coverage and monitors compliance with human rights, and the Greek Helsinki Monitor, which has been calling for increased access of minority groups to media outlets.⁴³ Media research, on the other hand, is carried out by a variety of institutions and seeks to inform state media policy.⁴⁴ However, the extent to which its findings actually feed into the process is difficult to discern.

Overall, the design of national media policy is under the responsibility of governmental bodies and institutions, whose functions frequently change when a change in government or even in the government's agenda occurs. The establishment of the NCRT as an independent (or quasi-independent) regulatory authority for the implementation and monitoring of broadcasting policy has not been associated with the necessary reforms that would have allowed it to effectively carry out its functions and be accountable. At the same time, the action of other authorities, such as the HCC and the NTPC, affects the media to a greater or lesser extent and thus contributes to the complex institutional mix that characterises the conduct of Greek media policy. Limited coordination amongst the actors involved, often combined with unclear mandates, creates confusion as to who is actually responsible for what. Journalists' unions and other professional associations have a limited say in the formulation of state media policy, while the public, in the absence of a strong civil society, has hardly any chance to express its views on media issues.

⁴¹ Since the entry into force of Law 3592/2007, 'Concentration and licensing of mass media enterprises and other provisions' (FEK A' 161/2007), the HCC has a specific department devoted to the media.

⁴² ESYEA, "Ypenthimisi tou kwdika deontologias" [A reminder of the code of ethics], 15/06/2010, available at: <http://www.esiea.gr/gr/index.html> (last visited on 23/7/2010).

⁴³ Greek Helsinki Monitor, "Minorities and the media in Greece", 3/8/2001, available at: http://www.greekhelsinki.gr/Minorities_of_Greece.html (last visited on 23/7/2010).

⁴⁴ Those include the Hellenic Audiovisual Institute that is supervised by the SGC-SGI, three university-based institutes, as well as independent research companies.

3.2 The media regulatory framework

3.2.1 Constitutional provisions

The Greek Constitution provides for freedom of speech and freedom of the press. Whereas paragraph 1 of Article 14 safeguards the individual right to freedom of expression, including through means such as the press, paragraph 2 recognises freedom of the press as an institutional guarantee (*thesmiki eggysi*).⁴⁵ When read together, they impose a duty of non-interference on the state, namely of abstinence from censorship and the adoption of preventive measures, and a positive obligation to create an enabling environment for a free press to flourish. Although Article 14(1) specifically refers to the press, it is by no means limited to it. Freedom of expression also applies to broadcasting and all other media, including through the internet.⁴⁶ However, according to Article 15(1), broadcasting does not enjoy the higher constitutional guarantees that have been afforded to the press.

During the constitutional revision of 2001, proposals were put forward by the two main political parties, PASOK and Nea Dimokratia (ND), in order to extend the protective provisions for the press to audiovisual media; however they did not gather the necessary political support.⁴⁷ Consequently, radio and television remain under the “direct control of the state”.⁴⁸ Reflective of the paternalistic environment in which Greek media operate, the exercise of state control, which exceeds the concept of state supervision, is under the exclusive competence of the NCRT and regards both public and private broadcasting.

Important changes brought about by the 2001 revision are the constitutional recognition of freedom of information and of the right to participate in the information society (Article 5A),⁴⁹ the constitutional safeguarding of the right of reply (Article 14(5)),⁵⁰ and the introduction of two public duties imposed on broadcasters, namely the obligation to cover free of charge the sessions of Parliament and of its committees, and the electoral addresses of the political parties (Article 15(2)). The 2001 constitutional revision also resulted in the modification of Article 57(1)(c), rendering incompatible the duties of member of Parliament and those of owner/manager of an enterprise that either publishes a newspaper of country-wide circulation or engages in radio and television broadcasting.

Undoubtedly, the most hotly debated amendment of the 2001 constitutional revision was that of Article 14(9), which deals with media ownership, transparency and pluralism. The provision formed the object of extensive discussion in Parliament,

⁴⁵ P.D. Dagtoglou, *Typos kai Syntagma [The Press and the Constitution]* (1989), p. 31.

⁴⁶ I. Karakwstas, *Dikaio kai internet [The law and the internet]* (2009), p. 41-43.

⁴⁷ G. Kiki, *H eleutheria tw n optikoakoustikwn meswn [Freedom of audiovisual media]* (2003), p. 110 *et seq.*

⁴⁸ Art. 15(2) of the Greek Constitution.

⁴⁹ Restrictions on freedom of information may be imposed, provided they are necessary and justified by reasons of national security, combating crime and protecting the rights and interests of others. The right to participate in the information society creates an obligation for the state to facilitate access to electronically handled information, as well as to the production, exchange and diffusion thereof, in observance of Articles 9, 9A and 19 of the Constitution regarding the inviolability of one’s private and family life, the protection of personal data and freedom of correspondence and communication.

⁵⁰ According to Article 14(5), every person offended by an inaccurate publication or broadcast has the right to reply. The information medium has a corresponding obligation for full and immediate retraction. In the case of offenses by an insulting or defamatory publication or broadcast, the media are obliged to ensure immediate publication or transmission of the reply. The manner in which the right of reply is exercised is specified by law.

and was modified after having secured an impressive majority.⁵¹ It determines that “the ownership status, the financial condition and the financing means of information media shall be disclosed, as specified by law”, and mandates national legislation to designate “the measures and restrictions necessary for fully ensuring transparency and plurality in information”. The provision prohibits concentration of control of more information media of the same type or of different types, as well as concentration of more than one electronic media (i.e. radio and television) of the same type. A crucial point is that it also prohibits holding the capacity of owner, partner, main shareholder or management executive of both an information media enterprise and an enterprise that enters into public sector contracts, for the provision of works, supplies and services. The scope of application of this prohibition is extended to “all types of intercalated persons, such as spouses, relatives, financially dependent persons or companies”. Domestic legislation must set out the specific regulations and the sanctions to be imposed in case of non compliance.

A series of provisions of a suppressive nature remains in the Greek Constitution which date back to the 1952 Constitution. Article 14(3) allows for the seizure of newspapers and other publications after circulation by order of the public prosecutor.⁵² Greek courts may also order the temporary suspension or definitive ban of a publication, and prohibit the practice of the profession of journalism.⁵³ In fact, according to Article 14(8), the conditions and qualifications requisite for the practice of the profession of journalist are to be specified by law.⁵⁴

The Greek constitutional provisions relating to free speech and the media are complemented by the European Convention on Human Rights and the International Covenant on Civil and Political Rights, which Greece has signed and ratified. Domestic authorities are bound by their respective Articles 10 and 19 on freedom of expression and freedom to seek, receive and impart information and ideas. The state is also obliged to respect Article 11 of the Charter of Fundamental Rights of the European Union (EU) when implementing EU law. In 2009, the Freedom House Index rated the media in Greece as “free”, with a total score of 29 points, zero (0) being the best.⁵⁵ Greece ranked above Italy and Turkey, holding the 23rd position out of 25 Western European countries.

⁵¹ 265 out of 280 present Parliamentarians voted in favour of the amended provision. See E. Venizelos, ‘Oi eggyiseis tis polifwnias kai diafaneias sta MME kata to arthro 14 par. 9’ [The guarantees for pluralism and transparency in the media according to Article 14(9)], Nomiko Bima (2005) 425, at p. 430.

⁵² Seizure of printed material may occur in case of: a) an offence against the Christian or any other known religion, b) an insult against the person of the President of the Republic, c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or a publication which aims at the violent overthrow of the regime or which is directed against the territorial integrity of the state, and d) an obscene publication which is offensive to public decency, in the cases stipulated by law.

⁵³ Pursuant to Article 14(6), after at least three convictions within five years for the criminal acts mentioned above, domestic courts may take such a decision.

⁵⁴ Note however that the provision was never put into practice.

⁵⁵ Countries scoring 0 to 30 are regarded as having “free” media. See Freedom House, Freedom of the press 2009, Press freedom rankings by region, available at: http://freedomhouse.org/uploads/fop09/FoP2009_Regional_Rankings.pdf (last visited on 23/7/2010).

3.2.2 Structural regulation

Structural regulation of the Greek media market has mainly focused on licensing and ownership matters. Contrary to the press, which is not subjected to licensing procedures in line with the constitutional recognition that the press is free, detailed rules have been adopted to regulate the licensing of television and radio stations, although they have remained “dead letters”. Restrictions on mono-media and cross-media ownership, combined with competition analysis and legislative action aimed to prevent integration of the media industry with business actors that are active in bidding for the award of public work contracts, have also been broadly imposed.

3.2.2.1 Licensing rules

The liberalisation of the radio and television market in the late 1980s inaugurated a period of regulatory uncertainty, initially due to the state’s inability to cope with the deregulation challenge and subsequently perpetuated as a means to keep the broadcasting media in check, influence their content and hopefully secure positive coverage.⁵⁶ The absence of a clear regulatory framework for the licensing of broadcasting operators, which characterises the Greek media scene even nowadays, has facilitated the anarchic entry of private broadcasters in the market, thus creating and progressively consolidating an atypical relationship between the state and private media interests. This relationship is not only founded upon interdependencies, but also upon mutual unease.

When the socialist party, PASOK, was in power, broadcasting deregulation commenced through the radio frequencies with Law 1730/1987.⁵⁷ Presidential Decree 25/1988 determined the procedure to follow for the allocation of local radio broadcasting licences.⁵⁸ It is reported that around 230 licences, that were valid for 2 years each, were granted to applicants filing an application with the media department of the Ministry of the Presidency.⁵⁹ The liberalisation of the television market took place by means of Law 1866/99.⁶⁰ National legislation made arrangements for the provision of seven-year licences to television broadcasters by the Ministry of the Presidency and the Ministries of Interior, Finance, Transport and Communication. The absence of prompt implementing action induced numerous operators of local and national range to start broadcasting illegally. The first television licences were granted only four years later, in 1993, just before the national elections that maintained the socialist party in power. Law 2181/94, which was subsequently enacted in order to facilitate “experimental” broadcasting,⁶¹ resulted in widespread abuse that was tolerated by the state, leading to increased numbers of operators active on the market.

⁵⁶ See D. Charalambis, “Eleutheria tis ekfrasis, plouralismos kai diafaneia sto xwro tw n ilektronikwn MME – H elliniki empeiria” [Freedom of expression, pluralism and transparency in the field of electronic mass media – The Greek experience], in A.D. Tsevas (ed.), *Diasfalisi tou plouralismou kai elegxos tis sygkentrwsis sta mesa enimerwsis* [*Safeguarding pluralism and controlling concentration in the information media*] (2006) 129, at p. 131.

⁵⁷ Law 1730/87, “Hellenic Radio-Television Corporation (ERT - S.A)”, FEK A’ 145/1987.

⁵⁸ Presidential Decree 25/88, “Terms and conditions for the establishment of local radio stations”, FEK A’ 10/1988.

⁵⁹ Hellenic Audiovisual Institute, ‘Radio in Greece’ (2006), p. 83, available at: <http://www.iom.gr/inst/iom/gallery/ekdoseis/ruthmistiko%20plaisio.pdf> (last visited on 23/7/2010).

⁶⁰ Law 1866/1999, “Establishment of the National Council for Radio and Television and provision of licences for the establishment and operation of television channels”, FEK A’ 222/1989.

⁶¹ Law 2181/1994, FEK A’ 10/1994.

The solution that ensued this chaotic situation was the adoption of Law 2328/1995 which laid down detailed rules for radio and television licensing.⁶² The newly introduced Ministry of Press and Mass Media became competent for the provision of four-year licences on the basis of competitive tendering, and the NCRT was assigned with tender evaluation.

Repeated attempts to licence the TV sector on the basis of the newly adopted law did not materialise. An invitation to tender for the licensing of private television broadcasters was published in 1998, but the procedure was annulled since no operator was found to comply with the requirements of the tender. In 2003, the NCRT, which in the meantime had become solely responsible for licensing the sector,⁶³ published three calls for tender, addressing national, regional and local television broadcasters. However, it did not succeed in concluding the process: several requests for annulment lodged with the Council of State on account of the complexity of procedures thwarted its activity. As to the radio sector, licences were only granted to the stations established in the prefecture of Attiki.⁶⁴ Incapable of rationalising the market, the Greek state recognised and prolonged the “legal” status of the TV operators that had participated in the 1998 tender and the radio stations, active on November 1st, 1999, by means of various acts.

The new government that came into power in 2007, ND, sought to streamline the rules governing licensing procedures and prepare the ground for the much desired switchover to digital terrestrial broadcasting. On July 19th, 2007 a new statute entered into force, Law 3592/2007.⁶⁵ According to the revised framework, licences for analogue, radio and television broadcasting should be granted by the NCRT, following publication of an inter-ministerial frequency chart and specifications brought by the competent ministry for the media regarding the range, number and type of licences available. Licences should be valid for six years and could be renewed once. They would be allocated after an evaluation of the tenders received on the basis of various criteria, including, amongst others, the applicants’ “legal” experience in broadcasting, their economic viability, the quality and diversity of their programming and the absence of sanctions imposed by the NCRT.⁶⁶ The law provided for the licensing of TV operators of national and local reach and of radio operators of regional reach; however it did not deal with local radio stations.⁶⁷

Regarding digital terrestrial radio and television services, Law 3592/2007 offered little guidance as to the procedures to follow. Not only did it not indicate a specific timeframe for the digital switchover; it also left a series of crucial issues to be decided at a later stage. Licensing procedures and assignment of frequencies should be regulated by means of a presidential decree. Three inter-ministerial decisions should, in turn, define a frequency chart for the broadcast of digital terrestrial signal, the number, type and reach of the licences to be granted and the cost for their award

⁶² Law 2328/1995, “Legal status of private television and local radio, the regulation of radio and television and other matters”, FEK A’ 159/1995.

⁶³ Art. 19(2) and (3), Law 3051/2002, “Constitutionally established authorities, amendments and supplements to the recruiting system for the public sector and related arrangements”, FEK A’ 220/2002.

⁶⁴ 20 licences were granted in 2001, and 15 in 2002. The latter were annulled by the Council of State.

⁶⁵ Law 3592/2007.

⁶⁶ In the case of sanctions, negative rating would apply.

⁶⁷ This might explain why merged operators or applicants intending to merge would be favoured in the assessment procedure.

and exploitation. Delays in the adoption of these instruments have significantly undermined progress to digital terrestrial transmission, which presently undergoes an experimental, transitional period, also governed by Law 3592/2007. It is indeed almost certain that the Greek state will not succeed in licensing TV operators wanting to transmit their programmes in digital terrestrial mode before 2012. As for radio, it has been confirmed that operators will continue to transmit in analogue mode after 2012.⁶⁸

Accounting for the above has mainly been the interruption and postponement of the preparation of the acts that are required for the start of the licensing process, due to the 2009 change in government and the coming into power of the social party PASOK. The presidential decree that is necessary for the organisation of the licensing procedure has not been issued yet, despite the fact that a first draft was prepared by ex-government, ND. The issuance of the frequency chart has also proven problematic. On August 20th, 2008, ND published a frequency chart, produced by the National Technical University of Athens, which determined the frequencies on which the existing television stations could digitally transmit their programmes.⁶⁹ The chart did not deal with the so-called “digital dividend”, namely the reduction in the amount of radio spectrum required to deliver terrestrial TV services when the transmission technology will be definitely migrated from analogue to digital and the use of the released spectrum.⁷⁰ The issue has turned into a key topic for the Greek digital switchover, as telecom and broadcasting operators compete fiercely for the allocation of the released frequencies.⁷¹ A new frequency chart will thus be produced, but only recently has the Greek state decided to commission a study in order to examine what the optimum use of the released frequencies could be.⁷²

Interestingly, the operators which have provisionally entered the digital terrestrial market are the public service broadcaster, ERT, and the private broadcasters of national range. No operator active at the regional or local level has started to broadcast digitally, despite the fact that many of them have had the quality of their programmes checked for that purpose by the NCRT, in line with the transitional provisions of Law 3592/2007.⁷³ The considerable investment that is needed for digital transmission might thwart the ability of regional operators to enter the market, with serious implications for democratic politics. The position of local operators is even more uncertain, as no legal provision exists for local digital TV stations following the definite passage to digital terrestrial broadcasting.⁷⁴ Moreover, market entry for new “comers” has been completely obstructed, as Law 3592/2007 has only allowed those

⁶⁸ See the minutes of the Greek Parliament Special Permanent Committee on Institutions and Transparency, 20/4/2010.

⁶⁹ KYA 21161/2008, “Formulation of the frequency chart for the switchover to digital terrestrial television”, FEK A’ 1680/2008.

⁷⁰ The reduction arises from the ability for digital technology to deliver a greater number of TV stations in a given amount of spectrum bandwidth, compared to analogue.

⁷¹ The digital dividend can be used to support a number of innovative services, including non-broadcast services, such as mobile broadband communications, and new broadcast services, for instance high-definition TV.

⁷² See the minutes of the Greek Parliament Special Permanent Committee on Institutions and Transparency.

⁷³ National Council for Radio and television, 2008 activity report, available at: http://www.esr.gr/arxeion-xml/pages/esr/esrSite/list_docs?section=035516d6c0ab1e7683571826e98263e5&categ=716aa0d6d0861e7683571826e98263e5&last_clicked_id=link6 (last visited on 23/7/2010), at p. 15-16.

⁷⁴ Art. 13(3) of Law 3592/2007.

operators that are considered to operate “legally” in Greece to make use of its transitional provisions.⁷⁵ This could lead to a *de facto* foreclosure of the market, once the passage is completed. Long-established media players have been given the possibility to lead the digital revolution and consolidate their position in the digital arena.

3.2.2.2 Ownership rules

Greek media ownership rules have undergone significant changes over the years and have been subject to much debate in governmental platforms. Law 1866/1989 has been at the heart of moves to ensure the state’s stranglehold on the media.⁷⁶ In an effort to appease owners of the print media that were willing to expand their activities in the field of broadcasting but at the same time prevent the emergence of powerful media conglomerates, Law 1866/1989 made provision for the granting of television licences to operators that were “solvent” and “trustworthy”, under the condition that shareholding in television companies did not exceed 25% of the company’s capital. Compliance was limited, and Law 2328/1995 introduced more restrictive rules,⁷⁷ prohibiting participation in no more than two types of media (i.e. television, radio and newspapers). The ‘two out of three’ model was supplemented by provisions precluding ownership of more than one TV and radio station and press ownership restrictions.⁷⁸ Shareholding in a television enterprise was kept to a maximum of 25% of the company’s capital and a similar ceiling was introduced for foreign ownership in electronic media.

The latest version of Greek mono-media and cross-media ownership provisions can be found in Law 3592/2007, which, distinguishes between electronic media (i.e. radio and television) and print media (i.e. newspapers and magazines). Ownership of an electronic media undertaking is permitted up to 100% but concentration of electronic media of the same type is prohibited.⁷⁹ Ownership of electronic media does not preclude ownership of print media, yet it must not lead to

⁷⁵ Art. 14(1)-(2) of Law 3592/2007.

⁷⁶ See P. Dimitropoulos, “Oi rythmistikes epembaseis tou kratous sti radioteleorasi” [The regulatory interventions of the state in broadcasting], in *Oi ekselikseis sto xwro twn meswn epikoinwnias*, 115, at p. 122-123.

⁷⁷ See Charalambis, “Eleutheria tis ekfrasis”, p. 136-137.

⁷⁸ Law 2328/95 determined that a natural or legal person and his/her relatives, deprived of business and financial autonomy up to the fourth degree, could own or participate in only: a) two daily political newspapers issued in Athens, Piraeus or Thessaloniki (a morning and an afternoon one); b) one daily financial newspaper and one daily sports newspaper issued in Athens, Piraeus or Thessaloniki; c) two daily and two non-daily provincial newspapers issued in different regions; and d) one Sunday publication.

⁷⁹ Article 1, read together with Article 3 of Law 3592/2007, defines concentration as the control enjoyed by a natural or legal person over more than one electronic media of the same type, that is, the exercise of substantive influence over media management and operation. Enjoying the capacity of owner, executive director, manager or member of the board of directors in more than one electronic media automatically denotes control. This is also the case with partners and shareholders which: a) hold at least 1% of the capital of more than one electronic media and figure amongst the ten most important partners or shareholders of the media concerned in terms of shares or voting rights; b) enjoy the right to appoint at least one member of the board of directors of the media involved. Media control can also be established via “intermediaries” (i.e. spouses, relatives, other intermediary persons and companies), provided that “unfair influence”, determined by a final judicial decision, is exercised over media management to the detriment of “pluralism, the objective provision, on equal terms, of information and competition”.

concentration in the media market. No particular press ownership restrictions apply, as is also the case with foreign media ownership.

Law 3592/2007 discloses a notable shift of state policy towards a less restrictive approach to media ownership. Ownership rules have been considerably relaxed, both as regards mono-media and cross-media ownership. Ownership of more than one media of the same type is allowed, press ownership restrictions and the “two out of three” rule have been abolished, and no restrictions on media shareholding are imposed. Such softening of the rules has hardly been an endorsement of a free market paradigm; the intention was rather to legalise the problematic *status quo*. Disturbing signs that the 1995 provisions were utterly ignored and circumvented induced the Greek state to amend ownership legislation. To evade the restrictive provisions of the 1995 act, media owners had broadly used intermediary persons and undertakings in order to expand their activity and gain control of various media outlets. Through Law 3592/2007, the state recognised its failing policy and sanctioned the actual configuration of media ownership structures in the country.

Whereas Law 3592/2007 amounted to a clear victory of private media interests, a more robust line was taken in relation to what became known as the “main shareholder” issue, that is, the enactment of rules against investment in and management of both media enterprises and enterprises that engage in public work contracts. Following the amendment of Article 14(9) of the Constitution in 2001, Law 3021/2002 prohibited holding the status of owner, main shareholder or administrator of both a media undertaking and an undertaking entering into public contracts, and defined the concept of “main shareholder” as the natural or legal person which represents at least 5% of the total capital share of a media undertaking or holds 5% of the voting rights. The incompatibility was extended to “intermediaries” (i.e. spouses, relatives and other companies), unless these could prove their financial independence. Before issuing acceptance of a tender for the award of a public contract and in any event, before signature of the contract, the administration should apply to the NCRT and request a “transparency” certificate. To facilitate such a task, the NCRT was charged with keeping detailed records of media undertakings and their ownership structure.

Law 3021/2001 was largely criticised by the then opposition party, ND, which argued for widening the concept of “main shareholder” and accused the government of PASOK for mitigating the effects of the prohibition. In adopting Law 3310/2005 three years later, ND toughened the scope of the provisions.⁸⁰ The party reduced the percentage of capital shares and voting rights to 1%, introduced an irrefutable presumption that relatives are by definition “intermediaries” and forbade shareholding of media undertakings by offshore companies. Additionally, it mandated the NCRT to maintain records of the undertakings concluding public contracts, together with the records kept on media enterprises.

The amended legal framework was met with much concern and was deemed to be unconstitutional and in conflict with EU law.⁸¹ It was also perceived as a concealed attempt on the part of the government to favour specific media undertakings and disadvantage others through careful drafting of rules that only in appearance were

⁸⁰ Law 3310/2005, “Measures to ensure transparency and avoid violations during public procurement procedure”, FEK A’ 30/2005.

⁸¹ V.G. Tzemos, “O ‘basikos metochos’ kai to Syntagma” [The ‘main shareholder’ and the Constitution], 4 DIMME (2005) 533, at p. 537-538

neutral and enforceable.⁸² The modified legislation also caught the attention of the European Commission, which sent a reasoned opinion to the Greek government, questioning the compatibility of both Law 3021/2002 and Law 3310/2005 with primary and secondary EU law.⁸³ Following unfruitful attempts to justify the adopted provisions, the Greek government was forced to suspend Law 3310/2005 and modify it via Law 3414/2005.⁸⁴ The latter determined that media activity and engagement in sectors that bid for public work contracts would only be incompatible, should an irreversible judgment on corruption be issued against the media enterprise concerned. The European Commission remained unimpressed by the changes made and urged the Greek state to comply with EU rules; in default, the case would be brought before the Court of Justice of the European Union (ECJ).

Eventually, it was the Council of State which resorted to the ECJ for guidance.⁸⁵ The case originated in a dispute, referred for a preliminary ruling, concerning the interpretation of Council Directive 93/37/ECC on the coordination of procedures for the award of public contracts,⁸⁶ in light of the constitutional provision of Article 14(9) and its former implementing statute, Law 3021/2002.⁸⁷ Completely disregarding the constitutional dimension of the case,⁸⁸ the ECJ ruled in *Michaniki* that Member States enjoy discretion to maintain or adopt rules designed to ensure in the field of public procurement observance of the principle of equal treatment and transparency, and to protect media pluralism and independence. Moving however to examine the proportionality of the national measure, the Court ruled that Greek legislation went beyond what was necessary to achieve the claimed objectives. Domestic rules excluded an entire category of public work contractors “on the basis of an irrebuttable presumption that the presence among the tenderers of a contractor who is also involved in the media sector is necessarily such as to impair competition to the detriment of other tenderers”.⁸⁹ The Court felt that the disproportionate nature of the Greek legislation was also evident in the very broad meaning of the concepts of “main shareholder” and “intermediaries”. Determined to settle for good issues of potential conflict with EU law, in 2007, the Greek state adopted an inter-ministerial decision (KYA 20977/2007), which practically rendered inapplicable the provisions concerning the delivery of “transparency” certificates by the NCRT. Law 3592/2007 did not introduce any new provisions on the issue, and the matter was closed.

⁸² N. Alivizatos, “O basikos metochos kai oi afaneis kyvernitikes epidiwkseis” [The main shareholder and the obscure objectives of the government], *Ta Nea*, 10/1/2005.

⁸³ See in detail, S. Papathanassopoulos, *H tileorasi ston 21o aiwna* [TV in the 21st century] (2005), p. 314-315.

⁸⁴ Law 3414/2005, “Amendment of Law 3310/2005, Measures to ensure transparency and prevent abuse in public procurement”, FEK A’ 279/2005.

⁸⁵ ECJ, Case C-213/07, *Michaniki AE v Ethniko Simvoulío Radiotileorasis, Ipourgós Epikratias*, available at: www.curia.eu.int.

⁸⁶ Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public contracts, OJ L 199, 9/8/1993, p. 53, as amended by European Parliament and Council Directive 97/52/EC of 13 October 1997, OJ L 328, 28/11/1997, p. 1.

⁸⁷ Council of State, judgment no. 3670/2006.

⁸⁸ On this see V. Kosta, ‘Case note: European Court of Justice, Case C-213/07, *Michaniki AE v. Ethniko Simvoulío Radiotileorasis, Ipourgós Epikratias*’, 5 *European Constitutional Law Review* (2009) 501.

⁸⁹ ECJ, C-213/07, para. 63.

3.2.2.3 Competition rules

Competition law, often justified as maximising consumer choice via better quality products or products at better prices, can make a sufficient contribution to a varied media offering by guaranteeing an undistorted media market. The Greek competition rules enjoy a specific media component. Law 3592/2007 has complemented Law 703/1977,⁹⁰ the general Greek competition act, by laying down specific provisions on the notion of dominant position and concentration of companies in the media sector. Concentration is forbidden when one or more of the media undertakings concerned enjoy a dominant position or a dominant position is the result of the concentration itself. Specific notification requirements apply and precise “dominance thresholds” are established, ranging from 25% to 35%, depending on the number of the media markets involved. The abuse of a dominant position is prohibited.

Although the aforementioned provisions illustrate a certain level of state sensitivity in the area, in light of the importance of the media for democracy and their contribution to public debate and an informed citizenry, it has been argued that the Greek state should have prohibited dominant position *per se*, not just its abuse.⁹¹ Moreover, the exclusive use of economic criteria for the establishment of a dominant position, based on advertising expenditure and sales income, is inappropriate.⁹² The assessment of whether a media enterprise enjoys a dominant position in the market or not should have also been based on criteria related to the influence it exerts on the public, usually reflected in audience shares. The endorsement of a pure economic approach in media competition assessment, coupled with the fact that concentration control follows and does not precede operators’ merging plans, is likely to undermine the ability of competition law and policy to support citizen access to a wide range of media outlets and voices.

3.2.3 Content regulation

A variety of legal provisions along with self-regulatory measures aim to regulate the content of the information supplied by the press and audiovisual media operators and ensure that they meet a level of quality, and standards of completeness and versatility.⁹³ Content requirements also define when and how much time media operators should devote to advertising.⁹⁴ The overarching goal of content requirements and the relevant regulatory measures is to cater to the right of citizens to receive information while at the same time ensuring political and cultural pluralism and demonstrating social sensitivity. The state is obliged to inform its citizens about the events of public life, and the media can criticise public figures, as long as such criticism is not in conflict with other rights and social goods. As is probably the case in other democratic countries, the right to be informed is recognised and given greater

⁹⁰ Law 703/1977, “On the control of monopolies and oligopolies, and on the protection of free competition”, FEK A’ 278/1977.

⁹¹ Charalambis, “Eleutheria tis ekfrasis”, p. 152.

⁹² Dimitropoulos, “Oi rythmistikes epembaseis”, p. 123.

⁹³ Media operators must include news broadcasting along with programmes on art and culture, sports and light entertainment, programmes of social and educational content, and programmes that promote the correct use of Greek language and their teaching to foreigners, among others. See in particular Art. 6(13) and 7(6) of Law 3592/2007.

⁹⁴ Art. 5(3) of Presidential Decree 100/2000, “Harmonisation of the Greek legislation for radio and television to the provisions of Directive 97/36 of the European Parliament and of the Council of June 30, 1997”, FEK A’ 98/2000.

weight when it concerns information that is directly relevant for the formation of the public's political opinion, i.e. when it concerns party financing, public order, management of public funds, etc.

Reflecting a broader tendency in many countries, the regulation of the press differs fundamentally from that pertaining to audiovisual media, a distinction that is constitutionally drawn. For reasons that historically rendered the press a bastion of democratic expression against state arbitrariness, content regulation in the press is defined by self-regulatory codes of conduct. Journalists have historically rejected state intervention in issues concerning the objectivity and impartiality of information, which are instead considered to be a matter of social responsibility on the part of journalists.⁹⁵ On the other hand, journalists' behaviour and programme content in the audiovisual sector is subject to state regulation and control through laws and administrative acts. The broader tendency that recognises the necessity for television to be subject to greater state-imposed constraints in comparison to the press is justified by the greater power that it arguably exerts over a "captive audience" in its daily life.⁹⁶

State regulation of the audiovisual media does not exclude self-regulatory measures such as codes of conduct. All radio and TV stations applying for permit to the NCRT must also submit a code of conduct, with which they vow to comply. Such codes of conduct must be approved by the NCRT, which may also take them into account when exercising its supervisory functions. Some codes of conduct are also adopted as regular laws, and thus hold a greater power.⁹⁷ Alternatively, their enforcement is the responsibility of internal Ethics Committees (*Epitropes Deontologias*) that national television channels must form.⁹⁸ However, such committees have been inactive and they have not imposed any sanctions, as it is noted by the NCRT in its 2009 annual report.⁹⁹

The quality of programme must exhibit social sensitivity towards sections of the audience that are considered to be particularly vulnerable to the overpowering, but also potentially detrimental influence of audiovisual media, such as minors. For instance, it is stipulated that both public (ERT) and commercial TV stations are obliged to refrain from showing programmes that can seriously injure the physical, mental or moral development of minors. Deemed equally unacceptable is the dramatised representation of news broadcasting, or the presentation of real acts of violence, that are unnecessary for informing the audience about a particular event.¹⁰⁰ In addition, television channels must refrain from showing programmes or providing information that provokes hatred on the basis of race, sex, religion or citizenship.¹⁰¹

The quality of content depends on the correct use of Greek language, which all public and private radio stations and TV channels must respect. They are obliged to

⁹⁵ Ch. Anthopoulos, "H aftorythmisi tw n meswn pliroforisis" [The self-regulation of information media], 3-4 To Syntagma (1999) 467, at p. 448-449.

⁹⁶ Anthopoulos, "H aftorythmisi", p. 454.

⁹⁷ This is the case for instance with the "Code of conduct for news broadcasting and other journalistic and political programmes", Presidential Decree 77/2003, FEK A' 75/2003.

⁹⁸ Art. 8 of Law 2863/2000.

⁹⁹ National Council for Radio and Television, 2009 activity report, at p. 24.

¹⁰⁰ For instance, it is prohibited to present minors who are witnesses, crime offenders, or victims of crime and accidents, and this can only be done as an exception and on the condition of parental consent.

¹⁰¹ Art. 4(1) of Presidential Decree 100/2000.

semi-annually organise a series of at least 15 programmes of thirty minutes each that aim to highlight the correct use of the Greek language, or teach it to foreigners and those who are illiterate.¹⁰² At the same time, public and commercial TV channels are also obliged to devote at least 51% of their total transmission time to European works, that is, works that originate in EU member states and other European countries that participate in the European convention for cross-border television of the Council of Europe.¹⁰³

Deregulation and the advent of private television and radio have no doubt expanded the openness, diversity and pluralism in the content of broadcasting in comparison to the past, including that of state television that has been forced to compete with private channels.¹⁰⁴ At the same time, the continuous disregard for the rules of operation of TV stations and for existing codes of ethics, has led the government to augment the powers of the NCRT in order to regulate and control the content of audiovisual programmes.¹⁰⁵ In the context of its reinforced mandate, the NCRT has issued numerous recommendations and decisions, as well as imposed sizeable fines to radio and TV operators that were deemed to violate the rules. However, the way in which the NCRT has performed its regulatory role as such has been heavily criticised for bordering on censorship, if not outright imposing it. It has made highly controversial and dubious value judgments, sanctioning with fines, programmes that violate certain rules, such as overly projecting homosexuality or demonstrating how the porn industry operates, for instance.

Up until now, there has been an uncertainty regarding the legal norms to regulate the content of information transmitted through the internet, including through blogs. There has also been uncertainty regarding how to strike a balance between freedom of expression and other social values such as respect for the private life, honour or personality of others. In part, the content of information transmitted through the internet (i.e. books in electronic form, e-newspapers, e-magazines, etc.) is considered to fall under the provisions for the press (Article 14(1) Const.). Insofar, as it concerns audiovisual content on the internet though, it is covered by the provisions pertaining to the media (Article 15(1) Const.).¹⁰⁶

3.2.3.1 Rules to ensure impartial and objective information

News broadcasting and other journalistic and political programmes must ensure a level of quality that is in tune with the social mission of the audiovisual media and the cultural development in the country.¹⁰⁷ Regulation of content is based on general principles, such as the right of journalists to freely convey the news in order to inform the public. Meanwhile, they have the obligation to do so in an appropriate manner. For instance, the presentation of facts must be accurate and as complete as possible, without creating confusion, exaggerated hope or panic for the audience.¹⁰⁸ The information that is conveyed must be cross-checked and must have been legally

¹⁰² At least 25% of their programme (typically more than this) must include shows that are originally in Greek. See Art. 3(18)-(19) of Law 2328/1995.

¹⁰³ Art. 10(4) of Presidential Decree 100/2000.

¹⁰⁴ Papathanassopoulos, "The politics and the effects of the deregulation", p. 361-362.

¹⁰⁵ Panagiotopoulou, "20 xronia", p. 12-13.

¹⁰⁶ Karakwstas, *Dikaio kai internet*, p. 46-47.

¹⁰⁷ See Art. 15(2) of the Constitution.

¹⁰⁸ Art. 5 of Presidential Decree 77/2003.

obtained (i.e. interception or secret cameras are prohibited). The journalist has the right not to disclose his/her source. It is prohibited to impart confidential information or pictures that can be damaging for the country's territorial integrity, defence and security. In a controversial provision that can be seen as a vestige of censorship, the law also stipulates that the country's constitution and the legal order in general must be respected when journalists criticise particular laws or institutions.¹⁰⁹

A most vocal assertion of the press' obligation to convey impartial and objective information is contained in the various codes of conduct adopted by Greek journalists.¹¹⁰ By defining information as a social good, and differentiating it from a commercial product or medium of propaganda, the Greek journalists' code of conduct considers their primary mission to be the revealing of truth. Journalists must communicate the truth with accuracy, objectivity, and without prejudice, while investigating *a priori* the facts and refraining from distorting or withholding information about actual events.¹¹¹ Journalists must also collect and cross-check the accuracy of their sources and received information with appropriate methods and always by making known their journalistic profession. Content-related obligations that self-bind journalists include: the obligation to treat equally all citizens without discrimination on the basis of ethnic origin, sex, race, religion, political conviction or social status, to respect the personality and private life of individuals and responsibly use information pertaining to their private life or public role. In addition, they must respect the presumption of innocence while an individual is facing trial in court, among others.¹¹²

Echoing the historical role of the press as a bulwark against state arbitrariness, existing codes of conduct proclaim the duty of journalists to vigorously defend the democratic polity and his/her freedom not to convey inaccurate information under pressure by his/her employer, as well as to denounce state authoritarianism and the abuses on the part of media owners. Finally, journalists acknowledge their cultural mission by undertaking the responsibility to improve the journalistic language, avoiding grammatical or syntactical mistakes, as well as vulgar language, in order to "protect" the Greek language from the intrusion of foreign terms. Consequently, they thereby contribute to the national tradition and cultural heritage.¹¹³ Most of the principles contained in the codes of conduct binding journalists in the press, are also reiterated in more condensed fashion in the code of conduct pertaining to the content of news broadcasting and political programmes in the audiovisual sector (both public and private). Reflecting the fact that journalism in the audiovisual sector is subject to stricter limitations,¹¹⁴ this last code of conduct takes the form of a regular law.¹¹⁵

¹⁰⁹ Ibid., Art. 8 and Art. 2.

¹¹⁰ See the "Rules of conduct of the journalists' profession", which have been adopted by the Association of Editors of Daily Newspapers of Athens (ESYEA) and by the Panhellenic Federation of Greek Editors (POESY). A similar set of principles is contained in abridged form in the "Statement of rules of professional conduct of the International Federation of Journalists", which has been adopted by the Greek Association of Correspondents of Foreign Press.

¹¹¹ Art. 1 of POESY Code of Conduct.

¹¹² Art. 2 of POESY Code of Conduct.

¹¹³ Art. 7 of POESY Code of Conduct.

¹¹⁴ Anthopoulos, "H aftorythmisi", p. 453.

¹¹⁵ Presidential Decree 77/2003.

3.2.3.2 Criticism of public figures and the right to redress and reply

The constitutionally protected right to express freely through the media is especially underscored when it comes to criticism of public and political figures, which is justified by the need to ensure democratic dialogue. Individuals, such as candidates for elections, members of parliament, etc., who participate in political discussions and controversies are particularly exposed to unfettered criticism. At the same time, freedom of expression is subject to a series of limitations and requirements aimed at balancing it against a variety of other rights and social goods, such as respect for human dignity, personal data, and the right to privacy. Greek legal and judicial doctrine does not *a priori* determine whether freedom of expression or protection against various kinds of insult, libel and private life intrusion by journalists, is paramount. Instead the limits of journalists' criticism are determined on a case by case basis. Some of the criteria that are considered in such assessments are the nature of insult or libel (statement of facts as opposed to an opinion or normative judgment), the motives, and the consent of the individual, whom a disparaging view or article concerns, among others.¹¹⁶

In both public and commercial television, existing laws stipulate that any kind of programme must respect the personality, honour and dignity, family life and all activities (professional, political, etc.) of any person who is depicted in it (i.e. his/her picture, name, or various information that indirectly refers to him/her).¹¹⁷ This requirement also applies to individuals who are depicted in news broadcasting or participate in political programmes. The views that they express must not be distorted, i.e. by partially reporting their answers or through the use of audiovisual techniques.¹¹⁸

At the same time, a number of legal provisions recognise the right to seek redress for those individuals whose personality, private life or professional, political or other activity are offended, or his/her reputation and business interest are injured by a television or radio programme. Such a right is also accorded to political parties and their members, as well as any professional or trade union association, when its views are silenced or distorted in a way that they create a false impression among the audience. It can be exercised within a particular timeframe of 10 days through a written text or live presentation in the same programme.¹¹⁹

3.2.3.3 Rules concerning political and cultural pluralism

The audiovisual media provides a platform for political contest during pre-election periods. Legal norms foresee the transmission (free of charge or charged with lower rates) of political party messages during the pre-election periods. Messages by candidates running for national or local elections, however, are not allowed to be communicated.¹²⁰ In the organisation of their programme as a whole, TV stations are obliged to respect and ensure political pluralism by equally enabling all political parties represented in the Greek and European parliaments to access their programme

¹¹⁶ For a detailed discussion, see I. Karakwstas, *To Dikaio ton MME [Media law]* (2005), p. 250-285.

¹¹⁷ Art. 3(1) of Law 2328/1995.

¹¹⁸ Art. 9 of Presidential Decree 77/2003.

¹¹⁹ Art. 9 of Presidential Decree 100/2000. If the TV or radio station turns down the request for redress, then it is forwarded to the NCRT, which must decide within 3 days, and its decision is binding for the radio or TV station.

¹²⁰ Art. 3(13) of Law 2328/1995, which was inserted in Art. 3(9) of Law 1866/1989.

and transmit their messages to voters.¹²¹ During pre-election periods, the presentation of political topics and the broadcasting of relevant news must be done with moderation and clarity, and in compliance with the principles of plurality, equality and respect for the democratic processes. News and other programmes that convey information about protests or violent events occurring in pre-election gatherings must refrain from the use of techniques that give misleading impression of the facts, as well as from inflammatory slogans that incite people to participate in violent and illegal acts.¹²²

This prohibition, which was introduced three years ago, served to restrict the political content of the media to publicise the results of polls fifteen days prior to election day.¹²³ Premised on the view that polls are an important component of the political dialogue as an assessment of experts about election results, legal scholars in Greece have criticised such prohibition as going against the right to freely impart information. Those advancing this view are not convinced by the argument that poll results may influence the voters' preferences in an unfair or illicit manner, at least not more so than other kind of electoral assessments that are routinely made by commentators in the media. Given that the prohibition does not apply to the conducting of polls but only to publicising their findings, it does not prevent leaks and rumours, often intentionally spread by political party campaigners in order to influence public opinion and debate.¹²⁴

News broadcasting and other journalistic and political programmes must also refrain from depicting individuals in ways that reinforce discrimination on the basis of race, sex, nationality, religion and disability, conveying messages that are xenophobic and sexist or expressing intolerant views that offend ethnic and religious minorities.¹²⁵ Similar restrictions also apply to the content of advertising that should not discriminate on the basis of race, sex, disability, religion or citizenship, or insult religious and political convictions, among others.¹²⁶

3.2.3.4 Rules concerning content regulation on the internet

Given that the legal rules regulating the press also apply to the e-versions of magazines and newspapers, any person who is offended by something published on the internet has the same rights as a person offended by content in the press.¹²⁷ A clear distinction, though, is drawn here with social networking sites: a person is not entitled to the protection of his/her honour, reputation or private life in content transmitted through the internet in such sites (such as facebook) in which s/he voluntarily discloses personal information to a wide circle of internet users. In this case, by voluntarily participating in such networking, an individual *a priori* deprives himself/herself of such protection by having made private information available to public use and display.¹²⁸

¹²¹ Art. 3(22) of Law 2328/1995.

¹²² Art. 16 of Presidential Decree 77/2003.

¹²³ Art. 7(1)(a)(b) of Law 3603/2007.

¹²⁴ For such a critique, see S. Tsakyrakis, "Antisyntagmatiki i apagorefsi" [The prohibition is unconstitutional], *Kathimerini*, 26/8/2007.

¹²⁵ Art. 4 of Presidential Decree 77/2003.

¹²⁶ Art. 5(3) of Presidential Decree 100/2000.

¹²⁷ Karakwstas, *Dikaio kai internet*, p. 56-58.

¹²⁸ *Ibid.*, p. 60.

Regarding blogs, the regulation of content in order to protect the honour, reputation, personality or private life of persons has not been fully settled in Greek legal and judicial doctrine. Such uncertainty is also evidenced in other countries. A relatively recent decision of a court of first instance in Greece drew a distinction between the electronic media (internet versions of newspapers, TV and radio broadcasting) and blogs, on the basis that the latter is an interactive medium of communication, the content of which is shaped not only by an editor or journalists but by all readers-internet users.¹²⁹ At the same time, because there is lack of legal provisions that specifically refer to blogs, the same court decision applied the provisions that pertain to the press in order to establish the responsibility of the blogger for content that was libellous or detrimental to the honour or reputation of others.¹³⁰

On the other hand, a contrasting legal and judicial approach dwells on the distinctiveness of the blog as a medium of communication rather than a channel of information for the public, which renders it incomparable with the conventional press, and thus the legal norms applying to the press cannot be enforced in the case of blogs. From this perspective, which is adopted in another recent court decision,¹³¹ the responsibility of the blogger, who is often an ordinary citizen, in cases of offence or insult, is not the same with that of a powerful media entrepreneur; therefore, it is not appropriate to extend to blogs the large sums of indemnification that are granted in cases of insult or libel in the press.¹³² From this latter perspective, some argue there is a legal gap regarding freedom of expression vis-à-vis protection of other social goods on the internet, which must be filled. Others, though, claim that such a gap could be filled by general rules for insult against one's personality, which are contained in the Civil Code.

Regardless of which approach prevails, it is generally conceded that insult of someone's personality through libellous or false information in blogs is illegal and the targeted persons are in need of protection. At the same time, each approach has different implications regarding another controversial aspect, namely whether or not bloggers are obliged to reveal their true identity instead of hiding behind anonymity or a false name. Those who view the internet and blogs as a fundamentally distinct due to its interactive nature, medium of communication are ready to defend the right to anonymity. In contrast to a consultatory response (*gnwmodotisi*) issued by the public prosecutor of Greece's Court of Cassation (*Areios Paghos*), the Hellenic Authority for Communications Security and Privacy (ADAE) has insisted that the internet and bloggers are entitled to anonymity and to the protection of personal data and privacy in communications.¹³³ According to ADAE, the confidentiality of this data can only be lifted in order to investigate particularly grave crimes or for reasons of national security.¹³⁴

¹²⁹ Court of First Instance (*Monomeles Protodeikio*) of Rhodope, No. 44/2008.

¹³⁰ P. Kalogirou, "H anonymia sta blogs" [Anonymity in blogs], *Sychnotites*, October-December 2009, p. 21-22.

¹³¹ Court of First Instance (*Polimeles Protodeikio*) of Pireus, No. 4980/2009.

¹³² For this approach, see "O nomos peri typou den efarmozetai sta blogs" [The law on press does not apply on blogs], published in the blog of a Greek lawyer V. Sotiropoulos, available at: <http://elawyer.blogspot.com/search/label/Blogo%CE%BD%CF%8C%CE%BC%CE%BF%CF%82> (last visited on 23/7/2010).

¹³³ Kalogirou, "H anonymia stab logs", p. 23.

¹³⁴ See Art. 19(1) of the Greek Constitution.

3.2.3.5 Rules concerning information gathering processes

In accordance with Article 10(3) of the Greek Constitution, public authorities are “obliged to reply to requests for information and for issuing documents, especially certificates, supporting documents and attestations within a set deadline not exceeding 60 days, as specified by law”. Article 5 of the Code of Administrative Procedure (Law 2690/1999) safeguards citizens’ right to access administrative documents, and is thus of relevance and importance to media professionals.¹³⁵ Administrative documents are defined as those produced by public sector entities, such as reports, studies, minutes, statistical data, circulars, administrative responses, opinions and decisions. Citizens with a legitimate right may also access private documents held by the public authorities. The right of access to documents cannot be exercised if the documents at hand concern the private or family life of others, or if their confidentiality is prescribed by specific legal provisions. Consideration must also be given as to whether the documents are protected under intellectual or industrial property regulations. Public bodies can refuse access if the documents concern discussions of the Ministerial Council or if access can seriously obstruct investigations of criminal or administrative violations, carried out by judicial, police or military authorities. Citizens may access the documents where they are held or obtain a copy at their own cost. Access can be denied, provided that refusal is reasoned and that it is communicated in writing within one month from the date of the submission of the request.

Law 2472/1997 on the “protection of individuals with regard to the processing of personal data” was introduced in order to incorporate Directive 95/46/EC¹³⁶ into Greek law.¹³⁷ In principle, the law prohibits the collection and processing of sensitive data, that is, data “referring to racial or ethnic origin, political opinions, religious or philosophical beliefs, membership to a trade-union, health, social welfare and sexual life, criminal charges or convictions, as well as membership to societies dealing with the aforementioned areas”.¹³⁸ However, an exemption is introduced for data pertaining to public figures, provided that such data are in connection with the holding of public office or the management of third parties’ interests, and that processing is carried out solely for journalistic purposes.¹³⁹ In such cases, data processing, as well as the establishment and operation of the relevant file, are allowed on the basis of a permit that is issued by the Data Protection Authority. The Authority may grant such permit if processing is absolutely necessary in order to ensure the right to information on matters of public interest, as well as within the framework of literary expression and on condition that the right to protection of private and family life is not violated in any way whatsoever. The permit is granted upon request and may impose terms and conditions for a more effective protection of the right to privacy. It is issued for a specific period of time and may be renewed upon request. A copy of it is registered with the Permits Register kept by the Authority.

¹³⁵ Law 2690/1999, “Code of Administrative Procedure”, FEK A’ 45/1999.

¹³⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995, p. 31.

¹³⁷ Law 2472/1997 “on the protection of individuals with regard to the processing of personal data”, FEK A’ 50/1997. The law was amended by Laws 2819/2000 and 2915/2001.

¹³⁸ *Ibid.*, Art. 2(b).

¹³⁹ *Ibid.*, Art. 7(2)(g).

4. Media policy and democratic politics: an assessment

It becomes clear from the overview provided in this report that Greek media policy is characterised by a large number of legal norms and rules that often exhibit discontinuity, contradictoriness, and haphazardness. Far from paving the way for the emergence of a coherent regulatory framework, deregulation since the 1980s has actually led to a highly unregulated environment, a phenomenon that has been termed as “savage deregulation.”¹⁴⁰ By European standards, Greek legislation for radio and TV licensing denotes a unique situation: dense regulatory rules exist, which yet remain largely inapplicable, not only because of their complexity and often contradictory character but also on account of the state’s inertia to take proper action to implement them.¹⁴¹ The epitome of such a contradictory and unenforceable legal framework that lacks overarching strategic (economic, social and other) goals is the fact that media operators in the private audiovisual sector function without valid licences (and they have done so for the past twenty years). The failure to adopt a sound legal framework for radio and TV licensing has important implications for the type and quality of broadcasting and the power relations that develop between the state and private media operators. This is because licensing procedures guarantee that broadcasting develops in line with specific content standards, in support of a variety of information reaching the public, at the same time ensuring a secure legal environment for operators to pursue their activities.

The Greek licensing adventures of analogue broadcasting testify to the Greek state’s inability, or even unwillingness, to implement a thorough media licensing policy. Following initial surprise, a first set of licensing rules were introduced, which however were prepared in a rather cursory, amateurish manner and therefore did not prevent anarchic private market entry. The second attempt to regulate the market in 1995 was similarly unsuccessful. Bad drafting of the rules enacted prevented the NCRT from proceeding with the allocations of licences. As a result, broadcasters continued to operate under a status of “semi-legality”, a situation which was maintained also after the adoption of Law 3592/2007. In a rather absurd manner, the 2007 act directed attention to the allocation of analogue licences, when what was needed were adequate procedures for the licensing of digital terrestrial broadcasting in view of the 2012 deadline. Critical moments are coming with the imminent passage to digital terrestrial broadcasting, as, similarly to its precursors, Law 3592/2007 reflects lack of strategic planning.

In order to understand the failure of successive Greek governments to grant proper and valid licences, we must focus our attention to the intensely politicised nature of the deregulation process already from its inception. Liberalisation in the late 1980s was not a result of explicit government decision on the basis of a national strategy but a political act of the centre-right opposition. The latter was evidenced in the action taken by the municipal radio stations of Thessaloniki, which the centre-right opposition controlled.¹⁴² Subsequently, deregulation was driven by the logic of antagonism among Greece’s main political parties competing for government power. For instance, in 1989, the government which was dominated by the centre-right awarded television licences only to media owners who had been critical of the

¹⁴⁰ Papathanassopoulos, “The politics and the effects of the deregulation”, p. 359.

¹⁴¹ A. Manitakis, “H anagki rythmisis tis radiotileoptikis arrythmias enopsei kai tis anathewrasis tou Syntagmatos” [The need to regulate the unregulated radio and TV sector in view of the revision of the Constitution], 3-4 *To Syntagma* (1999) 401, at p. 402.

¹⁴² Panagiotopoulou, “20 xronia”, p. 11.

previous socialist governments.¹⁴³ Similarly, in 1993-94 the socialist government did the same for channels, which had been supportive of PASOK during elections.¹⁴⁴

Political parties often adopted contradictory stances depending on whether they were in government or in opposition. While they were in opposition, they advocated soft regulation. But when they acquired government power, they tried through various mechanisms (i.e. cancellation of fines or non-payment for use of frequencies) and restrictive legal rules to pressure the media to adopt favourable attitudes towards the government.¹⁴⁵ In this intensely politicised deregulation process, and despite the fact that clear partisan lines no longer colour television broadcasting, it can still be discerned that in the attempts of political parties to direct and control the media, there is substantial continuity with the past.

In effect, it seems that Greek licensing policy for broadcasting has inadvertently followed a “laissez-faire” approach, which, however, has been a result of political favouritism. The apparent reluctance to introduce comprehensive rules for the licensing of electronic media and guarantee their enforcement could be seen as a deliberate attempt on the part of successive governments not to antagonise powerful business interests in the press and broadcasting, in anticipation that these would in turn support government policies. The result is the absence of a coherent legal framework that can effectively delimit the boundaries of political influence that the media can exert, leading, in the end, to a media environment, which has become difficult, if not impossible to regulate.

Evidently, the failure of the Greek state to licence the broadcasting sector for almost two decades has serious repercussions on the level of independence of the latter. It also creates and reinforces mutual dependencies between private media operators and the government, potentially undermining standards of objectivity and impartiality in news broadcasting. Given the legal ambiguity through which Greek broadcasters operate, one may not rule out the possibility of a certain degree of media self-censorship. Reactionary and averse responses to state action and policies may be sidelined or silenced, so as to refrain from upsetting (or upsetting too much) state bodies and organs that enjoy the capacity to roll back the legal status that has been “temporarily” conceded. On the other hand, media owners and broadcasting directors can exercise unfair and informal pressure upon government officials, which restrictive legal rules have purportedly sought to curb, while also feeling free to operate without following the rules. The interdependencies between government and the media, not only in public service but also in private sector broadcasting, are difficult to tackle considering the weakness of an independent civil society active in the media, which could serve as a vehicle of mobilisation and political pressure. They also augment the impression among the public that the political system fails to ensure transparency and accountability, and to guarantee equality for all citizens in their ability to influence the democratic process.

The most distinctive and controversial aspect of Greek media policy pertaining to the ownership structures in the media has no doubt been the restrictive rules known as the “main shareholder” (*vasikos metochos*). The concentration of media ownership in the hands of few conglomerates is a frequent phenomenon encountered in many European countries. In the Greek context, though, it has received particular attention

¹⁴³ Papathanassopoulos, “Broadcasting, politics and the state”, p. 394.

¹⁴⁴ Papathanassopoulos, “The politics and the effects of the deregulation”, p. 358.

¹⁴⁵ Panagiotopoulou, “20 xronia”, p. 18-19.

insofar as it concerns media owners and shareholders who have entered the field since its deregulation, and who simultaneously own or manage enterprises that bid for and engage in public sector contracts. They may be involved in sectors such as construction and telecommunications or in sectors where the state is a significant customer (energy, shipping etc.). This distinctive concern with media investors who are involved in such sectors must be understood in reference to a national context like the Greek one, in which the state has historically been a major economic actor, and has traditionally awarded large public work contracts on preferential basis to businesses with political connections.¹⁴⁶ Since the late 1980s, the entry of entrepreneurs into the media tremendously expanded the ability of business interests to influence and shape public opinion and attitudes vis-a-vis the political class.

The deregulation of radio and television in the late 1980s was a watershed for established relations between the political elites and the economic interests that had established themselves until then. While until then the media had served as a terrain for competing political parties and interests vying for influence, deregulation greatly empowered the media and the business interests vested in it. It shifted the main axis of juxtaposition to one between the political elites on the one hand, and the business interests on the other. While the state and the political class had a reigning position over the media prior to deregulation, the balance of power following the latter shifted with the emergence and gradual expansion of business interests with considerable investment activity, in media outlets. This alarmed politicians. Concerns that public work contractors connected with media undertakings and persons owning or managing them could use the influence afforded by their position to enter into contracts with the state became widespread.

In response to such concerns, restrictions applicable to the conclusion of public work contracts with persons and undertakings that were active or had interests in media enterprises, were first established by Law 2328/1995;¹⁴⁷ however, they proved to be largely unenforceable.¹⁴⁸ As a rare instance of cross-party consensus in the highly politicised sphere of the media, the two main parties subsequently reinforced such restrictions and incorporated them in an unusually detailed set of provisions in the Greek Constitution when it was amended in 2001.¹⁴⁹ The drafting of constitutional rules was driven by prevalent distrust towards ordinary legislation.¹⁵⁰ For the political forces of the period, an adequately revised constitutional text would place the legislator under significant strain, indicating the regulatory course to take. Notably, transparency in media ownership and public contract award procedures was

¹⁴⁶ D. Charalambis, “To telos tou ‘basikou’ metochou” [The end of the “main shareholder”], *To Bima*, 21/10/2007.

¹⁴⁷ By adopting this law, the government at the time had arguably sought to circumvent the pressures that media owners exercised upon it regarding large public contracts that were awarded within the second and third Community Support Frameworks (CSFs) established by the EU to assist the less developed economies of the south. See Panagiotopoulou, “20 xronia”, p. 14.

¹⁴⁸ In case of non compliance, Law 2328/1995 did not render the signed public contracts void. It only made provision for the withdrawal of the broadcasting licence. Since no proper licensing procedure had taken place, enforcement was not possible. Moreover, obligations imposed on the undertakings entering into public work contracts to have registered shares (i.e. shares mentioning the name of their owner) could not be enforced with regard to companies established in the EU Member States.

¹⁴⁹ The relevant amendment was voted by 265 out of the 280 Members of Parliament who were present. See Venizelos, “Oi eggyiseis tis polifwnias kai diafaneias”, p. 430.

¹⁵⁰ Kiki, *H eleutheria twv optikoakoustikwm meswn*, p. 209, Venizelos, “Oi eggyiseis tis polifwnias kai diafaneias”, p. 428, N. Alivizatos, “Syntagma kai ‘diaploki’” [The Constitution and the interweaving of interests], *1 DIMME* (2004) 16, at p. 19.

also used as a pretext to improve the popularity of the political parties of the time. Political actors competed over who would condemn more fervently the use of the media to influence state conduct.¹⁵¹ The media was criticised for being a platform nourishing corruption and preventing true pluralism and transparency, and action to remedy the situation was presented as protecting democracy.

The restrictions of the “main shareholder” placed upon media owners who were involved in public work contracts introduced much stricter limits than those previously defined by general laws that protect fair competition, and they were extensively criticised on a variety of grounds. First of all, they clearly went against the freedom of economic activity, and were incompatible with EU common market law. Additionally, a question was raised regarding the extent to which the purported illicit interweaving of political and media interests (*diaploki*), which they sought to curb, was in fact a widespread phenomenon and of a kind that had to be redressed in such a draconian manner.¹⁵² In any case, legal and communication scholars amply exposed the misguided assumptions regarding the nature of economic relations among family members and relatives, which underpinned the restrictions placed upon of media owners, but also the ineffectiveness of these restrictions to actually curb unfair and illicit influence.¹⁵³ In the end, the existence of strict rules that were not enforced and did little to prevent cross ownership of media outlets and enterprises engaged in public sector contracts, only reinforced perceptions of unrestrained and unaccountable media interests, both among political elites, and also among the public.¹⁵⁴

The spectre of an increasingly empowered media vis-à-vis the political world has alarmed elites across parties and appears to have significantly driven the various legal and policy norms adopted by successive governments. The weakness of political institutions permeated by particularistic interests and their fledgling legitimacy regarding the ability to represent citizens in a satisfactory and just manner has further bolstered the impression of an all-powerful and influential media with television having prime of place in this regard. Such an impression is shared by a large section of the Greek population, which believes that the national news media play a crucial role in political developments, and which at the same time appears deeply distrustful towards the media.¹⁵⁵ Recent Eurobarometer data shows that the Greek public has low levels of trust in the audiovisual and internet-based media.¹⁵⁶ Nonetheless, television

¹⁵¹ Kiki, *H eleutheria tw n optikoakoustikwn meswn*, p. 170.

¹⁵² Tzemos, “O ‘basikos metochos’”, p. 538.

¹⁵³ Alivizatos, “Syntagma kai ‘diaploki’”, D. Charalambis, “Skepseis sxetika me ta zitimata tis diafaneias, tis ‘asimbibastes idiotites’ kai ton ‘basiko metochos’ [Thoughts about the issues of transparency, ‘the incompatible capacities’ and the ‘main shareholder’], 1 DIMEE 2004.

¹⁵⁴ For such perceptions among political elites, see the speech by N. Konstantopoulos (former president of the Coalition for the Left and the Progress, Synaspismos), “O rol os tw n meswn enimerwsi s stin anaptiksi tis dimokratias” [The role of information media in the development of democracy] and Y. Papakonstantinou (formerly press spokesperson for PASOK and currently Minister of Economics), “H sxesi tw n paradosiakwn kai tw n sygxronwn meswn me tin politiki” [The relationship of the traditional and new media with politics], in *Oi ekselikseis ston chwro tw n meswn epikoinwnias*.

¹⁵⁵ See, “Oi polites amfivsitoun entona tin aksiopistia tw n MME” [Citizens question strongly the reliability of the media], *Ta Nea*, 1/3/2010.

¹⁵⁶ The TV is the least trusted news source (not trusted by 72% of the population, the highest rate in the EU), followed by the press (65%) and the radio (52%). Data also reveal low levels of trust in internet media too (64%), yet no distinction is made between news websites and blogs. See European Commission, Directorate General Communication, Eurobarometer 69, National Report, “Greece”, available at http://ec.europa.eu/public_opinion/archives/eb/eb69/eb69_el_exe.pdf (last accessed on 23/7/2010).

remains the most preferred source of information. More specifically, this preference is found in 70% of the population aged over 15, while almost half the respondents (54%) reported watching television news on a daily or almost daily basis.¹⁵⁷

The widespread perception that the media (and television in particular) has emerged as a centre of power that is unaccountable does little to instil public confidence in the country's democracy. More recently, the development of the internet as a medium, not only of information, but most importantly of interactive communication among users-readers, appears to hold the promise of democratising the media and its relations with the political system. The increasing use of the internet by Greek political parties and the government to communicate their positions on various issues and to directly reach citizens, can arguably bypass the ability of media operators and publishers to shape the flow of information and influence the political agenda.¹⁵⁸ At the same time, online platforms increasingly create alternative information and communication channels with citizens engaging directly in content production and distribution, enhancing opportunities for political participation and democratic debate.

Arguably, digitalisation and the changes brought by new technologies offer an optimum occasion for a re-appraisal of long-standing media policy-making practices in Greece. In a period of profound reflection about the new environment in which the media operate, but also widespread concern about the effects of economic recession on the operation of the media, especially the press, there clearly appears to be a need to return to the real focus of media policy and regulation, that is, the key role played by the media in a democratic society. Considerations about the democratic functions the media should perform and the contribution they should make to democratic discourse must take a prominent position in government thinking and similarly guide the agenda of all those wanting to influence media policy, including journalists and the media themselves.

¹⁵⁷ Public Issue, "Ethniki ereuna gia ta mesa mazikis enimerwsis stin Ellada - 2007" [National research on mass information media in Greece - 2007], available at: <http://www.publicissue.gr/128/iom-media-2007/#4> (last visited on 23/07/2010).

¹⁵⁸ See Papakonstantinou, "H sxesi tw'n paradosiakwn kai tw'n sygxronwn meswn me tin politiki", p. 102-108. In the same volume, see also P. Mandravelis, "Ta monastiria, h typografia kai to diadiktio" [Monasteries, printing and the internet], p. 76-80.

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The case of Italy

Federica Casarosa

1. Introduction

There has been a clear link between media organisation and regulation and the Italian political system since the Fascist period when, for the first time, the importance of media as a means to steer civic opinion was acknowledged and developed. The regulation of that period is an example of preventive control over the activity of any publisher, journalist or (radio) broadcaster able to verify *ex ante* the symmetry between the dominant party views and the information actually diffused to the public.¹

After the fall of the Fascist government and the subsequent end of World War II, the new government started a period of “normalising” the media system, amending and reforming the previous legislation in order to comply with the newly adopted Constitution,² which included the freedom of the press as one of its fundamental pillars.³ Thus, the period between the end of World War II and the 1970s was mostly characterised by the birth, or rebirth, of the press system, with the possibility for the newspapers closed or strongly limited by the Fascist dictatorship to regain their role and importance in the market. The economic boom that characterised the aftermath of the War also comprised the initiation and diffusion of the television service that came into being in 1954.

Only in the 1970s did the press market show signs of financial difficulties, while the same period is thought of as the start of commercial television, since the first private broadcasters emerged in the broadcasting market. The critical situation of the press system then opened the floor to a process that continued during the following decades: the increasing interest of powerful corporate groups in seizing and controlling the major newspapers and magazines, which was only slightly limited by legislative intervention.⁴ Nevertheless, the government’s concerns over the press crisis found positive results with the enactment of a financial subsidisation of the press that is still in operation now. If at that time such a decision was welcomed as a solution for the safeguard of the principle of pluralism since small and niche publications were saved from complete closure, the stabilisation of such governmental contributions to the press had strongly affected the system, reducing its capabilities to react to endogenous and exogenous factors, such as the increased internal competition through free press and, more importantly, the development of new technologies.

Regarding the broadcasting system, the Italian situation can be seen as a continuous struggle to limit the politicisation of the national broadcasters, in particular the public service broadcaster which has always been strictly controlled by the government and political parties. Indeed, the public service broadcaster

¹ P. Caretti, *Diritto dell’informazione e della comunicazione – Stampa, radiotelevisione, telecomunicazioni, teatro e cinema*, [Information and communication law – Press, broadcasting, telecommunication, theatre and cinema] (2009), at p. 38; E. Barendt, *Broadcasting Law – A comparative study*, (1993), at p. 24.

² See Law 47/1948 that addressed many of the crucial issues of press regulation, from the liability of publishers and editors of newspapers to the abolition of the obligation to register for any publication, to the definition of the offences concerning the press.

³ See below at par. 3.2.1. for the analysis of article 21 of the Italian Constitution.

⁴ See Law 416/1981.

Radiotelevisione Italiana (RAI) has never been truly independent from the major political parties, though on a few occasions legislation was enacted by the Parliament with the objective of ensuring RAI's independence from the executive branch. However, neither these legislative interventions nor the repeated reference to this point in several judgements of the Constitutional Court were sufficient to achieve a complete separation between the public service broadcaster governance bodies and the executive power. This ended into the "parcelling" of the available channels to the major political parties, the so-called *lottizzazione*, which characterised public service broadcasting for the subsequent decades.

When commercial television began in the 1970s, thanks again to the intervention of the Constitutional Court, the media framework changed. Deregulation allowed private stations to broadcast at the local level. However, the newly-emerged market actors coordinated their activities by transmitting the same programmes nationwide, providing in practice a national broadcasting chain. This situation was not dealt with by the then government, paving the way for the rise of a corporate group which in the mid-1980s started to be seen as the major competitor of the public broadcaster, namely the Mediaset group. In fact, in 1984, because of financial difficulties, two of the national private channels (owned by two different press publishers) were bought by the Mediaset group, adding them to the successful commercial channel already owned, yet also present on the broadcasting network.

The duopoly of Mediaset and RAI channels was then legalised by legislative intervention, showing the not-concealed alliance between politics and media. In particular, the law enacted in 1990 was clearly adapting both content and, more importantly, anti-trust regulation to the existing situation allowing both RAI and Mediaset to keep their channels and frequencies. This situation obviously limited opportunities for access and development of further competitors, thus limiting pluralism in the sources of information of citizens.⁵ This situation did not improve due to the results of the 1994 elections, when the media tycoon Silvio Berlusconi, owner of the Mediaset group, won the elections becoming Prime Minister.

The subsequent fall of the executive with the following elections, won by the left wing party, provided a small opening for a more pluralistic regime. In particular, in 1997 Law 249/1997 required the partial privatisation of RAI, the restructuring of the third channel of RAI into an advertising-free station and the dissolution of one of the private channels of the Mediaset group. However, none of the previous choices were put into practice, due to the resistance of the opposition party and parts of the coalition government. The fall of the left-wing executive, paved the way for a new victory for Berlusconi's coalition in 2001. Again the position of Prime Minister Silvio Berlusconi raised continuous debate during any legislative intervention regarding the media sector. The most important intervention during this legislature was Law 112/2004 that attempted to stop the application of the aforementioned provisions of the 1997 law and the subsequent intervention of the Constitutional Court, saving in particular the interests of the Mediaset group and the existence of one of its broadcasting channels. The law also envisioned the possibility of a privatisation of the state-owned television, but this has not yet been carried out in practice. The promotion of digital terrestrial broadcasting was seen then as a solution to the "Italian anomaly", being capable of opening up the market to new competitors and increasing

⁵ See G. Mazzoleni and G. Vigevani, "Italy", in Open Society Institute (ed.), *Television across Europe: regulation, policy and independence* (2005) 865, at p. 876.

the level of pluralism as the number of available networks would be increased. However, the two major players have already seized a large quantity of frequencies, thereby perpetuating their dominance.⁶

An important element of the Italian framework, in light of this short historical analysis of the political and legislative framework, regards the role of the judiciary, and in particular the Constitutional Court, in steering and correcting the media regulation. The Constitutional Court did not only sanction with a declaration of unconstitutionality conduct which does not comply with the Constitution, but it has also developed a comprehensive jurisprudence in the broadcasting field, identifying the fundamental principles governing the media that could be used as guidelines for legislative action. Unfortunately, the reaction of the Parliament to the – not-so-subtle – requests has been almost non-existent, due to internal struggles in the major political parties and the fear of addressing sensitive issues that could result in reduced support in the elections.

New media (such as digital television, broadband connection, Internet and satellite broadcasting) in the meantime has been diffusing all over the country, pushing for a change in the habits of the Italian audience. New technologies and the global media market may succeed in establishing the conditions for a free market that lawmakers have failed to create. However the approach that has been taken by the government for this new framework is to leave regulation almost completely to the logic of the market, which does not provide any guarantee of protecting and enhancing the level of democracy in this sector.

The following paragraphs will analyse more deeply the current media system in Italy providing a general overview of each market sector, namely press, broadcasting, radio and new media (par. 2), before introducing the legislative framework for the media (par. 3). Finally, this contribution will identify the most critical issues that characterise the Italian media policy, providing possible hints for future trends in the country (par. 4).

2. The media landscape in Italy

The press sector is one of the most important business sectors in Italy, though current trends show that the crisis has heavily affected this sector requiring the adoption of new strategies at the publishing level. The total number of publishers registered at the national registry for communication providers⁷ is 848, including electronic press publishers (6.3%), paper press publishers (53.9%) and press publishers that use both mediums (39.8%).⁸ The registration – though obligatory for the communication

⁶ See below in par. 2.

⁷ The *Registro degli operatori di comunicazione* [Communication providers registry] (ROC) introduced by article 1 of Law 249/1997 (which substituted the previous *Registro degli editori*) for press publishers, extended to all communication providers including press agencies, advertising agents, and broadcasters. It is an obligation for any communication service and/or content provider to register with the ROC in order to distribute their content and/or services in Italian communication networks. See G. Corasaniti, “Il registro degli operatori della comunicazione tra problematiche definitorie e deleghe ai comitati regionali per le comunicazioni” [The communication providers registry between definition problems and delegation to the regional communication committees], 25 *Dir. Informazione e Informatica* (2009) 221.

⁸ AGCOM, “Annual Report 2010”, available at: <http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=19> (last visited on 19/10/2010).

content and/or service providers – does not imply that all the registered members are currently active on the market.

The estimated number of newspapers in Italy is 200, also including the free press. The total is relatively high but it can be explained according to two factors: the geographical area of distribution (newspapers available at the national level are fewer in number, while the regional, inter-regional and provincial press count for more in total; however, looking at the number of copies sold the proportion is the opposite); and specific content (such as economic, sports and political, as many of them are still related to political parties).⁹ The most recent data reflects an overall negative situation either in terms of reduced revenues for all segments of press publishing, evaluated at 14% less than 2008 and almost 20% less than 2006. The only case in which the trend for the last year seems merely anti-cyclical is the electronic press, which in the long run provides the best situation, though its importance in value is still limited (see table 1).

Table 1: Total revenues for press sector (ml. of Euro)

	2006	2007	2008	2009	Var. % 08/09	Var. % 06/09
Newspapers	2651	2627	2449	2135	-12.8	-16.7
Periodicals	2162	2138	2020	1577	-21.9	-27.1
Electronic press	119	162	204	197	-3.3	65
Other revenues	833	813	765	774	1.2	-8.1
Total	5765	5740	5437	4684	-13.9	-18.9

Source: AGCOM (2010) and (2007)

The reduction in total revenues flows from two sets of reasons: on the one hand, the economic crisis has negatively affected the purchasing habits of consumers and the investment strategies of enterprises; on the other hand, the diffusion of new media has developed a new approach to the sources of information. Concerning the former, it should be emphasised that the reduced sale of copies affected not only the traditional press but also the free press, which showed the larger decrease (-23.7%), with a concurrent general reduction in advertising expenditures of almost 1/5 as compared to the previous year. Concerning the latter, instead, the data about the average number of Internet users accessing the electronic version of the newspapers show the increasing importance of such source of information, moving from 3.4 millions in 2008 to 3.8 in 2009.¹⁰

⁹ ACGM, *Indagine conoscitiva riguardante il settore dell'editoria quotidiana, periodica e multimediale [Study on the daily, periodical and multimedia publication sectors]* (2006), available at: www.agcm.it (last visited on 19/10/2010).

¹⁰ AGCOM, “Annual report 2010”, p. 102 and AGCOM, “Annual Report 2009”, available at: <http://www.agcom.it/Default.aspx?message=viewrelazioneannuale&idRelazione=17> (last visited on 19/10/2010).

It is worth noting, that in the press sector most newspapers are owned and controlled by a few financial trusts, namely RCS Mediagroup, Gruppo Editoriale L'Espresso, Gruppo Mondadori, IlSole24 and Gruppo Caltagirone. The first three of these comprise almost 60% of the press sector.¹¹

Since the end of World War II, the Italian government has subsidised the press sector with direct and indirect contribution to its activity. The justification has always been found in the need to eliminate any economics-based obstacle to pluralism, safeguarding the existence and development of smaller publishing enterprises and cultural initiatives. The recent legislation on the point, namely Law 230/1990, however, has been criticised since the criteria to access indirect contribution were not deemed effective in terms of protection of pluralism; on the contrary they would only fund surreptitiously a specific type of companies (in the legal form of cooperatives) and political parties.¹²

Due to the stratification of different regulation on media subsidisation, the current legal framework is under review in order to provide a reorganisation which could achieve a higher level of effectiveness in the light of the overall objective of promoting the so-called "external pluralism".¹³

The online distribution of printed content is growing and the online versions of newspapers are in the highest positions of rankings of the most visited websites.¹⁴ However, their style and format are not yet satisfactory in view of the available interactivity potentiality of online distribution, as they are still more focused on textual articles with limited role given to multimedia and to user-generated content.¹⁵

Current strategies of publishing groups attempt to increase revenues in the electronic market, building on the reputation of the offline publications, though at the moment the by-line sales are still insufficient to justify different business strategies. The current debate focuses on the challenge for publishers of newspapers to find ways to charge for content without alienating readers, identifying information products on which to levy additional fees for consumption. Tailored commercial services, such as those available in mobile communication, are currently deemed one possible solution.

The Italian television sector is currently undergoing a wide transformation which is due, partly, to the recently-enacted legislative reform¹⁶ and, partly, to the current shift from analogue to digital television.¹⁷ In contrast to other media sectors, television has been more resistant to the effects of the economic crisis, as is shown by the lesser reduction in advertising revenues and by the increase in additional pay-per-view services. Although analogue television is still the main player on the market, the increasing importance of satellite broadcasting and new communication providers of

¹¹ AGCOM, "Annual report 2010", p. 94.

¹² See Caretti, *Diritto dell'informazione e della comunicazione*, p. 76.

¹³ For the definition of external pluralism, see Constitutional Court, decision n. 474/1984.

¹⁴ AGCOM, "Annual report 2010", p. 92.

¹⁵ R. Bertero, *Il quotidiano online in Italia: Stato dell'arte e possibili evoluzioni* [*The online newspapers in Italy: State of the art and possible developments*] (2009), available at: http://www.lsd.it/wp-content/Lsdi-tesi_roberta_bertero.pdf (last visited on 19/10/2010).

¹⁶ See the *Testo Unico dei servizi media audiovisivi e radiofonici* [*Code of audiovisual and radio services*] (TUSMAR), legislative decree 177/2005, with the recent amendments introduced by the legislative decree 44/2010, which implemented the AVMS directive in Italy.

¹⁷ The total shift towards digital television is scheduled for 2012, and currently it seems that, after a long 'experimentation' period, the process will be completed on time.

pay-TV implies that the current position is but a moment in an ongoing process whose outcome is not yet definable.

As mentioned, the available data concerning the television sector provides a positive picture of the sector, which registered an increase in overall revenues of 1.7%. Looking at each source, the decreasing trend that affected the advertising revenues is clear, though it is still the most important source of funding for the television sector; a greater more role has been gained by the pay-TV component, comprising 1/3 of the overall revenues (see table 2).

Table 2: Total revenues for television sector (ml. of Euro)

	2006	2007	2008	2009	Var. % 08/09	Var. % 06/09
Fee	1491	1567	1603	1630	1.7	9,3
Pay-tv	2145	2322	2677	2875	7.4	34
Advertising	3825	3933	3906	3541	-9.3	-7,5
Other sources	156	245	267	548	104.9	251
Total	7617	8067	8453	8594	1.7	12

Source: AGCOM (2008) and (2010)

Italy, like the other EU countries, has a mixed broadcasting system that provides for a public television provider, RAI, and a set of private broadcasters born during the unplanned period of deregulation in the 1970s. Among the latter, the most important is RTI-Mediaset, whose economic strength has become so large that the current situation in analogue broadcasting can be qualified as a duopoly, whose legitimacy is also questioned by the fact that the owner of the RTI-Mediaset group, the tycoon Silvio Berlusconi, currently occupies the position of Prime Minister.

This perception changes if digital and pay-TV broadcasters are also taken into the picture. As a matter of fact, the main competitors are then three as they also include Sky TV, which is a pay-TV on satellite communication network. Altogether, these three competitors comprise more than 90% of the television market.¹⁸

RAI represents the public pole of broadcasting. RAI controls three analogue television channels, thirteen digital channels, and seven satellite channels. It also provides three radio channels which almost replicate the audience targets of the analogue television ones. The broadcasting service is assigned to RAI by means of a renewable national contract lasting three years between the company and the Department of Communication, according to the guidelines adopted by the Department and the Italian Communication Authority.¹⁹

¹⁸ See that each of them has a different business strategy, which is based on the annual household license fee for RAI, while on pay-per-view services for Sky Italia and on advertising investments for RTI-Mediaset. See AGCOM, “Annual report 2010”, p. 76 ff.

¹⁹ See below par. 3.1.

Concerning its legal form, RAI is a joint-stock company,²⁰ whose internal governance has been reformed by the recent legislative decree 177/2005, the *Testo Unico sui servizi media audiovisivi e radiofonici* (TUSMAR), which attempted to overcome the strong connection between the board of directors and the political parties, which resulted in a polarised broadcasting system.²¹ The RAI board of directors is now elected by the assembly of the shareholders, giving the representative of the government (the Ministry of Economics and Finance) the possibility to present a set of candidates proportional to number of shares. Moreover, to improve the independence and autonomy of the directors, their mandate now lasts only three years with the possibility of only one renewal. The difficulties encountered in the recent election of the board of directors, however, show that it will be difficult to fully dispel the domination of major political parties over the governing body of RAI.

The shift towards digital television is an ongoing process that has as its objective the full transfer to digital throughout the country by 2012. Currently there are already 40 national free channels and over 30 pay-per-view channels that transmit digitally. Since the initial development of this new broadcasting technique, the Italian legislator was keen to endorse it in order to improve the level of pluralism in the sector, overcoming the scarcity of frequencies that characterised analogue transmission.²² However, this optimistic interpretation was not shared by the Constitutional Court, which understood the improvement of pluralism only as an “uncertain event”, and required instead a set of specific monitoring interventions by the State.²³

Moreover, the technical development of digital broadcasting opened a debate concerning the general public service function of the broadcasting sector. In particular, it was proposed that, given the increase in the volume of the content being offered and in the potential number of content providers providing it, the model to be adopted should have been a universal broadcasting service.²⁴ In this approach the general obligations of the public service broadcaster should have been applicable to all broadcasting providers. However, such an interpretation was contradicted by a judgement of the Constitutional Court which affirmed that the move from a public monopoly did not eliminate the need and constitutional rationale for a public broadcasting service which still has its purpose of enhancing the participation of citizens in the cultural and social development of the country.²⁵

Most broadcasting channels, public or private, have also provided an electronic version of their programmes online, which comprises both free and pay-per-view services. However, the quality of these experiences for the final user is still unsatisfactory. A recent survey focused on the online website of the public service

²⁰ See article 49 of the TUSMAR.

²¹ See that the previous system achieved the so called “*lottizzazione*” of the three broadcasting channels to the governing coalition (RAI 1), right wing parties (RAI 2), and left wing parties (RAI 3). See on this point, P. Mancini, *Elogio della lottizzazione - La via italiana al pluralismo [Praise for lottizzazione - the Italian way for pluralism]* (2009).

²² The law that opened the doors to experimentation of digital broadcasting dates back to 2001, namely Law 66/2001. See A. D'Arma, “Shaping tomorrow's television: Policies on digital television in Italy 1996-2006”, in M. Ardizzoni and C. Ferrari (eds), *Beyond monopoly - Globalization and Contemporary Italian media* (2010) 3, where the author emphasises the underlying economic rationales that caused the Italian government to endorse so quickly and efficiently the new broadcasting system.

²³ See Constitutional Court, decision n. 446/2002.

²⁴ Caretti, *Diritto dell'informazione e della comunicazione*, p. 166

²⁵ See Constitutional Court, decision n. 284/2002.

broadcaster, on the one hand, emphasised the improvements of the interactive character of this offering, while on the other it pointed out the difficulties in providing a user-friendly website, which was perceived as difficult to navigate and always requiring additional external tools, such as search engines.²⁶

The radio sector mainly follows the distinction between public service broadcaster, the three RAI channels, and private networks which are individual radios or part of more general media groups. The negative trend in the average number of radio listeners and access to the market of competitors available on different devices (e.g. personal computers and mobile phones) imposes a redefinition of radio networks strategies.²⁷ In practice, the major publishing groups have increased the development of multimedia activities as synergistic and complementary to the traditional radio service. In particular, web streaming and podcasting seem to be the major solutions attracting online listeners. In addition, mobile services are changing and widening their offerings in terms of content but also providing interactive services to final users, based on the convergence of mediums.

Internet diffusion has reached almost half on Italian population.²⁸ The wider availability of this new source of information both at home and in offices has changed the use of traditional ways of communication. A recent study of the national population showed that an increased percentage of people use the Internet not only passively (to search for information on education, purchase of goods, etc.), but also to participate in the so-called Web 2.0. The majority of people still have a low level of involvement, such as reading blogs and participating in chats, newsgroups, and discussion forums online, but the interest in user-generated content is beginning to take off also in Italy (see table 3).²⁹

Table 3: Internet communication activities (%)

Phone calls	15,9
Video calls	15,9
Chat, blogs, newsgroups and discussion forums	22,3
Instant messaging	21,3
Read blogs	28,5
Write or manage own blogs	7,8
Total	100

Source: ISTAT (2009)

News agencies in Italy provide the majority information content to the media. After the experience during the Fascist period of a state-owned (and consequently controlled by government interests) news agency, the *Agenzia Stefani*, the following

²⁶ AGCOM, “Annual report 2010”, p. 202.

²⁷ AGCOM, “Annual report 2009”, p. 83.

²⁸ ISTAT, Indagine multiscopo sulle famiglie “Aspetti della vita quotidiana”, [Multiobjective analysisi on Italian families 'Dayly life elements'] (2009), available at: http://www.istat.it/dati/catalogo/20090312_00/ (last visited on 19/10/2010).

²⁹ Ibid.,

agencies have always been free from government influence in the governance structure. In particular, the oldest news agency *Ansa* is a cooperative company composed only of newspapers publishers. Many others are instead privately-owned companies, such as *Italia*, *Adnkronos*, *Asca*, *Il Sole 24 ore Radiocor*,³⁰ which provide not only coverage of national news but also foreign news, in some cases with offices abroad (e.g. *Ansa*), or through connections with foreign news agencies.

News agencies in Italy have improved their role and importance in the emerging ITC-based framework for media, as they have started to provide directly, without the intermediation of any other media provider, additional services to online users as well, such as short video news available on the website, teletext service and an SMS service for mobile phones. In this sense, it is no longer possible to characterise news agencies as mere sources of information for media operators, which have limited connection with the final recipients of such information; rather they have become competitors of other media operators for information provision.³¹

The journalist profession in Italy is regulated by Law 69/1963 which defines journalistic activity as a professional intellectual activity, regulated specially under labour law, and imposes the obligation to enrol in the *Ordine dei Giornalisti*, ODG (journalists register) on any person that engages in such activity, including semi-professionally. The ODG distinguishes between two types of categories: professional (who continually and exclusively work as journalists) and freelance journalists who can work in any communication network. The former category has just under 28 thousands members, while the latter has over 64 thousands.³² In order to become a professional journalist, a period of practice of at least eighteen months is required after which the applicant must pass a professional qualification test.

The law mentioned above provides for the self-regulation of the category of journalists (the ODG), which can elect their own representatives in internal governance bodies and eventually impose sanctions where there is non-compliance with rules.³³

In the last ten years the consumption of all types of media increased, at different rates (from 2% of TV to 26.9% of Internet), reaching a higher percentage of the total population (almost 100% in the case of TV diffusion, but not yet 50% in the

³⁰ Note that many of them were linked to specific political orientations at their birth, such as the *Asca* to the *Democrazia Cristiana* political party, or *Italia* to the social democrats. However, all of them have tried to comply with a pluralistic view of information. See S. Lepri, "Storia e funzioni delle agenzie di informazione" [History and function of the press agencies], in V. Roidi (ed.), *Studiare da giornalista. Il sistema dell'informazione [Studying to become a journalist. The information system]*, vol. 1, (2003) 172.

³¹ Note that the provision of complete articles or video reports immediately publishable by the media provider has become more and more widespread, without any further intervention. See A. Meucci, "Agenzie di stampa e quotidiani – Una notizia dall'ansa ai giornali" [News agencies and daily news – News from *ansa* to newspapers], Università di Siena, Dipartimento di Scienze Storiche, Giuridiche, Politiche e Sociali, WP n. 42, 2001.

³² Ordine Dei Giornalisti, "Annuario Giornalisti 2010" [Journalist yearbook 2010], available at: <http://www.annuariogiornalistiitaliani.it/home.asp> (last visited on 19/10/2010).

³³ The role of the ODG has also been questioned in front of the Constitutional Court, which did not define it as an institution that limits the freedom of the press because it regulates only the ways in which professional activity should be carried out, it does not impose any limit on the freedom of expression of those who do not wish to become journalists. See Constitutional Court, decision n. 11/1968.

case of Internet diffusion).³⁴ However, the overall trend showed a multiplication of media and expansion in their use without a general reduction of one type in favour of the others (see table 4).

In more recent years, the data available shows a move from paid to free media services, in particular mobile phone diffusion increased in the basic use but it decreased in the more expensive Internet services; the same situation can be seen for the newspapers where the amount of regular weekly and daily readers has decreased considerably. Yet, online newspapers have also experienced a relatively smaller increase in their consumption. However in this case the rationale is not an economic one; instead it related to a different approach to online surfing, and it should take into account the increase in alternative sources of information such as blogs, social media, etc.

Table 4: Media consumption in Italy (percentage of people that have used the media with a frequency of almost once a week during the year)

	2001	2009	Var. % 01/09
Television	95.8	97.8	2
Mobile phone	72.8	85	12.2
Radio	68.8	81.2	12.4
Newspapers	60.6	64.2	3.6
Books	54	56.5	2.5
Internet	20.1	47	26.9

Source: Censis (2009)

According to the European Commission report,³⁵ Italy has a level of media literacy slightly under the average. Although Italy has a good availability of media and media literacy context, the individual competencies do not achieve a high result, both in use and communication abilities. This is due also to the fact that the current focus of the Ministry of Education objectives towards improvements of ICT skills for students does not have a wider mass media perspective, which could strengthen the interest in and interconnections between traditional education and new technologies.

3. Media policy in Italy

The regulation of the Italian media includes a number of regulatory interventions that have been developed since the end of the Second World War. The different interventions, however, did not result in a comprehensive regulatory framework that

³⁴ See Censis/UCSI, *I media tra crisi e metamorfosi – Ottavo rapporto sulla comunicazione [The media between crisis and metamorphosis – Eighth Report on Communication]* (2009), available at: http://www.governo.it/GovernoInforma/Dossier/rapporto_censis_2009/SintesiOttavoComu.pdf (last visited on 19/10/2010).

³⁵ European Commission, Directorate General Information Society and Media, “Study on assessment criteria for media literacy levels”, available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 19/10/2010).

coordinates the different sectors. Only recently did the Italian legislator succeed in codifying the patchwork of legislation on media in a unique code, but without any modifications brought to improve its coherence.

The following paragraphs will provide an overview of the most relevant institutional actors that regulate the media and define its policy; then, the existing regulatory framework will be sketched analysing, first, the constitutional provisions related to the freedom of expression principle, then structural regulation, distinguishing among licensing, ownership and competition rules, and finally content regulation, taking into account also the rules on political advertising and on specific media sectors.

3.1 Actors in media regulation and policy

After a long period of retained regulatory power, the government regained its primary role in the Italian media policy with Law 112/2004. The most important body in this area is the Ministry of Economic Development. The Ministry has received the remit of the previous Ministry of Communication³⁶ covering, all communication networks. In particular, the newly-created Department for Communications is in charge of monitoring compliance with the obligations related to the allocation of digital broadcasting authorisations and/or licences. Moreover, during the previous years of the Ministry's existence, it was a preferred reference for industry representatives and the facilitator in the drafting and approval of numerous codes of conduct, dealing with issues such as the protection of minors and specific methods of sales (i.e. home shopping).³⁷

Italy was among Europe's first countries to introduce the "single" or "convergence" regulator in late nineties. The *Autorità per la garanzia delle comunicazioni*, AGCOM (Italian Communication Authority) is a powerful body with a remit for the whole communication sector. It is an independent body created by Law 249/1997, with the competence to monitor the press, broadcasting, electronic media and telecommunications.³⁸ AGCOM started its operational activities at the end of July 1998, also absorbing the functions of the former Authority of Publishing and Press,³⁹ while one of its first activities was Italy's first national television frequency plan.⁴⁰ The current functions focus on monitoring the shift towards digital broadcasting, the

³⁶ Law 85/2008 merged the Ministry of Communication and the Ministry for Foreign Trade into the Ministry for Economic Development, creating a specific internal Department for Communications.

³⁷ However, part of the doctrine acknowledges this fact as potentially spoiling the role and functions of the Communication Authority, which have a similar remit concerning monitoring the compliance with general principles. F. Bruno and G. Nava, *Il Nuovo ordinamento delle comunicazioni – Radiotelevisione, comunicazioni elettroniche, editoria* [*The new telecommunication system – Radio and broadcasting, electronic communications, publishing*] (2006), at p. 138.

³⁸ This body was partly created in order to comply with European Community laws, such as Directive 90/387/EC, and partly created in response to a political crisis in the 1990s, which led to the demand for a stronger role for independent regulatory authorities. See G. Mazzoleni and G. Vigevari, "Italy", p. 884.

³⁹ Created by Law 416/1981.

⁴⁰ Note that, on the one hand, the fragmentation of the broadcasting sector was a legacy from the liberalisation of 1976, which resulted in opening the doors to a large number of small and medium sized operators; and on the other, the national frequency plan was a pressing need as Italy has never developed cable and satellite television in parallel to analogue broadcasting.

application of antitrust laws to the telecommunication sector,⁴¹ the monitoring of broadcasting services in terms of quality and compliance with rules on advertising, politics and the protection of minors.⁴²

The sanctions applied by AGCOM are proportional to the gravity of the violation, and range from administrative sanctions of a pecuniary nature to more severe sanctions such as withdrawal of the licence for up to ten days.⁴³

The internal structure is based on a set of bodies which include: the President; the Commission for infrastructure and networks; the Commission for services and products; and the Council. There are eight Commissioners: four elected by the Senate and four by the Chamber of Deputies. The President of the Communications Regulatory Authority is appointed by the Italian President upon proposal by the Prime Minister and the Minister of Telecommunications. However, the independence of this body is not guaranteed by these rules, as the voting system for the selection of the members could end in a duplication of the political coalitions existing in Parliament. This is one of the examples where resistance to eliminating the tight connection between the legislative and executive branches and supervisory authorities is more than evident in practice.

It is important to mention that the increasing role for AGCOM concerning the press sector was done at the expense of the body previously responsible for them, namely the *Presidenza del Consiglio* [Executive presidential committee]. The role of this body was more clearly defined by Law 400/1988, which created the Department for information and publishing that is now still in charge of the decision concerning the subsidies requested by press industries.

Within the broadcasting sector, another important body should be mentioned, namely the *Commissione Parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi* [Parliamentary Commission for general guidance and monitoring of radio and broadcasting services] (CPIV). The CPIV was created by Law 103/1975 in order to define and monitor compliance with public broadcasting principles, such as pluralism, fairness, completeness and impartiality of information, but it only focuses on the public service broadcaster, RAI. It does not provide a very detailed definition of the objectives to be met by RAI annually, so as not to limit the freedoms of expression and of the press, and at the same time to enhance competition with private broadcasters. In this way the lack of any sanctioning power of the CPIV should also be characterised. However, the interventions of the CPIV have been very few and only in very exceptional cases, as its role has always been restrained by its very political nature. Moreover, the CPIV [also] has an important say over the list of

⁴¹ In collaboration with the *Autorità Garante della concorrenza e del mercato*, AGCM, the Italian Antitrust authority. See G. Montella, “La collaborazione dell’Autorità per le garanzie nelle comunicazioni all’attuazione della disciplina comunitaria” [The collaboration of the communication Authority in the implementation of the European regulations], in M. Manetti (ed.), *Europa e Informazione* [Europe and Information] (2004) 189.

⁴² In collaboration with the *Commissione Parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi*, see below.

⁴³ Note that AGCOM's sanctions concerning breaches of antitrust regulation have been very few, and they were almost trying to safeguard the *status quo* in particular in the broadcasting sector. See the exceptions of the severe sanctions imposed on RAI, RTI Mediaset and Publitalia '80 in 2005. See AGCOM, “Posizioni dominanti: sanziona RAI, RTI e Publitalia 80” [Dominant positions: sanctions for RAI, RTI and Publitalia 80] (2005), available at: http://www2.agcom.it/provv/d_226_03_CONS.htm (last visited on 19/10/2010).

candidates for RAI's board of directors.⁴⁴ The fact that the composition of the CPIV replicates the current majority in Parliament still has a strong influence over the decision on candidates, impairing the steering and monitoring functions allocated to the body. Again it is perceivable that, despite efforts to neutralise political control over the media by transferring the monitoring and enforcement functions to independent bodies, the confusing and complicated regulatory system still leaves a lot of control in the hands of politicians.

As mentioned above, the main journalist body is the ODG which is characterised as a guarantee of the rights and autonomy of the journalists towards their employers and publishers in general.⁴⁵ However, the traditional structure and approach of ODG has been criticised, and, in this regard, the role of the Constitutional Court in preserving such characteristics is deemed to be very relevant, limiting any attempt to modify this body.⁴⁶

Another organisation that is in charge of protecting the interests of journalists is the *Federazione Nazionale della Stampa Italiana*, FNSI. This is the unitary trade union for the journalism profession, which includes the regional trade unions existing all over Italy. The FNSI role is to negotiate collective labour agreements and provide union services to the members.

It is worth noting that the autonomy and independence of journalists *vis-à-vis* their employers is only protected by “conscience clauses” included in the employment contract, in order for the journalist to keep her retirement contribution also in case of voluntary unilateral conclusion of the contract due to a change in the editorial orientation of the publication. However, this is only a limited shield for the freedom of expression of journalists, while no support has been received by the government through legislative intervention on this point, in particular in the current framework where the merger and concentration of media industries could increase their already greater contractual (i.e. editorial) power.

In order to encourage a tighter connection between AGCOM and civil society, the Law 249/1997 also provided for a *Consiglio Nazionale degli Utenti* [Users national council], which has recently been changed into the *Consiglio Nazionale dei consumatori e degli utenti* [Consumers and users national council].⁴⁷ In particular, it may formulate opinions and make proposals to AGCOM, Parliament, the government and other public or private organs. It is composed of experts appointed by consumers' associations.

Aside from this, the participation of civil society to media policy is very limited at least in the institutional setting. However, the recent reactions of public opinion to a legislative proposal concerning the new regulation of tapping and the publication on the media of data concerning existing investigations used in the course of court proceedings should be noted. The draft proposal was deemed to reduce excessively the freedom of the press, and consequently the appropriate level of information of the citizens.⁴⁸ This triggered a large debate in society which was

⁴⁴ The list of candidates is then approved by the Ministry of Finance and presented to the members of the assembly of the RAI company to vote on it. See article 49 of the TUSMAR.

⁴⁵ See Constitutional Court, decision n. 2/1971 and n. 113/1974.

⁴⁶ Caretti, *Diritto dell'informazione e della comunicazione*, p. 60.

⁴⁷ See article 136 of the legislative decree 206/2005.

⁴⁸ Under the latest draft, publishers face fines for publishing reports on wiretapped conversations and leaks of police interrogations. Journalists who report on such material face prison sentences of up to 30

mainly amplified by social media and Internet, and the increasing social opposition had the effect of shifting the timing for the approval of the law, and eventually introducing modifications of its content.⁴⁹

3.2. The media regulatory framework

3.2.1 Freedom of expression and information

The Italian Constitution has overcome the limited dimension offered by the previous constitutional act (the *Statuto Albertino*) which regulated only the freedom of the press and provided wide powers to the executive in limiting such freedom. According to the current wording of Article 21 of the Italian Constitution:

"1. All have the right to express freely their own thought by word, in writing and by all other means of communication.

2. The press may not be subjected to any authorisation or censorship.[...]

5. The law may introduce general provisions for the disclosure of financial sources of periodical publications.

6. Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law".

The main points of such an expansive definition of the boundaries of freedom of expression can be summarised in the existence of a double relationship: one between the holder of the right and the public authority legitimately able to limit the right, and the other between the holder of the right and the receiver of the content of the freedom of expression, where the public authority is in charge not only of providing the best conditions for the fulfilment of the freedom of expression, but also the best conditions for achieving complete and impartial information for the receivers (i.e. the citizens).⁵⁰ The holders of such rights can be citizens or foreigners, either in the individual or collective legal form, with this interpretation being due to the need to provide a space also to opinions that concern collective interests.⁵¹

The article, moreover, distinguishes between the content of freedom of expression and the means by which such content can be diffused. Although it mentions only the press explicitly, the Italian Constitutional Court has confirmed the application of Article 21 to the entire broadcasting sector.⁵²

days and fines. The use of tapping information will also be restricted for prosecutors: requests to order phone taps, based on 'strong evidence of a crime', will have to be presented to a panel of judges, for approval; such approvals will need to be confirmed every 3 days for the tapping activity to continue.

⁴⁹ According to Italian procedural rules, a double approval by the two Chambers of the Parliament on the same text is required for draft laws to be adopted. The draft law was scheduled to be voted on at the lower house of the Parliament by late July, but this has been moved to September. If also in this passage modifications are adopted, the text will once again require the Senate's approval.

⁵⁰ To the latter objective was introduced by par. 5 of the article, which was not readily implemented by the Italian government in the first reforms after the fall of Fascism.

⁵¹ See Constitutional Court, decision n. 126/1985.

⁵² See Constitutional Court, decision n. 59/1960.

The limits to freedom of expression are to be found in public morality⁵³ (expressly defined in Article 21), but also in the right to privacy, in state secrets,⁵⁴ and the right to honour and the protection of reputation (that the case of breach could be qualified as slander or defamation). On this point, the Supreme Court established a set of requirements to be complied with in order to frame the expression within freedom of information: truthfulness, moderation, and public interest.⁵⁵ This clarification was particularly meaningful for journalists who could use such elements as a more authoritative defence in comparison to the previous situation's lack of points of reference.

Regarding the application of Article 21 to electronic content, Law 70/2003 (implementing Directive 2000/31/EC) imposes on the publishers of electronic journals the same obligations as pertain to traditional publishers but only in case when these publishers wish to apply for subsidies provided by Law 62/2001. On this point, a very recent decision of the Supreme Court provided for the exclusion of the application of Article 21 (and in particular of the specific limitations in case of seizures) to online discussion forums.⁵⁶ The reasoning of the judges acknowledged that the equalisation of discussion forums etc to the press could provide advantages, such as a higher guarantee of the messages left on the platforms by any user, but at the same time it could impose excessive burdens on the managers or owners of the platforms, which should as a consequence register as a publisher and be subject to tort and civil liability in the role of editor-in-chief.⁵⁷ This consequence could indirectly impair the fulfilment of freedom of expression, as it would restrain the provision of online forums since it would be overly burdensome for an individual to comply with the standards imposed on the press.

The Italian constitutional provisions are supported by the application of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Domestic authorities are bound by their respective Articles 10 and 19 on freedom of expression and the freedom to seek, receive and impart information and ideas. The state is also obliged to respect Article 11 of the Charter of Fundamental Rights of the European Union (EU) when implementing EU law. In 2009 the Freedom House Index rated the media in Italy as “partly free”, with a total score of 33 points, zero (0) being the best.⁵⁸ Italy ranked only above Turkey, holding the 24th position out of 25 Western European countries.

⁵³ Note that this concept has been updated over time, and the Constitutional Court is the body that has from time to time interpreted such terminology; see Constitutional Court, decision n. 9/1965; and more recently decision n. 368/1992.

⁵⁴ The Constitutional Court limited the extension of this concept to a very detailed definition that includes only information that could damage the integrity of the state. See Constitutional Court, decision n. 87/1977.

⁵⁵ See Supreme Court, decision n. 4/2000.

⁵⁶ See Supreme Civil Court, decision n. 10535/2008.

⁵⁷ M. Nisticò, “Un recente intervento della Cassazione a proposito della problematica sussumibilità di internet nel paradigma costituzionale della stampa (osservazione a Cass., 11 dicembre 2008, n. 10535)” [A recent judgment of the Supreme Court regarding the inclusion of internet in the constitutional conceptualisation of the press], available at: http://www.associazionedeicostituzionalisti.it/giurisprudenza/oss_decrilcost/index.html (last visited on 19/10/2010).

⁵⁸ Countries scoring 0 to 30 are regarded as having “free” media. See Freedom House, Freedom of the press 2009, Press freedom rankings by region, available at: http://freedomhouse.org/uploads/fop09/FoP2009_Regional_Rankings.pdf (last visited on 19/10/2010).

3.2.2 Structural regulation

Licensing rules

The allocation of electromagnetic spectrum in Italy has been a never-ending process where regulation has always tried to catch up with the evolving broadcasting market, resulting in preserving the positions acquired by private broadcasters (at least the larger one), regardless of the existence of conflicts with the opinions of the Constitutional Court and, recently, the Commission.

Historically, the opening of the broadcasting market to private companies dates back to 1974-1976, following two landmark decisions of the Constitutional Court which steered the political choices on this issue. The first decision focused on the monopolistic position of RAI in the market.⁵⁹ The important element of the decision is the fact that, while acknowledging the position of RAI as public service broadcaster, the Court required the legislator to create an internally pluralistic public broadcasting system not only based on the role of RAI, implicitly opening the broadcasting market to private companies. Only in 1976 with a second intervention did the Court clearly acknowledge the possibility for private companies to access the local broadcasting market.⁶⁰ However, the requests of the Constitutional Court were not answered by the government, leaving the market to a complete lack of regulation concerning access and authorisations to broadcast at the local level. The effects of this evasion of governmental responsibility were the creation of a commercial broadcasting pole that was mainly based on advertising revenues.⁶¹

Only in early 1990s Law 223/1990 was adopted to regulate (by legally endorsing it) the public/private radio-television system.⁶² The law covered many issues, as it was the first intervention that extended its scope to the communication system as a whole (including the press). In particular, the law provided the criteria for the assignment of radio and television frequencies, with a distribution of licences among RAI, private networks and local broadcasters. However, the criteria and the following licensing plans provided by the Ministry of Communications were not applied and the private broadcasters that had been occupying frequencies unlawfully succeeded in preserving their occupation.

The first successful intervention is to be found almost a decade later, when the subsequent Law 249/1997 designated the newly-created AGCOM as the responsible body for this issue. The success was far from complete, however, as the licences were allocated without the assignment of the necessary frequencies, implicitly allowing

⁵⁹ Constitutional Court, decision n. 226/1974.

⁶⁰ Constitutional Court, decision n. 202/1976. Note that in the 1980s the court changed its position, affirming that also private national networks could be admitted into the broadcasting sector provided the legislator enacted suitable antitrust laws to prevent the emergence of oligopolies (Constitutional Court, decision n. 148/1981).

⁶¹ A. Pace, "La radiotelevisione in Italia con particolare riguardo alla emittenza private" [Radio and broadcasting in Italy with peculiar attention to private broadcasters], *Riv. trim. dir. pubbl.* (1987) 615; A. Pace, "Il sistema televisivo italiano" [The Italian broadcasting system], *Pol. dir.* (1997) 97.

⁶² Note that this regulation was triggered not only by the need to implement the 1989 TVWF directive, but it was also the long-awaited reaction to the intervention of the Constitutional Court that, in 1988, gave its ultimatum on the repeatedly insufficient actions of the executive. See in particular Constitutional Court, decision n. 826/1988.

the unlawful occupation of the broadcasting frequencies to continue, at the expense of the licensed private networks for which no frequencies remained.⁶³

The existing framework was then complicated by steps taken towards the switch-over to digital technology. Law 66/2001 provided for distribution of the digital broadcasting frequencies, without specifying any significant parameters either for its implementation or for the assignment of frequencies to operators. The subsequent Law 114/2004 clearly had the objective of translating the existing duopoly of the analogue broadcasting system to the digital one, in particular by granting the private monopolist Mediaset – still officially owned by the Prime Minister Berlusconi – both of the digital broadcasting licences: the lawfully assigned, and the unlawfully occupied analogue frequencies.⁶⁴

The situation was not improved either by the aforementioned TUSMAR which tried to codify into a comprehensive legislative text the vast number of regulations enacted since the early 1970s. The situation of the market, with the low possibility of access for new operators and ongoing inequalities among the networks, induced the Commission to react with a formal infraction procedure concerning the incorrect implementation of most of the “Electronic Package” directives,⁶⁵ namely Directive 2002/21/EC, Directive 2002/20/EC, and Directive 2002/77/EC, which provided the new framework for electronic communications Europe-wide.⁶⁶

The current framework took into account the opinion of the Commission and reformed the existing legislation, opening the digital broadcasting market also to new

⁶³ This was the case of the private network Centro Europa 7, that after a contrary decision of the Administrative Tribunal in Italy presented its claim at the ECJ. On 12 September 2007, the ECJ Advocate General criticised the Italian situation and supported Centro Europa 7’s right to be granted frequencies. On 31 January 2008, the ECJ confirmed the opinion of the AG by ruling on the “discriminatory nature” of Italian frequency allocation. See on this decision L. Pace, “Il caso “Centro Europa 7” dinanzi alla Corte di giustizia: ampliamento del campo di applicazione dell’articolo 49 TCE, tutela della chance del prestatore di servizi e protezione del pluralismo “esterno”” [The case Centro Europa 7 at the ECJ: extending the field of application of article 49 TCE, protection of service provider and protection of ‘external’ pluralism], 53 *Giur. Cost.* (2008) 4000; and G. Fares, “La Corte di giustizia certifica la contrarietà al diritto comunitario delle modalità di attribuzione delle frequenze per l’esercizio di impianti radiotelevisivi: un caso di provvedimento senza oggetto” [The European Court of justice certifies the breach of community law in the methods of allocation of broadcasting frequencies rights: a case of a measure without object], 18 *Riv. it. dir. pubbl. Comunit.* (2008) 557.

⁶⁴ The law was the solution provided for the unconstitutionality issue acknowledged by the Constitutional Court in 2002 which obliged the termination of the broadcasting activities of those networks exceeding the ownership limits set by law no later than December 2003, which in the case of Mediaset meant that one of the free channels, namely Rete4, should have been stopped. See Constitutional Court, decision n. 284/2002. See more deeply on these issues, O. Grandinetti, “Principi costituzionali in materia radiotelevisiva e d.d.l. Gasparri” [Constitutional principles in broadcasting and the d.d.l. Gasparri], *Giornale di Diritto Amministrativo* (2003) 1185.

⁶⁵ See Reasoned Opinion of the European Commission sent on the 18th July 2007, n. 2005/5086, C(2007) 3339.

⁶⁶ See Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities; Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services; Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services; Directive 2002/22/EC of 7 March 2002 on universal service and users’ rights relating to electronic communications networks, Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

operators which did not have a previous licence for the analogue broadcasting service, as required by the precedent regulation.⁶⁷

The current framework is now based on action from AGCOM and the Department of Communication.⁶⁸ The law gives AGCOM the right to formulate and approve a national plan for the assignment of the public frequencies. The Department of Communication has the right to grant the relevant broadcast authorisations for the content providers and the network operators.⁶⁹

The authorisations are granted for a duration of twelve years, with the possibility of renewal, imposing also obligations and limits on the content providers, namely:

- a) compliance with European production quotas;
- b) respect for the laws regarding the protection of children; and
- c) a guarantee of the rights to reply and rectification.

Furthermore, the networks operators are limited to a single authorisation, either national or local,⁷⁰ while one third of potential digital frequencies is to be assigned to local networks operators.

These requirements are framed within a logic that aims to treat all broadcasters as public entities that provide a public service and have various obligations, including that of offering truthful information and events in order to promote the independent development of opinion.⁷¹ At the same time, licences are granted by the Department of Communication, essentially the Ministry, and not by the AGCOM: this for sure creates an “enabling environment” for dependencies between economic and political actors.

Ownership and competition rules

The introduction of a regulation concerning an ownership quota in media companies was originally formulated as a restraint on the concentration trend that has characterised the Italian landscape since the 1970s. Although the first intervention was devoted to the press industries, the following legislation covered all media, in an attempt to overcome uncontrolled media concentration, particularly in the broadcasting sector.

The objective of Law 67/1987 was mainly to create the conditions for free competition in the press market, while at the same time safeguarding the right of citizens to be informed. The law defined the case of abuse of dominant position, where the dominant position is qualified as a company that directly, or indirectly through controlled or parent companies, publishes newspapers whose circulation is more than 20% of the national total, or more than 50% of the referring inter-regional one. The law also covers the case of concealed grouping system, given that also in

⁶⁷ See Law 101/2008, article 8-novies and Law 88/2009, article 45.

⁶⁸ See AGCOM, “Approvazione del regolamento relativo alla radiodiffusione terrestre in tecnica digitale” [Approval of the regulation concerning the terrestrial broadcasting through digital means], decision 435/2001/CONS and following modifications, available at <http://www.agcom.it/default.aspx?DocID=2115> (last visited 19/10/2010).

⁶⁹ See the distinction introduced by Law 66/2001 between network providers and media operators.

⁷⁰ Only the public broadcasting service provider, RAI, is allowed to have both.

⁷¹ See Vigevani and Mazzoleni, “Italy”, p. 895. See below for content rules.

this case an indirect control by one of more firms can be exercised over others. In this respect, the reference to the hypothesis provided by Article 2359 of the Italian Civil Code should be considered, which includes not only the proprietary control over enterprises that are controlled or parent companies, but also indirect control in the case of an “informal group”.⁷²

Supporting the same objective were the transparency requirements imposed on the press industries, which were required to reveal their annual balance in which advertising revenues and the financing bodies or relevant shareholders should be publicly disclosed.

It is important to emphasise that the same obligations and requirements were also to be applied to advertising agencies. The reasoning for this wide field of application lies in the importance that these market actors have in gathering revenues that can support and, consequently, allow the persistence of publishing activity. The legislator took into account the case in which the advertising agency, though formally free from shareholder quota in its client companies, can exert a strong influence upon them due to its role as provider of their advertising revenues. Thus, not only are advertising agencies obliged to register in the ROC and provide their annual balance, but they also have the more stringent obligation where they work exclusively with the press industry. In particular, any advertising agency cannot work exclusively with a press publisher whose circulation covers more than 30% of the total, with this lowering to 20% where the relationship between the two is based on proprietary control.

This very powerful regulation was then reformed by Law 223/1990 which provided for a single set of rules, applicable regardless of the type of media. As mentioned above, the law tried to contain the concentration trend that was increasingly evident in the media sector, yet this first anti-trust regulation did not determine the conditions for a stronger protection for pluralism, as was its objective, but it ended in endorsing the existing duopoly in the broadcasting sector.

The rules focused on three main elements:

- the maximum number of licences assignable to a national broadcaster and the ban on contextual licences at the national and local level;⁷³
- the limit that publishers in control of more than 16% of newspapers in circulation were not allowed to receive broadcasting licences;
- the limit on advertising agencies providing advertising to more than three national broadcasters (or two national and three local) where they are also in a relationship of proprietary control with any of them.

These limits, however, were not in compliance with the indication received previously from the Constitutional Court, affirming clearly that “*the pluralism at*

⁷² This case refers to the hypothesis of relationships among enterprises so that one or more individuals take strategic and conclusive decisions about the management of all of the enterprises. This power could come from the fact that the individual holds majority interests in the different enterprises, as well as from the existence of minority interests, agreements, or relationships of a different kind. See i.a. U. Tombari, *Il gruppo di società [Corporate group]* (1997).

⁷³ The licences can be distinguished on the basis of their territorial coverage they have as either national or local. Originally the national coverage was assigned only to the public service broadcaster, while the private ones could only receive the local ones. See above the effect of the decision n. 202/1976 of the Constitutional Court.

national level would not be achieved by the concurrence of a public pole and of a private pole represented by a single entity or an entity in a dominant position in the private sector".⁷⁴ This was the reason why in 1994 the same court denied the constitutionality of the first of the aforementioned rules, asking for a reform of the anti-trust system in the media sector in order to achieve pluralism. According to the Court, "*it is not sufficient that the whole media system is characterised by a plurality of initiatives, but it is needed that this principle should be achieved in each and every sector (press, analogue television, satellite television, etc.)*".⁷⁵

The immediate reaction was to create a transitory regime applicable up to the enactment of a codification of the media sector regulation, initially defined by Law 249/1997, and subsequently by Law 112/2004.⁷⁶

The current antitrust rules are included in the TUSMAR that codifies the previous piecemeal legislation, from the perspective of convergent media. The rationalisation resulted in a single article⁷⁷ that provides for an *ex ante* limit of 20% of the total financial resources flowing into the market, the *sistema integrato della comunicazione* [integrated communication system] (SIC), where the radio and television activities, the production and distribution of radio and television content, the publishing in form of press, books and electronic media, and the advertising intermediation coincide. The legal cap is reduced to 10% where in one of those specific sectors the revenues are already over 40% of the sector total.

In addition, the law regulates differently the possibility for cross-media ownership, as it eliminates the ban on press industries accessing the broadcasting sector, while it still prohibits, up to the end of 2010, the possibility for national broadcasting enterprises to access the press sector, extending the prohibition also to controlled or parent companies.⁷⁸

The *ex post* monitoring activity is delegated to AGCOM, which should define the relevant markets, and in case of the acknowledgement of a dominant position in the SIC or in a single market the authority can sanction the relevant enterprises and eventually impose measures to restore pluralism.⁷⁹

These provisions, however, have been criticised as the SIC seems to have an extremely wide reach, paving the way for a further, almost uncontrolled growth of the

⁷⁴ See Constitutional Court, decision n. 826/1988.

⁷⁵ See Constitutional Court, decision n. 420/1994.

⁷⁶ Note that the latter law should be read jointly with the Law 215/2004 concerning the case of conflicts of interests. The law forbids the Prime Minister and other officials' direct involvement in the management of corporations, albeit allowing them to retain ownership. On the transitory nature of both laws mentioned in the text, see C. Pannacciulli, *Pluralismo e mercato nell'attività radiotelevisiva. Profili costituzionali* [Pluralism and market in broadcasting activity. Constitutional issues] (2005), at p. 193; G. Azzariti, "La temporaneità perpetua, ovvero la giurisprudenza costituzionale in materia radiotelevisiva (rassegna critica)" [The neverending transitoriness condition, in other words the constitutional caselaw on broadcasting (critical review)], 40 *Giur. cost.* (1995) 3037; M. Dogliotti, "Regime definitivo e transitorio del sistema radio-televisivo" [Final and transitory rules in broadcasting system], 45 *Giur. merito* (1993) 675.

⁷⁷ Article 43 TUSMAR.

⁷⁸ Note that the law still refers to article 2359 of the Civil Code for the definition of proprietary and non proprietary control.

⁷⁹ On the difficulties concerning the overlap of competence of AGCOM and the Italian antitrust authority in the same sector see M. Conticelli and A. Tonetti, "La difficile convivenza tra regolazione e antitrust: il caso delle comunicazioni elettroniche" [The difficult coexistence of regulation and antitrust: the case of electronic communications], 58 *Riv. trim. dir. Pubbl.* (2008) 71.

existing major broadcasters, to the detriment of potential new media operators. In practice, the legislator seems to rely heavily on a large increase of the content provided by digital broadcasting, almost replicating in the new system the loose control enjoyed by private companies in the analogue television market.

The decision of the Italian legislator to include the prejudice to pluralism as an autonomous criterion for the evaluation of significant market power has also been criticised. This goes further than the obligations imposed by the European regulations on electronic communications.⁸⁰ As mentioned above, AGCOM should define the relevant markets and verify whether in any of them there is a company with a dominant position, i.e. a firm possessing more than 20% of market resources (par. 9, Article 43, TUSMAR).⁸¹ Contextually, the legislator couples the hypothesis of the dominant position with those that are “*prejudicial to pluralism*” (par. 5, Article 43, TUSMAR), which could result in a sanction for the firm that, though complying with the anti-trust provisions, damages the legislatively-defined level of pluralism. Although this choice shows that the legislator takes into account the fact that anti-trust provisions could not provide an efficient safeguard for pluralism without favouring the quality of different sources of information, in addition to their quantity, the use of the aforementioned 20% quota of the SIC in order to evaluate the level of pluralism, could not be very effective. The rule was justified so as to prevent an undue amount of political persuasion that could be exerted through an extremely concentrated market. However, a mere anti-concentration rule and a case-by-case analysis of AGCOM within each sector could result in a confusing situation for market actors, that are not aware *ex ante* of the elements that could be interpreted as prejudicial to pluralism.

3.2.3 Content regulation

Since 1960 the Constitutional Court has made repeated interventions concerning the tools and methods to achieve the best level of information for citizens in order to enhance their democratic participation.⁸² This reasoning has always been framed in the terminology of the Constitutional Court as the protection of pluralism, using it as a justification for the existence of a public service function, and then as the catalyst for the opening of the market to commercial operators. Only in more recent times has the Court defined this concept in a detailed manner, emphasising its internal and external dimensions.⁸³

⁸⁰ F. Poletti, “Tutela della concorrenza e pluralismo dell'informazione del DDL Gasparri” [Protection of competition and information pluralism of ddl Gasparri], 12 *Dir. Ind.* (2004) 149; V. Zeno-Zencovich, “Motivi ed obiettivi della disciplina della televisione digitale” [Rationals and objectives of digital television regulation], 21 *Dir. Informazione e Informatica* (2005) 653; A. Frignani, “La concorrenza nella disciplina radiotelevisiva” [Competition in radio and broadcasting regulation], 23 *Dir. Informazione e Informatica* (2007) 1005.

⁸¹ This is already far from the current interpretation of the European rules on competition, which at least impose an evaluation of the existing competitors in the market and the additional abusive behaviour. See A. Frignani, “L'abuso di posizione dominante” [Abuse of dominant position], in A. Frignani and R. Pardolesi (eds), *Diritto della concorrenza comunitaria [European competition law]*, (2006), 267.

⁸² See Constitutional court, decision n. 59/1960.

⁸³ See Constitutional court, decision n. 474/1984.

The numerous judgements of the Constitutional Court, though initially finding a limited positive reaction from the legislator,⁸⁴ resulted in the progressive endorsement of pluralism among those principles operating in the audiovisual sector. The principle of pluralism, together with the freedom of the media and the protection of the freedom of speech,⁸⁵ is now accepted as one of the fundamental principles included in the TUSMAR, which should permeate all the legislative and regulatory intervention.

In the audiovisual sector the rules are appropriate and touch upon many issues. For instance, users are protected both in terms of access to different types of content, and in terms of access to free broadcasting channels, including quantity rules for a sufficient number of broadcasting programmes available for free at the national and local level, and quality rules concerning these programs, that should cover events with social relevance.⁸⁶ Moreover, the codification includes general rules concerning the protection of fundamental principles such as the respect of dignity, and the protection of specific vulnerable categories of users such as minors.⁸⁷ It should be emphasised that the codification refers to the co-regulatory instrument approved in 2002, namely the Codice TV e Minori [TV and minors code of conduct], drafted by the then Ministry of Communication and subscribed to by the public and private broadcasters and the relevant associations. The reference within the TUSMAR provides wider and deeper monitoring powers to AGCOM, which is in charge of verifying compliance with the code, including the possibility of imposing direct sanctions.⁸⁸

The aforementioned rules are applicable to any media service provider in Italy, regardless of their public or private legal form. However, the public service broadcaster is still subject to a set of special rules aiming at the promotion of education, civil growth and social development, and of the Italian culture and language as well as the preservation of national identity. These objectives are specified in Articles 45 and 46 TUSMAR, and in particular require that the public service broadcaster allocate an appropriate number of hours, including prime time, devoted to education, information, cultural promotion through cinema, theatre and musical works; provide access to programming for political parties, trade unions, religious groups and other associations of social interest; include programming destined to be broadcast abroad to promote the knowledge of the Italian language and culture; and include programming in minority languages.

Moreover, the public service broadcaster must comply with the obligations imposed by the service contract that is defined by the Department of communication with RAI's board of directors, in which are included general and specific provisions regarding programme type and quality.

⁸⁴ Ibid.

⁸⁵ Note that article 3 TUSMAR includes as fundamental principles, additional to those mentioned in the text, the objectivity, completeness and impartiality of information, the protection of copyright, the openness to different opinions in political, social, cultural and religious fields, the safeguarding of ethnic differences and of the cultural, artistic, and environmental patrimony, both at the national and local level, the respect for freedoms and rights, in particular dignity, health and minors' physical and mental development that are granted by the Constitution, the European law and the international agreements applicable to the Italian state.

⁸⁶ See article 32-41 TUSMAR.

⁸⁷ See article 34 TUSMAR.

⁸⁸ Note that AGCOM should report annually to the Parliament concerning the activities (and the eventual actions) carried out in relation to the co-regulatory action.

The service contract for the three year period between 2010 and 2012 sets out the detail of the public service remit. It takes the new way of assessing compliance with the quality level introduced in the previous service contract (2007-2009), which is no longer based solely on viewing figures but also includes indicators that combine cultural and civil enrichment, respect for the feelings of audiences, innovation, pluralism, independence, balance, ability to entertain and originality. These criteria aim to ensure that public value will permeate all types of programmes on all platforms instead of being measured just in terms of the inclusion of certain type of programmes within the schedule.⁸⁹

The service contract also defines the main quotas on programming, which oblige the public service broadcaster to allocate 15% of its total annual revenue to producing and co-producing films and cartoons, documentaries, drama, ballet, and classical and popular music. RAI must also reserve at least 20% of its total programming on the terrestrial analogue signal to European works by independent producers. It is not known whether RAI fulfils these quotas, as no reports are available from AGCOM or RAI on this topic. There have been no changes to the system of quotas in the new service contract. As before, the new contract also envisages programming for minorities, without imposing any quotas.

Rules on information provision

In general, regarding the information provision it should be noted that the legislative and self-regulatory interventions agree on the fundamental role of correctness, completeness, and impartiality of information.⁹⁰ When looking in particular at news broadcasting and other radio and audiovisual information provision the TUSMAR specifies that they constitute a service of general interest, thus they should ensure the truthful presentation of facts, in order to promote the free formation of opinions, prohibiting at the same time any use of methodologies or techniques to manipulate surreptitiously the content of information.⁹¹

The former principle should be read together with the article concerning the right to act for rectification,⁹² and eventually redress, in case of lack of respect to one's personality, honour and dignity, or in case of broadcasting untruthful materials. This right, originally introduced in Law 47/1948, then confirmed in Law 69/1963 for press publication, requires a quick reaction from the audiovisual operator (within 48 hours) to correct the wrongful information provided to the public,⁹³ however, in addition to this, the audiovisual operator, and the journalist in particular, could be charged with a crime such as libel or defamation, where specific criteria are met. In order to clarify this issue, the Supreme Court provided a set of criteria to be evaluated in order to verify the existence of defamation: the information should be truthful, thus

⁸⁹ See I. Katsirea, *Public broadcasting and European law: a comparative examination of public service obligations in six member states* (2008) at p. 90.

⁹⁰ See the aforementioned article 3 TUSMAR and the premise of the “Carta dei doveri dei giornalisti”, drafted and subscribed to by the ODG and the FNSI (available at: http://www.fnsi.it/Pdf/Carte_deonto/Carta_Doveri.pdf (last visited on 19/10/2010).

⁹¹ See article 7, par. 2 TUSMAR.

⁹² See article 32-quinques TUSMAR.

⁹³ The “Carta dei doveri dei giornalisti” imposes an obligation of rectification on journalists regardless of any request by the interested subject as compliance with the right of the citizens to be correctly informed, in particular when her error could offend or damage individuals, associations, communities, etc.

requiring the journalist to verify the reliability of her sources; the information should be socially relevant; and the information should be provided in a correct manner, avoiding any aggressive and conceited style.⁹⁴

The corresponding self-regulatory interventions are mainly made by journalists and their associations, and range from an ethical code (the *Carta dei doveri dei giornalisti [Journalists ethical code]*) to a code on data protection, a code on the protection of minors (the *Carta di Treviso [Treviso Charter]*),⁹⁵ a code on the television broadcasting of trials,⁹⁶ and a code on health information (the *Carta di Perugia [Perugia Charter]*),⁹⁷ etc.

In particular, the ethical code is a comprehensive charter that includes all the principles that should permeate the journalistic activity, excluding the possibility for a journalist to provide his name, voice, or image for an advertising campaign, where such activity could limit the professional autonomy of the journalist. The incompatibility should also be appreciated in the case of concurrent functions that conflict with the rigorous and exclusive research of truthful information.

The code on data protection instead is a co-regulatory instrument⁹⁸ that has been drafted by the Journalist Register in collaboration with the Data Protection Authority. After approval by the latter, the code has been introduced as annex to legislative decree 196/2003, the so called Data Protection code. The code has then the status of primary legislation and addresses the balance between freedom of the press and the protection of personal data of citizens. However, the legislator did not consider it sufficient with respect to publication of data concerning investigations within court proceedings. The draft law decree on tapping,⁹⁹ which has recently passed the vote in the Italian Senate, intends to modify the Italian Penal and Procedural Codes and introduces new clauses sanctioning the behaviour of magistrates, journalists and publishers in case of non compliance. In particular, the act takes a questionable interpretation of data protection,¹⁰⁰ in order to limit the quantity and timing of the publication of information gathered through telephone interception in addition to any data concerning existing investigations used in the course of court proceedings.¹⁰¹ Although the draft should still require a double approval from the two Chambers of the Parliament, the ensuing debate raised by public opinion and the criticism by civil society and journalistic associations forced the executive to rethink

⁹⁴ See Supreme criminal court, decision n. 3287/2000.

⁹⁵ Available at: http://www.fnsl.it/Pdf/Carre_deonto/Carta_Treviso.pdf (last visited on 19/10/2010).

⁹⁶ Available at: http://www.mcreporter.info/normativa/deont/processi_tv.pdf (last visited on 19/10/2010).

⁹⁷ Available at: <http://www.odg.mi.it/node/30170> (last visited on 19/10/2010).

⁹⁸ Garante per la Protezione dei Dati Personali, “Codice di deontologia relativo al trattamento dei dati personali nell'esercizio dell'attività giornalistica” [Deontology code regarding the treatment of personal data in journalistic activity], Provvedimento del Garante, 29/07/1998, G.U. n. 179 (1998) available at: <http://www.garanteprivacy.it/garante/doc.jsp?ID=1556386> (last visited on 19/10/2010).

⁹⁹ See the provisional text of the decree, Senato della Repubblica, “Norme in materia di intercettazioni telefoniche, telematiche e ambientali” [Rules concerning digital, environmental wiretapping], available at: <http://www.senato.it/leg/16/BGT/Schede/Ddliter/33809.htm> (last visited on 19/10/2010).

¹⁰⁰ See the intervention of the Italian Data Protection Authority on this point, “Intercettazioni, Garante privacy: ‘giustificato allarme libertà’”, Reuters Italia, 30/06/2010, available at: <http://it.reuters.com/article/topNews/idITMIE65T07020100630> (last visited on 19/10/2010).

¹⁰¹ Under the draft, publishers would face fines of up to €450,000 for publishing reports on wiretapped conversations and leaks of police interrogations. Journalists who report on such material would face prison sentences of up to 30 days and fines of up to €10,000.

the proposal and in order to revise it in a format which is more respectful to the principle of freedom of expression.

The 'par condicio' as equal access to media for political parties

The so-called *par condicio* [equal conditions] law, Law 28/2000, subsequently amended by Law 313/2003, was not only adopted to define the rules applicable to broadcasting and the press during election periods in order to guarantee that citizens have the greatest amount of knowledge about the candidate political parties, but also to regulate comprehensively political communication in the media, in particular the broadcasting sector.¹⁰²

The general rules distinguish between political communication, defined as all broadcasting programmes that provide the different political positions in a dialectic and discursive way (e.g. a debate with participants holding different positions), and self-managed political communication spaces, where the communication is unilateral. The former should be broadcast obligatorily by public and private broadcasters at the national level, while the latter should be broadcast obligatorily by the public broadcaster where requested; in case of commercial broadcasters this is only an optional decision.¹⁰³

During the election period, the rules are stricter and more detailed. In particular national public television stations are obliged to allocate free airtime to political parties, while again commercial broadcasters do not have such an obligation. In any case, paid political advertising on national television is forbidden in Italy. Moreover, the rules also concern television programs such as debates, thematic round tables and press conferences that are not included in the political communication as defined above, providing for a set of limitations and rules of behaviour also for TV hosts.¹⁰⁴

The law attributes the monitoring and enforcement function to CPIV and AGCOM respectively for public and commercial broadcasters. It is worth mentioning that the sanctions provided are mostly compensatory, as they allow the competent bodies to impose the broadcasting of political communications of those parties damaged by unbalanced scheduling. This is more suitable than economic penalties in order to achieve better access conditions for political parties to the broadcasting sector.

A less stringent set of rules is applicable to the press in the same period, imposing as a general principle the obligation for the publisher to distinguish clearly in publication informative content from campaigning communications. Moreover, no further indications are given in terms of correctness and impartiality, this being due to

¹⁰² See R. Borrello, "Stampa e par condicio: riflessioni critiche sulla vigente disciplina" [Press and par condicio: critical observations on the current regulation], 53 *Giur. Cost.* (2008) 2767.

¹⁰³ Note that the self-managed political communication spaces are subject to specific rules in terms of duration and content in order to guarantee their integrity and value. For instance, their duration cannot last for less than one minute and no more than three, and they must allow a motivated exposition of the political programme of the interested party. They cannot be inserted during a commercial advertising break and may not interrupt a programme, but have to be included in specific slots together with other similar messages. See article 2, 3 and 4, Law 28/2000.

¹⁰⁴ See article 5, par. 3 where the law provides that television hosts "are required to have a correct and impartial approach running the programme, so as not to influence surreptitiously the free choice of the citizens".

the fact that the legislator relies on a greater number of sources of information available to citizens in the press market in comparison to the broadcasting one, which can also assist in granting visibility to all political parties.

The level of invasiveness of the legislation in the broadcasting sector is higher than the average level in European countries, and it has been also questioned in terms of compliance to the constitutional principle of freedom of the press.¹⁰⁵ The justification for the level of detail that can be found in the Italian law should be found in the specificity of the Italian system, where the leader of one of the main political parties and currently Prime Minister is still the owner of the main commercial competitor in the broadcasting sector. Thus, the same person can directly or indirectly influence the editorial choices of the majority of the information sector. From this perspective, the degree of detail of political communication on broadcasting can be interpreted as a way of rebalancing this anomaly of the Italian system.¹⁰⁶

Rules concerning Internet content

The recent reform addressing the aforementioned TUSMAR in order to implement Directive 2007/65/EC introduced in the first article of the codification that the general principles are applicable to “*the provision of audiovisual and radio media services, taking into account the convergence process among the different means of communication, such as electronic communications, electronic publishing and Internet in all its applications*”. However, the definition of audiovisual media services provided in Article 2. a) TUSMAR, referring directly to Articles 56 and 57 of the Treaty limited the application of the rules contained in the codification to a specific category of audiovisual media providers, namely those that have the objective of informing, entertaining or educating the public through the use of an electronic communication network. The article then clearly excludes the provision of services that are not mainly economic and not in competition with television broadcasting, such as private Internet websites (e.g. blogs) and services consisting of the provision or distribution of audiovisual content produced by individual users so as to share them (e.g. Youtube) or to exchange them in a specific community (e.g. Facebook); the same exclusion is applicable to exchange of emails or text messages, and to services which do not have as their main objective the provision of audiovisual content, such as online games, search engines, electronic versions of newspapers and magazines, and online gambling.

The choice of the legislator in this case was to exclude from the field of application of the TUSMAR all Internet-related services that could not be interpreted as an organised form of audiovisual information or entertainment service provision. The original draft of the amending regulation imposed the obligation to register for any internet user who provided video content or web streaming online, regardless of whether they were professionals, thus imposing heavy administrative burdens on those users which provided such content only occasionally. Moreover, this could have been interpreted as an equivalence between Internet websites focused on video sharing and broadcasting stations, which consequently could impose not only registration obligations but also a stricter liability regime conflicting with the position of the former as an Internet intermediary provider defined through Law 70/2003. The

¹⁰⁵ See Constitutional court, decision n. 48/1964.

¹⁰⁶ Caretti, *Diritto dell'informazione e della comunicazione*, p. 157.

choice to move away, yet not so unambiguously,¹⁰⁷ from this situation is to be welcomed as providing a more reasonable implementation of the provisions of the AVMS directive.

Regarding blogs and discussion forums, as mentioned above, the jurisprudence has clarified that these forms of online communication should not be subject to the same regime as the press, and in particular the obligations of registration to the ROC, and the exclusion of seizures or similar preventive sanctions.¹⁰⁸ This has been confirmed also in terms of the editorial responsibility of the blogger or moderator of the discussion forum, as a recent decision of the Court of Appeal of Turin, overturning the First Instance approach, acknowledged the responsibility of a blogger only concerning her own produced and uploaded content, without any obligation to monitor comments and intervention coming from other users, thus excluding any equivalence between a blogger and an editor-in-chief of an online newspaper.¹⁰⁹

However, this exclusion does not mean that the manager of the blog or discussion forum is exempted from compliance with the rule concerning the protection of honour, reputation, personality, and the private life of persons, which is also applicable to any content diffused online.¹¹⁰ However, it should be noted that another just published decision of the Supreme Court addressed the monitoring function of editors of online newspapers, in particular where the online publication could be framed as defamatory.¹¹¹ The judges acknowledged the applicability of Article 57 of the Penal Code concerning defamation only to newspapers published on paper, due to the fact that the interactivity of the Internet medium can not impose the obligation to verify all the materials received in form of comments and reviews by the editor.

4. Media policy and democratic politics: an assessment

The analysis presented in the previous paragraphs shows with sufficient clarity that the Italian media system is still in a period of transition, and further developments both in terms of legislative interventions and new balances in the market power allocation are likely. This situation has been determined by the evolution of communications technologies that do not involve only the Italian state, but the whole European media in general. It is also possible to argue that the technological evolution

¹⁰⁷ See that the criteria of “not mainly economic” and “not in competition with the television broadcasting” have been criticised due to their lack of specificity and possible extended interpretations by many commentators, see “Decreto Romani, meglio ma non bene”, PuntoInformatico, 02/03/2010, available at: <http://punto-informatico.it/2823280/PI/Commenti/decreto-romani-meglio-ma-non-bene.aspx> (last visited on 19/10/2010). Moreover, the definition of non-linear audiovisual media service could surreptitiously include the scenario of video sharing websites, as it is defined as “*audiovisual media service provided to the vision of programmes chosen by the user, based on a catalogue of programmes selected by the provider*”. See article 2, lett. m), TUSMAR.

¹⁰⁸ See above, par. 3.1.

¹⁰⁹ See Court of Appeal Turin, 23 April 2010.

¹¹⁰ See the recent case of *Vividown v. Google*, where four Google executives were convicted for violating data protection, in connection with the on-line posting of a video showing a disabled person being bullied and insulted. The Milan Tribunal, while acquitted all Google executives with regard to the charge of defamation, sentenced three of them to a six-months suspended jail for violation of the data protection law. See Milan Tribunal, decision n. 1972/2010.

¹¹¹ Supreme Court, decision 1907/2010.

has catalysed the existing trend of the internationalisation of the problems that characterise the media, requiring repeated interventions by the European bodies.

The Italian regulatory framework was developed in three main phases. The first, dating back to the period between the two World Wars, was based on a public monopoly over the means of information, including the press sector being heavily controlled through the obligation for journalists to adhere to mainstream political thinking. In this period, the State was not only the regulator of the media, but it also started to be involved in the organisation of the broadcasting sector, due to the interpretation of the broadcasting activity as falling into the category of public service. The final outcome of this period was the affirmation of the monopoly of the state over broadcasting, creating the tight relationship between political power and the media that still exists today.

The second phase in the evolution of media regulation coincided with the deep constitutional changes which came about after the recognition of new principles and rights in the relationship between the State and citizens. The time period of this phase dates to the 1960s and 1970s, when the model of public monopoly of the broadcasting media declined and the concentration trend that characterised the press required a comprehensive regulatory framework. The debate in that period was focused mainly on the social impact of the media and its capability to affect the cultural and political education of citizens. The main reference point was the principle of freedom of expression, read in light of the pluralism of sources of information, yet which should also take into account the technical limitations applicable to specific media. Thus, the legislator was asked to balance the monopolistic role of the state in the media sector with the unavoidable needs of free and independent media. The subsequent interventions can be seen as a set of corrections and amendments to the existing framework, focusing on three axes: the balance between the role of the Parliament and the executive in the regulation of the media system, and in particular their respective roles regarding the public service broadcaster; the definition of a closer relationship between media networks and local communities; and the introduction of new forms of the participation of social groups in the management and use of the media, for instance through the creation of new consultative bodies and the definition of an access right for specific social groups.

The last three decades have seen the enactment of the “third generation” legislation.¹¹² The social context has changed, and the regulation has faced new challenges: the acceleration of technological innovation that has eliminated the rationale for the scarcity of resources in broadcasting networks, the increasing pressure from the entrepreneurial and advertising sectors for a liberalisation and privatisation of broadcasting, the need to embrace the media as a converged whole that is no longer compartmentalised into different market sectors. The opening of the broadcasting market also to private or commercial television was the first step moving into this new framework; however, the Italian legislator did not provide sufficiently defined rules that could regulate access and activities of these new market actors. Attempts were made to correct market abuses, introducing both ceilings for advertising revenues, so as to monitor funding mechanisms, and anti-trust regulations, in order to verify the level of concentration in the sector.

The main points that the current framework still has not resolved are, first, the role of the State, that shifted from the position of editor and deliverer of the

¹¹² Caretti, *Diritto dell'informazione e della comunicazione*, p. 186.

informative activity, to a subject that is regulating and monitoring the application of common principles in a sector where private actors now comprise the majority. Secondly, the increasing importance of the independent communication authority in terms of regulatory functions, which is able to be more impartial due to its distance from political parties. However, such independence is yet to be achieved completely. Thirdly, the difficulties in introducing effective anti-trust rules that can limit concentration trends and, at the same time, regulate the flow of financial resources among the different media. Finally, the role of the public service broadcaster in the new context, that is no more a pillar for the safeguard of the internal pluralism of information – a role which cannot be imposed directly over private actors – but is more a guarantee of access for the public to new communication technologies, in an attempt to avoid the risk of introducing new forms of social marginalisation.

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The case of Romania

Cristian Ghinea and Alina Mungiu-Pippidi

1. Introduction

Romania's troubled political and economic transition from communism to democracy over the past 20 years has taken a heavy toll on its media landscape. The evolution of mass media from total state control to a free press has been strongly linked to political cycles, changes in government structure and economic development.

The metamorphosis of the media since the 1989 anti-communist revolution can be traced through four fairly distinct periods, dominated in turn by the state, prominent journalists, multinational media companies and local investors.

- **1990-1995:** The state maintains control of public television, the main source of information for most Romanians. Other media outlets continue to be dominated by former supporters of communist dictator Nicolae Ceausescu, who was overthrown and executed in 1989.
- **1995-early 2000s:** ProTV, the first truly commercial and independent station, begins operation. In print media, old outlets change and new ones, including some quality newspapers, gain circulation and prominence.
- **Early 2000s:** A mixed period in which journalists' control of major media wanes and that of foreign and domestic media companies grows.
- **After 2004:** Local "media moguls" begin to dominate. The state is openly hostile but impotent. Foreign media investors retreat.

The symbolic end to these four stages of development came in July 2010, when the last foreign owner of a Romanian quality newspaper raised the white flag. Bodo Hombach, manager of the German WAZ media company, said WAZ was abandoning the Romanian market because it was "distorted" by the "massive investment made by people who make their money in other industries and invest million of euros in mechanisms that artificially increase the audience."¹ With the withdrawal of WAZ, Romania now has virtually no foreign investment in mainstream quality media.

The history of Romania's media since the 1989 revolution is one of radical change. During the communist era, the country had no samizdat media and thus no alternative to the official press. The only attempt to publish an illegal newspaper, led by Petre Mihai Bacanu in 1989, ended when the three authors were jailed. They were freed only after the revolution. Then, in the enthusiastic aftermath of the revolution, journalists began editing, printing and even directly selling countless newspapers. Just as quickly, however, the old guard in the profession took advantage of this media frenzy, and people who had previously praised Ceausescu continued to control the major media outlets.

¹ "Bodo Hombach (Grupul WAZ): Ne retragem din Romania pentru ca piata media este distorsionata" [We retire from Romania because the media market is distorted], Hotnews, 03/08/2010, available at: http://economie.hotnews.ro/stiri-media_publicitate-7658216-bodo-hombach-grupul-waz-retragem-din-romania-pentru-piata-media-este-distorsionata.htm (last visited on 10/10/2010).

So in 1990, one can hardly speak of an independent media in Romania. The troubled political scene that year split the media, as it did Romanian society. Former Communist Party apparatchik Ion Iliescu and his National Salvation Front (FSN) used autocratic methods to maintain power. FSN dominated public television, which most Romanians relied on for their information. That control allowed the FSN to gain an overwhelming majority in the new Parliament. The voters had been persuaded to fear instability and reject change. Public TV portrayed the democratic opposition as hooligans and traitors who wanted to sell off the Romanian economy. The few newspapers available to the opposition were as hysterical toward Iliescu and his regime as the FSN's media outlets were toward the democratic opposition.

At the huge cost of political violence and international isolation, Iliescu's regime succeeded in maintaining power until 1996. It was a wrenching period for the country and a frenetic one for journalists. Economic reforms were slow and disjointed, benefiting only a small number of corrupt officials and businessmen with connections to the state. Iliescu became the symbol of stagnation and failure. State officials tried to maintain a firm grip on the media, but failed. The state was forced to retreat from the industry, and a number of journalists and editors filled the gap.

Although 1995 was a defining year, the media landscape had begun changing before then. In 1991, the first independent TV station started broadcasting: SOTI TV. The station was an amateurish attempt supported by United States democratisation money, but that funding prepared the ground for the first truly commercial and independent station in 1995: ProTV.

In print media, old outlets changed and new ones began to dominate the landscape. *Scanteia*, the newspaper of the former Romanian Communist Party, changed its name after the 1989 revolution to *Adevarul* – The Truth. In 1990, “the truth” was just a metaphor, because *Adevarul* was a mouthpiece of the Iliescu regime, and its editorial leadership was under the direct control of the government. The journalists at the paper later rebelled, deposed the editor in chief and elected their own leaders. Although this did not make *Adevarul* a respectable newspaper, given the fact that the new management had a shady relationship with the politicians, control at least appeared to have been wrested from the state.

In 1993, an innovative newspaper took the market by surprise. *Evenimentul Zilei* combined an aggressive style with both quality and yellow journalism. The paper's owners kept a low profile, but founding journalists (and minor shareholders) Ion Cristoiu and Cornel Nistorescu gave its editorial stance a high profile. Two years later, Pro TV succeeded in ending the dominance of the public television. By the mid-1990s, all the important newspapers were run and dominated by journalists, and most of them played a significant role in the opposition victory in 1996. That ended Iliescu's reign, a decisive moment that put Romania into the orbit of Westernisation.

Over the next few years, until the early 2000s, journalists slowly lost ground to media investors, both national and foreign. Journalists lacked the financial means to develop their outlets, while the investors had the money and skills to do so. But the period when journalists dominated major media was far from a golden era in which heroic media professionals strived to serve the common good. It was actually the moral bankruptcy of the professionals that brought their downfall, in particular three factors.

- **Personalisation of the press:** The media outlets were less important than their directors or editors-in-chief. These were Popescu's or Nistorescu's newspapers. The media stars' personal idiosyncrasies dictated editorial policies, often for no other reason than, "I don't like this or that politician." This also led to fragmentation, as any journalist who began to gain notoriety tried to start his own (almost never her own) newspaper.
- **Uncertain revenue:** The media research, marketing and advertising industry was new to Romania, thus higher circulation did not assure higher revenue. Moreover, the fragmentation of the media meant that the total circulation of the top 12 Romanian national dailies barely reached the numbers of, for instance, the top newspaper in Poland. This made each unsustainable financially, and their directors had to negotiate both with private companies and the state to obtain advertising or "special deals." The entire market became easy prey for the businessmen and Western media companies that entered the Romanian market in the late 1990s.
- **Lack of professional ethics:** Because the directors' opinions were in fact editorial policy, the journalists dismissed any discussion about journalistic ethics as personal attacks. The many attempts by various NGOs to talk about rules of professional ethics were ignored, drew little reaction or were harshly criticised.

In the 2000s, the arrival of powerful Western media companies and the rise of local "media moguls" ended this short period of dominance by journalists. *Evenimentul Zilei* was bought by the Swiss Ringier, *Romania Libera* by the German WAZ, and *ProTV* by a regional media company. The market became less fragmented, but the journalists were sidelined from their positions of power and influence. Conflicts broke out between journalists and owners at each of the three leading newspapers: *Evenimentul Zilei*, *Romania Libera* and *Adevarul*.

The democratic coalition that led Romania between 1996 and 2000 started painful reforms of the stagnant economy. The economic difficulties that followed made the government unpopular. The permanent conflict among the four coalition parties gave the impression of chaos and instability, and many Romanians began to feel nostalgic about Iliescu's stable stagnation. Nevertheless, the coalition succeeded in putting the country on a strong pro-Western track, which led to the EU's decision in December 1999 to start membership negotiations with Romania.

During the 2000 elections, the disarray of moderate right-wing coalition parties led to a run-off between Ion Iliescu and the neo-fascist Corneliu Vadim Tudor, leader of the Greater Romania Party. The same media outlets that contributed to the defeat of Iliescu in 1996 had no choice but to support him to avoid a Tudor victory, seen as a danger to Romanian democracy. It was a mostly spontaneous campaign oriented against Tudor that all mainstream media supported and justified because of the circumstances.

Ion Iliescu regained power, and his party, now called Social Democrat Party (PSD), dominated a Parliament in which the opposition was split among the democratic right wing and Tudor's extremist party. Because Iliescu preferred to keep a low profile this time, the new strongman was Adrian Nastase, prime minister and formal leader of the PSD. Nastase was a pragmatist who kept the pro-Western tendency and succeeded in completing negotiations with the EU in 2004, with 2007 set as the accession date. Nevertheless, Nastase and his party's strong position led to some setbacks for democratisation. The media felt this change directly.

Freedom House evaluated and downgraded the country's press, calling it "partially free." Though not openly, Nastase tried to revive the role of the state in the media market by concluding shadow deals with media owners and awarding preferential public money to friendly media. All major media outlets owed money to the state from unpaid taxes, and the government and the owners made under-the-table deals. Essentially, these deals bought positive coverage for tax delays.

Another strategy was to buy advertising for public companies and institutions. Some of these were bogus ads, such as those for airports or national railway companies. A civic campaign against this practice gained the European Commission (EC)'s support. The EC wielded great power at that moment because of conditions the Romanian government was required to meet to complete EU accession negotiations. The NGOs involved in the campaign monitored the public money spent on advertising and revealed that the state was the biggest single buyer, at about €5 million each year. At least for the print media, these funds made the difference between profit and economic collapse. The problem worsened in 2003-2004, when some newspapers such as *Evenimentul Zilei* were forbidden to take public money. They later raised the issue on the public agenda.

Content monitoring data from that period showed Nastase to be the main media star on television, receiving overwhelmingly positive coverage. His image was more balanced in print media, and some newspapers were even openly hostile.

Facing the PSD's dominance, the democratic opposition united. The Democrat Party (PD) and National Liberal Party (PNL) made a deal to compete on a common ticket called D.A. Alliance ("Yes" in Romanian but also the abbreviation for "Justice and Truth"). The PD's leader, Traian Basescu, was to compete with Adrian Nastase in the presidential race (Iliescu had reached the two-term constitutional limit), and Liberal leader Calin Popescu Tariceanu was to be appointed prime minister. The 2004 parliamentary elections showed PSD and the Alliance finishing neck and neck. It was then up to the new president to appoint a prime minister, each side being able to reach a majority with the support of smaller parties and the Hungarian minority representatives. In a dramatic run-off, Basescu narrowly defeated Nastase and appointed Tariceanu as prime minister, although their personal relations were rather cold.

Basescu promised to reform the state and the economy and to fight corruption. But he is a divisive figure, openly attacking enemies and friends and criticising public institutions. He defends himself by claiming that the job of a directly elected president is to speak for the common people.

Romania has a rather eccentric semi-presidential system. The president supervises security and foreign affairs but has limited formal power outside these areas. Though both of Basescu's predecessors used their presidential powers to influence government and public institutions, Basescu's combative style annoyed other politicians and estranged Prime Minister Tariceanu. The relationship between Basescu and Tariceanu began to deteriorate in 2006, but the chief of the executive decided to expel the ministers of Basescu's party a year later, after waiting for the EU accession to be completed. Romania became an EU member in January 2007, and Tariceanu immediately excluded Basescu's Democrats from the government. They included popular Justice Minister Monica Macovei, a reformer and anti-corruption activist who had an important role in convincing Brussels that Romania deserved to be an EU member.

Basescu accused Tariceanu of making deals with powerful businessmen in search of political patronage. The political conflict between the president and the prime minister lasted until the new parliamentary elections in 2008. Basescu was isolated in his palace, with limited influence over policies, except in cases when he picked the fights and used the presidential power to temporarily veto legislation. He succeeded primarily in protecting the National Integrity Agency, a bold institution that charged numerous politicians with corruption. Such charges are rare in Romania. The influence of the European Commission, which still monitors the Romanian justice system, also helped. During 2007-08, the government and the ad-hoc majority in Parliament tried to intimidate the prosecutors by changing the legislation and parliamentary controls over their cases.

Tariceanu was the leader of a minority government supported by the Social Democrats. The new allies succeeded in keeping Tariceanu in power, as any change in the government leadership would have given an advantage to Basescu (the president appoints the prime minister). Romania became the second European country in modern times (after Lithuania) to impeach a president. The Parliament took this decision against the advice of the Constitutional Court, which decided that although Basescu was an unusually outspoken president, his behaviour was within the limits of the Constitution. Basescu was suspended from the office for one month until a referendum was organised in order to confirm the Parliament's decision.

Basescu campaigned as a defender of the people against the oligarchy and though the turnout was low, won with more than 70% of the votes. Though Basescu was back in power, this moral victory meant little for the government, which continued to have the support of PSD in Parliament. The cost of this opaque legislative majority was that Romania reached 2008 with a 5% budget deficit in the last year of economic growth. The sharp increase of public spending meant an increase in public sector wages and pensions – the PSD's conditions to support the government. The global economic crisis caught Romania with empty pockets and limited possibilities to increase public spending for anti-crisis economic stimuli.

During these years, the media followed the societal trend and split sharply into pro- and anti-Basescu camps. Many have argued that the media encouraged this division. Basescu continued to criticise the owners of TV stations (see below the description of media conglomerates in Romania). He faced a hostile media during this period, with limited support from some newspapers. He tried and partially succeeded in making the media seem less credible, helped by the poor image of media owners. Basescu called them “media moguls,” and the label stuck. A conflict rose among journalists, with Basescu's enemies vigorously attacking any journalist who might have said a nice word about the president. At the same time, the other side called the anti-Basescu journalists puppets of their owners.

The 2008 parliamentary elections failed to produce a convincing majority. The Liberal Party of PM Tariceanu took 20%. Basescu's Democrat Liberal Party (the PDL, renamed after receiving some pro-Basescu liberal defectors) and the old PSD, led now by the former diplomat Mircea Geoana, again finished neck and neck with about 30%, and with PDL having only two more MPs. The agreement between Liberals and Social Democrats to force the hand of Basescu in appointing their prime minister failed, and a historic deal was made between PDL and PSD.

Emil Boc, the formal leader of PDL and Basescu's right-hand man, was appointed prime minister, and Geoana took the second state position as leader of the

Senate. The two parties shared the ministries equally, but this grand coalition lasted less than a year. The PSD left the government and a new party was created within the Parliament from Liberals and PSD defectors. This new party supported Emil Boc as prime minister and a new clear pro-presidential majority was created. Basescu finally saw his dream to control the government come true. But this came when a severe economic crisis hit Romania, and Boc had to cut public spending, including public sector wages and pensions.²

The new measures were unpopular, and the government's popularity and Basescu's personal rating dropped to historic lows. The hostility between the president and a large part of Romanian media had perverse effects for both. The president needed public support for the necessary measures to reduce public spending, but the media blamed him for all the country's economic problems. The media was one of the industries most affected by the economic crises, but the political wars the media outlets were engaged in made them vulnerable.

2. The media landscape in Romania

2.1 The media market

The print media

More than 1,200 new titles flooded the market within a year after the Romanian 1989 revolution. Twenty years later, there are still about 20 Bucharest-based daily newspapers, 14 of them with reliable circulation figures. The larger cities in the country have three to four local daily newspapers, although few are able to function as market-oriented outlets. Most are essentially covert public relations operations for local politicians and business circles.

The Romanian Audit Bureau of Circulation (BRAT) was founded in 1998 as an independent, not-for-profit organisation to provide reliable circulation figures. It was a civic initiative that included big advertisers and the main newspapers, and it represented a significant step forward for the media industry. Most advertising agencies have set the existence of a BRAT certificate as a precondition for allocating any advertising contract. The system is largely functional but is still often perverted by the influence of the state and the powerful position of the intermediaries – especially advertising agencies that give huge rebates, mostly for the personal benefit of some of the industry's executives. BRAT also developed the National Readership Survey (SNA), a research tool that approximates the total number of readers for publications and establishes their demographic profiles.

BRAT currently audits 14 national newspapers, 65 local and regional dailies, and 150 weekly and monthly publications.³

² The Constitutional Court later rejected the decision to reduce pensions, which forced the government to increase the VAT.

³ Audit Bureau of Circulations (BRAT), official website available at: www.brat.ro (last visited on 03/08/2010).

Table 1: Top 10 national dailies

	Title	Circulation	Category of journalism
1	Click	332,279	Yellow
2	Libertatea	209,465	Yellow
3	Adevarul	141,330	Quality
4	Cancan	114,790	Yellow
5	Jurnalul National	77,914	Quality
6	Gazeta Sporturilor	69,145	Sport
7	Romania Libera	59,685	Quality
8	PRO Sport	54,713	Sport
9	Evenimentul Zilei	40,635	Quality
10	Gandul	26,733	Quality
	Total	1,126,689	

Note that dailies in the yellow journalism category hold three of the top five spots. The only quality newspaper with more than 100,000 circulation is Adevarul, which has an aggressive promotional policy with permanent inserts (books, movies, DVDs). The numbers for Adevarul represent a mean for the audited period; without the inserts, its circulation is half of this figure.

Table 2: Top 10 regional and local dailies

	Title	Circulation	Region
1	Gazeta de Sud	22,271	Oltenia, south west
2	Unirea	21,255	Transylvania, west
3	Jurnal Aradean	18,751	Banat, west
4	Jurnal Bihorean	14,364	Western Transylvania
5	Informatia Zilei	14,300	Northern Transylvania
6	Bihari Naplo	13,420	Western Transylvania (Hungarian language)
7	Renasterea Banateana	12,944	Banat, west
8	Viata Libera	9,333	Southern Moldova
9	Monitorul de Suceava	9,304	Northern Moldova
10	Editie speciala	9,215	Oltenia, south west
	Total	145,157	

The print media's distribution system is a continuing problem. Rodipet was once the state monopoly for press distribution, but it was inefficient, consistently delayed payments to media outlets, and often paid in a preferential order. Despite controversy, the company was privatised but remained inefficient, lost market share and in 2009 went bankrupt. This caused losses of about 300,000 to 400,000 euro for the major publishing companies. One of them, Adevarul Holding,⁴ lost 1,000,000 euro. Some of the media conglomerates started their own distribution services. Adevarul Holding is leading the way, after suffering the huge loss from Rodipet's bankruptcy. But the distribution market is fragmented, with many local or regional players. A newspaper trying to cover the entire national territory has to deal with numerous minor players, with separate contracts and inefficient payment systems. As for the subscribers, the Romanian Post Company is notoriously inefficient and distributes the newspapers in the afternoon, which makes the subscription system unattractive.

The broadcast media

Besides the six public television channels, there are eight generalist TV stations in Romania, three sports-oriented stations and four news stations. Realitatea TV started in 2001 as the first news station, trying to follow CNN's model. Limited resources forced it to offer a combination of news (mostly national, with limited interest in foreign affairs) and endless talk shows. Realitatea never attracted large audiences but it did make the politicians' agenda. Thus the model was copied.

Antena 3 was the second TV news station, and its more aggressive attitude attracted some attention. Antena 3 was also firmly anti-Basescu, and largely seen as a propaganda tool against the President. But after a conflict between Basescu and Realitatea TV's owner, that station also turned against Basescu. The two now compete to see which can be more anti-Basescu. The President's response was to try to create his own news station, Vox TV, formally owned by a business person seen as close to Basescu. But the new station failed to become an influential voice. In 2008, public TV launched its own news station, but because of a lack of investment it remains largely ignored.

The way these TV news stations operate might be seen as a metaphor for Romanian media: extreme fragmentation, politicisation and preferential arrangements between the owners and the state.

⁴ "Cel mai negru an al presei scrise: 50 de milioane de euro pierderi în 2009" [The toughest year of print media: 50 million euro loss in 2009], paginademedia.ro, 23/07/2010, available at: <http://www.paginademedia.ro/2010/07/cel-mai-negru-an-al-presei-scrise-50-de-milioane-de-euro-pierderi-in-2009/> (last visited on 10/10/2010).

Table 3: Top ten TV stations (in prime time, for 2008⁵)

	TV station	Thousands of viewers	Profile
1	Pro TV	719	Generalist, entertaining
2	Antena 1	540	Generalist, entertaining
3	Acasa	403	Women's magazines
4	TVR 1	270	First channel of public TV
5	Prima TV	230	Generalist, entertaining
6	Kanal D	201	Generalist, entertaining
7	Realitatea TV	164	News
8	OTV	162	Generalist, entertaining
9	Antena 3	120	News
10	National TV	112	Generalist, entertaining

Public television and radio

Romanian Television (TVR) has six channels, but its influence has faded in the past few years, with its audiences collapsing. Mismanagement and political influence over the company took their toll. TVR is far from the powerful political instrument it was in 1990s. It looks now to be a behemoth incapable of reform, losing the battle with private stations. The main problem seems to be the direct link between the electoral cycles and TVR's management changes. Under a 1995 law, TVR's board of directors is appointed by the Parliament, the President and the government. Employees also elect their representative on the board. Although officially the board's term of office is not linked to a change of the majority in Parliament, the legislature can dismiss the board. Each new government treats TVR as being among the victor's spoils.

Efforts were made to change the law, and after 2004 a draft was negotiated in Parliament with the media freedom NGOs. The groups had endorsed the final version prepared by Raluca Turcan, head of the Media and Culture Committee of Parliament. But political tensions killed the project. Turcan was among the liberals to defect in Basescu's party, and she lost her position within the Parliament. Basescu refused to appoint his own representatives to the board of TVR until the law was changed. But PSD and the liberals went on, appointing their own people to the board and capturing TVR for the following years. Alexandru Sassu was named general director of TVR, coming directly from the position of PR chief executive of PSD. This was against the tradition of appointing professionals to lead TVR, although each party had its own preferred professionals. Sassu's appointment was a direct recognition that TVR was an instrument for his party. During his term, TVR lost audience share and is now in the second tier of Romanian television. After the 2008 elections, Traian Basescu took his revenge. He ignored the plan to change the 1995 law, and his party now dominates TVR's board. Sassu was replaced by Alexandru Lazescu.

⁵ "Audiențe TV" [Number of TV viewers], [Paginamedia.ro](http://www.paginamedia.ro), available at: <http://www.paginamedia.ro/audiente-tv/> (last visited on 12/10/2010).

But the way general directors are now appointed is only part of TVR's problem. After years of politicisation and neglect, TVR has structural problems. First, the political parties negotiate among them the places in the board. The people thus appointed act openly as representatives of their parties. They see their role as making the president of the party look good on TVR news. Second, after politicisation came incompetence and a lack of accountability. In the second half of 2008, TVR launched two new channels, including TVR Info, a news station. But TVR Info mostly transmits live static images from several public locations. TVR is directly subsidised by Romanians through compulsory subscriptions for households and companies. Though it has this competitive advantage over private stations, it still lost viewers. Between 2004 and 2008, TVR registered a 73% decline in total audience and its financial deficit for 2007 totalled 8.8 million euro.⁶ TVR's management of human resources also is a problem, with its perverse system of incentives. Though wages are substantial, they do not depend on performance. After conflicts with the management, some pre-eminent personalities at TVR were sidelined but continued to receive their salaries, because their jobs are protected by law. The situation is further complicated by powerful unions (which are concerned only with salaries and benefits, not ethical issues) and highly restrictive rules for hiring, promoting, punishing and firing people.

While less exposed to political scandals and pressure, public radio is in only slightly better shape. Maria Toghina, the young reformist manager appointed in 2005, actually limited reform initiatives to surface changes in order to preserve the status quo. She was replaced in 2009 by a representative of the Hungarian minority party, part of a larger deal within the government coalition.

Advertisement market

In Romania, 2008 represented an advertisement market peak, with about 540 million euro spent, the lion's share going to TV stations. The biggest advertisers are the multinational companies such as Procter & Gamble, L'Oreal, Unilever, and Coca-Cola.

Table 4: Total advertisement spending in Romania – 2006-2010⁷ (million euro)

Media category / Year	2010	2009	2008	2007	2006
TV	209	222	337	306	229
Print	27	37	82	79	71
Radio	23	25	35	30	23
Out-door	35	42	70	58	40
Internet, Cinema	14	13	16	9	6
Total	308	339	540	482	369

⁶ P. Barbu, "TVR este în criză de bani și audiență" [The Romanian public television faces a crisis of money and audience], *Adevarul*, 22/01/2009, available at: <http://www.mediafax.ro/revista-presei/tvr-este-in-criza-de-bani-si-audienta-3783061> (last visited on 10/10/2010).

⁷ Figures provided by Initiative monitoring company, published in *paginademedi.ro*, available at: <http://www.paginademedi.ro/cifre-utile> (last visited on 10/10/2010).

Note the sharp decline in 2009 and 2010 caused by the economic crisis. As the advertising budgets of companies decreased, they tended to concentrate on what they considered the most effective media – TV stations. Thus the print media was disproportionately affected. An independent analysis of the fiscal declarations of media companies indicated that the print media lost 50 million euro in 2009.⁸ Comparing this figure with the above table, it is evident that in 2009 the print media lost more money than total advertising revenue. Two of the pre-eminent central newspapers – Ziua and Cotidianul – closed in 2009. All media companies were forced to lay off employees, cut wages, or both.

Media online

According to the International Telecommunication Union (ITU), the leading United Nations agency for information and communication technology issues, 35.5% of Romanians have Internet access in 2010, and the pace of growth is significant.

Table 5: Internet Usage and Population Statistics

Year	No. of Users	Total Population	% Pop.	Usage Source
2000	800,000	22,217,700	3.6 %	ITU
2004	4,000,000	21,377,426	18.7 %	ITU
2006	4,940,000	21,154,226	23.4 %	C.I. Almanac
2007	5,062,500	21,154,226	23.9 %	ITU
2010	7,786,700	21,959,278	35.5 %	ITU

The online outlets are growing fast and have begun to compete with mainstream media. The online news portal Hotnews.ro remained one of the few independent influential voices operating outside the major media conglomerates. It often succeeds in shaping the public agenda. The online outlet also hired some reputable journalists from radio and TV who had fallen out of favour with big media owners. All print newspapers have an online version, even the smaller ones, and they often gather more readers than their print versions. Because the online advertising market is still limited, the online success of newspapers only aggravates their economic troubles. Some of the print outlets that failed to survive the economic crises remained online only, hoping to maintain their core readers until the situation improves.

In 2008, BRAT started to audit the websites' audiences. The new service is contested in the industry, which is hesitant to accept a unitary monitoring system, as was the case with print media 10 years before.

Facebook started later in Romania and still does not have its Code of Conduct translated into Romanian. It regained ground in 2009–2010, and now has more than 1.3 million Romanian users, 10 times more than the previous year. Women represent 52% and men 47% of the users. Most are 18-27 years old, and 24% of Romanians

⁸ "Cel mai negru an al presei scrise: 50 de milioane de euro pierderi în 2009", Paginademedia.ro.

who are 19 years old have a user account, with 22% of 21 year olds. Only 6% of people 30-40 years old have a Facebook account. In Eastern Europe, Romania is behind Serbia, Bulgaria and Hungary but ahead of Moldova and Ukraine in the number of users.⁹ Facebook is often used to organise spontaneous protests, as in September 2010 when over 70 journalists organised a flash mob outside the Finance Ministry to protest changes in the tax system. Blogging was a trend in 2007–2009, sparking debate over whether blogs would replace traditional media. Several prominent bloggers maintained public sites, but only several succeeding in making a living from blogging. The number of active blogs is now decreasing, and twittering appears to be the latest fad.

News agencies

The most important news agency is the privately owned Mediafax, which has been the dominant player on the market for the past decade. The state-owned AgerPress is largely irrelevant, both for the general public and for the journalists, because of its poor reporting. AgerPress is formally controlled by the Parliament, but because it is powerless to influence the public agenda, the legislature shows no interest in it.

Many editors complained that Mediafax's dominant position led to high prices, and an important new player arrived in 2006. The media group owned by Sorin Ovidiu Vintu (see the section on media conglomerates) launched the NewsIn agency to compete with Mediafax. The competition forced Mediafax to decrease prices and to be more flexible in negotiating contracts. But NewsIn did not survive the economic crises and in 2009 became a limited online operation.

Media concentration

We described in the introduction the changes in Romanian media after 1989, from a phase in which the state and journalists were competing for power, to the current situation in which the main media outlets have become concentrated in the hands of powerful businessmen. There are five major media concentrations in Romania, and we will describe them starting with the person who controls them:

- **Sorin Ovidiu Vantu:** A highly controversial businessman who prefers to keep a low personal profile. Though he had been convicted of common felonies during the communist period, Vantu built his fortune by organising a network of former Securitate agents. In the late 1990s, he organised an investment fund that was in fact a Ponzi scheme that benefited from protection within the state. The fund eventually deprived 300,000 Romanians of their life savings. Some of the managers were prosecuted, but not Vantu. The media savagely attacked him, but Vantu later began to build his own media empire. He bought the first Romanian news TV station, Realitatea TV, using an off-shore entity registered in Cyprus, though he later acknowledged that he owned the TV station. From 2006 to 2009, Vantu expanded his empire to 14 print outlets, three television stations and a radio network. He had a policy of aggressively attracting journalists from other outlets with high salaries, and ended up having on his payrolls most of the pre-eminent journalists. This venture was never profitable, and it collapsed in 2010 when Vantu

⁹ Internet World Stats, usage and population statistics, "Romania", available at: <http://www.internetworldstats.com/eu/ro.htm> (last visited on 03/08/2010).

restructured his investments. He sold all publications to their employees, but most of the outlets later disappeared. He closed the radio network and kept only Realitatea TV, because of the station's influence. Vantu was openly involved in the 2009 presidential campaign, calling for the other parties to isolate Traian Basescu, whom he called dangerous. Basescu in turn attacked Vantu, calling him an example of the oligarchy that threatens Romania. Basescu's opponent, Mircea Geoana, paid a controversial night visit to Vantu four days before the election run-off. Basescu asked about this visit in the final electoral debate, taking everybody by surprise, including Geoana, who did not have a reasonable explanation. Many think this incident cost Geoana the victory, since Basescu won by only several thousand votes.

- **Dinu Patriciu:** Another highly controversial businessman and former liberal politician, Patriciu is the richest Romanian. He was involved in the oil industry and later was prosecuted for manipulating the stock exchange. He became involved in the media industry quite recently, buying the newspaper Adevarul and creating Adevarul Holding, a network of print outlets with an aggressive marketing strategy. Adevarul Holding now owns the top circulation newspapers in the yellow and quality segments (see table 1). Patriciu is an old enemy of Traian Basescu, and they often publicly attack each other with harsh remarks.
- **Adrian Sarbu:** The only one among the so-called “media moguls” whose business is only in media. Sarbu created the first private news agency, Mediafax, in the early 1990s and the first professional private TV station, ProTV, in 1995. He later sold them to CME, a regional media organisation, and remained as CEO of the company. CME has outlets in Czech Republic and Bulgaria. Sarbu controls five television stations (Pro TV remains the leading TV station in Romania), several Bucharest-based publications, one radio network, a network of local newspapers, and the main news agency. He has not been involved in politics except during the Nastase government. A persistent rumour at that time was that he made a deal for positive coverage of the prime minister in exchange for delaying some debts payment the company owed to the state. Pro TV and other outlets he owned then almost completely withdrew from reporting politics, concentrating on entertainment, which is still the case. In 2008,¹⁰ the TV stations he controlled received 36% of the total TV advertising volume in Romania.
- **Dan Voiculescu:** A former agent of Securitate (declared as such by the Romanian equivalent of the Gauck Commission), Voiculescu was said to have confiscated the shadow money that Nicolae Ceausescu owned in foreign accounts – an accusation he vehemently denies. Voiculescu made money in the early 1990s in foreign trade, an industry that was then still controlled by the state. Later he made money on favourable deals with the state in the energy sector. He started his media empire by creating Jurnalul National, one of the first private newspapers, and later with Antena 1, the second private TV station. He controls five television stations, six Bucharest-based publications, and a number of radio stations. His TV stations received 18% of total TV advertising money in 2008.¹¹ Most notably, his company

¹⁰ P. Barbu, “Cum a fost împărțit *tortul* reclamelor TV” [How was the advertisement's pie split?], Adevarul, 13/01/2009, available at: http://www.ziaresireviste.ro/index.php?page=revista_presei&details=on&id=20108 (last visited on 10/10/2010).

¹¹ Ibid.

launched Antena 3, the second TV news station, which takes sides openly in politics. In the late 1990s, Voiculescu founded the Conservative Party (PC), a small party that despite its name is left-leaning. PC never entered Parliament on its own merits, but made deals with the Social Democrat Party to receive eligible places on the tickets in exchange for positive coverage for PSD in Voiculescu's media. He was vice president of the Senate and led the parliamentary committee (called the Voiculescu Committee), which started the prosecution that led to Traian Basescu's impeachment in 2007. He is a fierce opponent of the President, and his media outlets have always been openly anti-Basescu.

- **Ringier:** This foreign company based in Switzerland was the biggest foreign investor in Romanian media for many years. At one point, Ringier controlled the leading quality newspaper (Evenimentul Zilei), the leading sport newspaper, the leading yellow daily (Libertatea), and the leading economic publication (Capital). But its market share had declined, and it sold Evenimentul Zilei and Capital to the Paunescu family (see below). Ringier is seen now as a minor player, only owning Libertatea. Serious rumours suggest that the company will soon abandon its operations in Romania.
- **George Constantin Paunescu:** He was a trader and banker during Ceausescu's regime and thus always suspected of having connections with the former Securitate. He made a fortune in the 1990s by taking loans from the state-controlled banks but never paying back the money. His brother (a former official journalist during communism) founded Curierul National newspaper in the early 1990s. Later, the family founded B1 TV, a small station with limited influence. In 2009, the Paunescu family entered the big league of Romanian media by buying the influential Evenimentul Zilei. Since its TV station, B1, was the only one that supported Basescu in the 2009 presidential election, the move was largely seen as an attempt by the President's party to develop a friendly media conglomerate to balance the hostile ones, using the Paunescu family as intermediaries.

In 2008, the six conglomerates controlled about 90% of national newspapers in terms of circulation. They had 45% of the television audience market,¹² counting together the outlets now owned by Ringier and the Paunescu family. Property concentration seems to be a natural process, and having six conglomerates presents no obvious monopoly danger. Still, when these conglomerates tend to orchestrate their positions, a cartelisation occurs. This was the case in the electoral campaigns in 2007 (the impeachment referendum), 2008 (parliamentary elections) and 2009 (presidential elections).

Some disagreement existed among the big owners. In 2004, a media war broke out between Sorin Ovidiu Vantu and Dan Voiculescu, each using his own outlets to attack the other. Accusations of illegal acts by Vantu flooded Voiculescu's outlets, and vice versa. But the old enemies were later united by their mutual antagonism toward Traian Basescu.

¹² I. Comanescu, "Cum s-a impartit presa la mogulii in 2008" [How the press was split between moguls in 2008], available at: <http://www.comanescu.ro/cum-s-a-impartit-presa-la-moguli-in-2008.html> (last visited on 10/10/2010).

2.2 Journalists' background and education

In Romania, there are no formal barriers to becoming a journalist. One of the leading journalists' associations discussed the possibility of requiring licences to enter the profession, but the idea was dropped. Journalists do need accreditation to enter certain institutions. The Freedom of Information Act adopted in 2001 has a special chapter meant to protect journalists. This came after some abuses committed by Parliament against journalists who reported on the institution's spending. The act specifies restrictive conditions in which accreditation could be withdrawn if a journalist seriously disrupts an institution's activity.

There are 20 university journalism programs in Romania, both public and private. The average number of students per class is 60, so a large number of young would-be journalists graduate each year. But professionals in the field have doubts about their practical skills. A focus group consisting of senior editorial staff concluded that less than 20% of those who enter the profession graduated from journalism programs.¹³

Work force legislation in Romania is inflexible and encourages collective bargains, but is seldom implemented. In each industry, trade unions and owners' associations negotiate collective contracts that become compulsory for the entire industry. The negotiators often are not representative, as both union and owners' organisations are fragmented. A trade union that represents the journalists (although few actually belong to the organisation) signed such a collective contract with an owners' association that did not include media businesses. The contract nevertheless became compulsory, on paper, though it was largely ignored. After this contract, the minimum wage for the media industry is the national one plus 10%. Between 2005 and 2008, the media boom led to an inflation in journalists' salaries, and those with experience usually earned five to 10 times the national average wage. The entry level wage in a national newspaper was about 500 to 600 euro, while at the middle level the average was 2000 to 3000 euro. A particular problem was the widespread practice of splitting these amounts among permanent working contracts (with the minimum wage) and paying the rest in temporary intellectual rights contracts to avoid paying benefits such as pension and health insurance. Successive governments accepted this situation, although it was illegal, and the practice was seen as an informal form of subsidising the media industry.

In 2009 and 2010, with the decrease in advertising revenue, most media outlets fired people – up to 50% of the employees in Sorin Ovidiu Vantu's company. Dan Voiculescu and Adrian Sarbu cut wages 20 to 30%. To make matters worse, the state suddenly became severe with the previously accepted practice of avoiding social taxation. It was found that at Vantu's company, even drivers were paid using the intellectual rights contracts. Fiscal authorities later leaked information about journalists' earnings to an obscure newspaper. In August 2010, the government changed the law, practically forbidding the intellectual property contracts, renaming them "independent activities" and imposing social duties on them. To pay the new taxes, each journalist (but also actors, painters, and others) had to go each month to three different institutions – pension, health and employment authorities. This infuriated the journalists, and a petition calling for a fiscal strike was signed by more than 6000 people in August and September. The government changed the payment

¹³ Media Sustainability Index 2008, "Romania", available at: http://pdf.usaid.gov/pdf_docs/PNADL578.pdf (last visited on 05/10/2010).

method, but the new taxation remained in place, further decreasing media industry revenue.

2.3 Media literacy and media status in society

Entertainment TV draws the top audiences for television and yellow journalism the top circulation for print media (see tables above). Yellow and sport print newspapers have about 80% of total circulation. The editors blame the public for this trend,¹⁴ saying they just provide what their readers and viewers want: stories about rapes, crimes and shallow lifestyles. One recent phenomenon became known as OTV-sation. OTV is a local station, started with limited resources by Dan Diaconescu, a journalist. Without money to buy or produce content, Diaconescu simply transmitted live shows with bizarre topics and characters, mostly involving crime. He approached politics only as a matter of conspiracy and populism. OTV had some success, and gained some legitimacy because Diaconescu often invited President Basescu to appear on air. The President said he accepted because he needed to communicate with the people, since the other television stations were hostile toward him. As Diaconescu seemed to attract audiences, his practices were copied by mainstream outlets. This created the OTV-sation trend, in which crime and lifestyle stories also dominate the main news programs of mainstream stations. Diaconescu built a personal fortune of 30 million euro by taking unofficial payments from everyone who wanted to appear on his shows. In 2010, the National Anti-Corruption Office arrested Diaconescu and accused him of blackmailing a local mayor. He was later released and claimed the case was politically motivated. He declared himself disappointed by the entire political class and announced the formation of Party of the People. OTV suddenly became a live show on how to create a new party. The party is estimated by some opinion polls to have attracted about 10% of voters.

The war between President Basescu and the media owners had a collateral victim: journalists who try to maintain balance and independence in their reporting. The President often attacked journalists indiscriminately. This caused his supporters to react sharply to any criticism of Basescu, no matter how accurate. Because the other side also attacked journalists without making distinctions, some professionals abandoned journalism all together, saying the atmosphere had become too toxic.

3. Media policy in Romania

3.1 Actors of media policy and regulation

No ministries or other executive branches of government oversee Romanian media. Public television is managed by a board whose members are appointed by the President, the government and the Parliament. The state-owned news agency, AgerPress, is under direct parliamentary control. But the regulations for print media and electronic media differ significantly. There are no legal rules for print media, other than general legislation, and there is no state body to control print media. But TV and radio have special legislation on licensing, monitoring and limits on content. The National Council of Broadcasting (NAC), which is formally an autonomous body subordinated to the Parliament, implements the rules. The eleven NAC members are appointed by the President, the government, and the Parliament. As in the case of

¹⁴ Explanation offered for the Media Sustainability Index 2009, "Romania".

public television's board, however, this formal arrangement does not prevent the politicisation and political wars around the institution. The current president of NAC was appointed at the same time as Alexandru Sassu at TVR (see the previous chapter) as part of a deal between liberals and social democrats. NAC went to liberals, public television to the social democrats. The institution was fiercely criticised for how it managed the licensing process.¹⁵ Each company that wants to obtain a licence has to present a complete dossier on content. But the process of evaluating the dossier was subjective and political favouritism was alleged. Since 2008 there have been no more scandals about licences, since there were no more airwave licenses to grant.

With all its problems, NAC plays an important role in maintaining minimal decency standards for TV stations. Its most prominent "client" is OTV. NAC imposed numerous fines against OTV and even ordered a three-hour interruption of its broadcasting. Despite its attempts, NAC seems too weak to fight the trend toward triviality on Romanian television. OTC fought back and launched a campaign against CAN, with the slogan "Hands off the people's television." Although it was in its legal right to remove the station's licence, NAC did not take that step. CAN also has other permanent "clients," such as Mircea Badea, a television host who uses injurious language and even threatens to physically assault people who annoy him.

Both OTV and Mircea Badea are popular and have good ratings, which makes NAC an unpopular body. It is not helped in its attempts to regulate the media by the secrecy in which its collective decisions are made and the lack of an appealing president or spokesperson to represent the institution in public debates. Some of its members' behaviour further weakens the institution's position. For instance, a person appointed by the President of Romania to NAC was later openly involved in the President's electoral campaign. NAC has also taken on some debatable cases, such as the fines it decided to levy against some radio hosts who mocked the poetry of the "national poet" Mihai Eminescu. But such actions are allowed under freedom of expression, without violating the decency principles, which should be NAC's main focus. In another case, NAC forbade a television advertisement about a group of workers destroying some architectural artifacts, saying the public might follow their example.

The Romanian Press Club (RPC) was once the most influential media organisation in Romania. Its history provides a good illustration of how the Romanian media has changed since the 1990s. The club was created in late 1990s as an association of powerful editors and journalists who were in control of the media at that time. It was led by Dumitru Tinu, the leader of *Adevarul* newspaper. Tinu was himself a controversial figure. After the privatisation of the newspaper, the shares were distributed among the journalists. Tinu bought the shares from his colleagues, but the source of the money was never revealed. Tinu died in 2001, and the newspaper was bought from his family by Dinu Patriciu, who created the current *Adevarul* Holding around it. Under Tinu's leadership, the club behaved as a close circle of powerful insiders who wanted to influence the government to their benefit. One of the informal rules that was rumoured to be in effect during that period said that members of the RPC would not hire a journalist who resigned (or was ousted) from another media outlet member of the club as the result of a conflict with management. After 2001, the club was led by Cristian Tudor Popescu, a charismatic journalist who worked with Tinu at *Adevarul* but left the newspaper after Tinu's death to create his

¹⁵ Media Sustainability Index 2005, 2006 and 2007 "Romania".

own publication. Popescu was more respected by the community and tried for several years to open up the club, forming partnerships with the media specialised NGOs. But the club itself had to change because the media industry changed. All the powerful editors who controlled the newspapers sold them to investors, either foreign companies or local business persons. Thus, the club was led formally by a journalist, but the majority of its members were now corporate representatives of media conglomerates. The new media moguls were able to strike a deal with the politicians on their own and did not need the club. After he sold his newspaper to Adrian Sarbu, Popescu tried to rally the journalists against the owners. He split the club into two separate organisations. The old club remained a representative of the owners and is now led by a low-profile person working for Sarbu. Under Popescu's plan, the journalists who formerly belonged to the club were supposed to create the Association of Professional Journalists to represent them. The association was created but is largely dormant. The rise and fall of the Romanian Press Club reflects the short story of the decline of the journalists' power and the rise of the owners' influence.

Journalists in Romania remain generally sceptical of joining a trade union. MediaSind union started as a marginal voice, became more vocal during the economic crisis, but still was unable to do anything about the layoffs and salary cuts. Few journalists belong to the union, which is mostly based in the public outlets. In 2004, MediaSind signed a collective contract for the media industry with an association of owners that did not include media businesses. The companies represented in the Romanian Press Club rejected the contract and never fully implemented it.¹⁶ The contract also established "the clause of conscience" as one of the fundamental labour rights for journalists, although the clause was not used by the journalists in their conflicts with the owners.

The Association of Local Publishers (APEL) gathers the most important local newspapers in terms of circulation, mainly those audited by BRAT, the circulation auditing office. APEL represented its members in some important conflicts, especially with the Romanian Post Office, which tried to increase its fees on the distribution contracts. APEL also supported some training and best practices projects for members who are interested in dissociating themselves from the majority of local newspapers, which do not have reliable circulation numbers.

Broadcasters have their own organisation, called the ARCA, which acts as a typical lobbying group in the interests of the industry. It is not involved in editorial matters. There are about 40 journalists' associations organised as NGOs, but most are low-profile, inactive or ineffective. There are some traditional media watchdog NGOs. Most important are the Centre for Independent Journalism (CIJ), Media Monitoring Agency, and the Romanian Helsinki Committee. They were traditionally financed by money from international donors supporting democratisation. After 2007, when Romania entered the European Union, the groups began to face financial difficulties because the country is now considered a mature democracy, and donors shifted their attention to other regions. The NGOs act as an informal coalition on political issues involving the media, for example, on legislation before the Parliament. They also try to create legal precedents by focusing on controversial cases involving freedom of expression.

¹⁶ The contract is compulsory for the industry under the law, but the state showed little appetite for enforcing it.

3.2 The media regulatory framework

3.2.1 Freedom of expression and information

Most experts agree¹⁷ that there are no problems with the legal framework in Romania, but enforcement is often defective. Social and political attitudes threaten freedom of expression more than the laws and public institutions. The Romanian Constitution guarantees freedom of expression and of speech. Parliament also changed the penal code after pressure from the European Commission during accession negotiations. An article in the code against spreading false information that could damage the country's national interests was abandoned. In 2004, the burden of proof provisions were aligned with those of the European Court of Human Rights. In 2006, after much resistance, Parliament passed a law eliminating prison terms for libel. The Constitutional Court later ruled that the new law was unconstitutional, because a person's honour cannot be repaired with money and treated as a commercial matter. The court's decision should be followed by a revised law from Parliament, but lawmakers did not act upon it. Legal experts debate what is the current situation: should Romanian judges stop sentencing people to jail after the court's decision or should they fine them, following the law? Fortunately, no journalists have been sent to jail because of this provision, and the case seems to be tacitly settled in favour of abandoning jail terms.

But journalists have been fined large amounts as damages for their reporting. The mayor of Constanta, Radu Mazare, won a case against journalist Feri Predescu, who wrote about connections between the mayor and some controversial businessmen. Although her article was solidly documented, Predescu was ordered to pay 20,000 euro to the mayor.

3.2.2 Structural regulation

The National Council of Broadcasting (NAC) is the body charged with issuing broadcast licences. NAC began operating in 1992 and distributed all available licences until 2008. There are now 387 television licences and 704 radio licences granted by NAC (national TV stations usually use local or regional licences to cover the national territory).¹⁸ The granting process was controversial and politically influenced, because the media groups competed fiercely for them. In recent years, NAC has made some positive steps, becoming more transparent. Its website periodically publishes information about licence holders, including their shareholding structure. But NAC adopted a passive stance, publishing official information it receives from the broadcasters, even though there have been cases in which powerful people use intermediaries as formal owners. For example, Sorin Ovidiu Vantu controls a media empire without formally owning it.

The transparency of the ownership is not a serious problem in Romania, however, because everybody knows who owns what. The political war between the major media owners and President Basescu raised the visibility of the ownership. The owners are often the real media stars of their outlets, more so than the journalists.

¹⁷ Conclusion of the focus group organised for the Media Sustainability Index 2008 and 2009, "Romania".

¹⁸ National Council of Broadcasting (NAC) official website, available at: <http://www.cna.ro/-English-.html> (last visited on 30/08/2010).

Print and Internet outlets have no legal requirement to disclose their ownership, although this information is widely available.

The broadcasting law (art. 44) contains a provision meant to prevent media concentration. The article states that no broadcaster should have more than 30% of a certain market. But it is unclear whether this is about audience, advertising or another indicator. It may also be the case that none of the six media conglomerates has such a dominant position, but this should be determined by NAC with a measuring instrument tailored to the provisions of Article 44.

There are no other restrictions on ownership. Local or international companies, associations or religious groups may start a media business in Romania.

3.2.3 Content regulation

In order to obtain a licence from NAC, each broadcaster has to complete a dossier with details about the programs. The law contains no specific provisions, other than requiring a minimal amount of European production to balance American movie production. NAC is not active in monitoring the content, and there have been cases when broadcasters changed the content on which they obtained the licence. To protect children, there are provisions against pornography. Each TV program also has to specify the ages it addresses, and the programs for those older than 16 must be broadcast later in the night.

NAC created some special regulations to maintain the political balance of news and talk shows. This began in 2004, when the overwhelmingly positive coverage of the Nastase government triggered protests. NAC then required at least 30% of coverage be of the opposition's opinions. This regulation was ignored during the conflict between Basescu and the government, and it was difficult to determine who was in opposition. The major media's hostile coverage of Basescu also was ignored, because the NAC was dominated by representatives of the liberals and social democrats.

In 2008, liberal MP Iona Ghise and nationalist Gheorghe Funar co-sponsored a law that required television and radio stations to ensure that half of their news coverage consisted of "positive news." The exact definition of what is "positive" would have been determined by NAC, but the council publicly protested against the law, saying it was impossible to implement. Parliament nevertheless adopted the law, but it was later vetoed by President Basescu.

Various organisations have developed professional and ethics codes for journalists, but none has been consistently implemented. They are not even followed within the industry. The Romanian Press Club has its own ethics code but was not active in implementing it. The media companies have no internal codes and tend to solve problems on a case-by-case method.

Some high-profile scandals have occurred in recent years involving journalists breaching elementary ethics standards. Bogdan Chireac was the first journalist in Romania to resign because of a conflict of interest. He was deputy director and a shareholder of Gandul newspaper, which was founded and led by Cristian Tudor Popescu. Chireac was also a daily presence on TV screens as a security and foreign affairs analyst. At the same time, however, he secretly owned a company that sold communication equipment to the Romanian secret services – the same people he was

analysing on TV. Another newspaper published this information, and Chireac was forced to resign from the newspaper. He was later involved in a case in which, together with another controversial journalist, Sorin Rosca Stanescu, he blackmailed the president of the National Integrity Agency to obtain information about some ministers' foreign bank accounts. The Romanian Press Club and other media organisations protested his behaviour. After several months out of the public eye, Chireac is now a daily presence as a political pundit on Realitatea TV talk shows. His personal friendship with owner Sorin Ovidiu Vantu might explain his public survival despite the scandals.

4. Media policy and democratic politics: an assessment

The flowering and then the decline of Romanian media in the 20 years since the fall of communism seems to be a classic story of grandeur and decadence. The current domination of the industry and of the public agenda by a few media moguls also reflects the moral bankruptcy of several ideas that have shaped debates about the media for two decades:

1) The state is bad: The communist state's total dominance over society left deep marks in the collective memory. For a majority of Romanians, the state is bad on principle, even when it makes small attempts to regulate. Nevertheless they continue to expect jobs and social security from the state, as was the case with the communist state. "Give me all I want, but do not regulate me at all" is a common attitude. To be sure, the media's consistent stand against state regulation is grounded in the early 1990s, when journalists had to fight hard to win and maintain their autonomy from the state. By the late 1990s, the state had little influence over the rapidly expanding media industry. Since then, politicians have made numerous attempts to regulate media, but most in response to personal frustrations and were in fact attempts to restrain freedom of speech. A certain senator wants to forbid journalists from taking pictures of the official's villas. Two deputies want to force television stations to broadcast positive and negative news in equal proportions. A minister wants the newspapers to be obliged to publish replies in the same space and the same fonts and characters as the original article. These are only a few of the ideas that became draft laws over the years, creating tensions and raising protests from journalists before in the end being abandoned. It's not surprising that Romanian journalists see each new proposal by a politician concerning media as meant to create problems for them.

These two factors – the anti-statist mood inherited from the communist era and the early 1990s, and the unfortunate regulatory attempts in recent years – explain journalists' opposition to the idea that the state could be helpful at all.

We have argued that Romanian media's evolution after communism began as a fight between the state and journalists and now has resulted in the domination of the media industry by several local investors. The journalists have maintained the assumption that the state is bad, and state regulations are always mere attempts to curtail their freedoms. This actually paved the way for the dominance of the media moguls. The multinational media companies that were expected and welcomed in 1990s were unable to compete with local investors who were in search of political protection through the media. The state lost the battle but so did the journalists.

2) Self-regulation works: This was the mantra of the media NGO community, to which both authors of this paper belonged. Given the bad image of the

state and the negative expectations of the authorities, self-regulation was the only acceptable solution to the media's problems. But this proved to be an illusion. The story of the many ethics codes adopted by various associations and organisations, none of them properly implemented, is telling. The fragmented media market created fragmented professional authority. What one journalist found unacceptable, others found acceptable, and this created a race to the bottom in terms of ethics, principles and good journalistic practices. Quality journalism succumbed to the pressure of yellow journalism. Although the latter has bigger audiences all over Europe, in Romania basically no quality editorial operation functions as a sustainable business. You have to practice yellow journalism to survive economically.

3) Private property is always good: To be sure, a free market in Romanian media created some positive results. The big media companies that invested here (WAZ, Ringier, Sanoma Hearst) brought sound rules and protected their journalists. But they did not last. They lost the battle over private property, which came with strings attached.

These three false expectations are blocking attempts to find solutions to the Romanian media's problems. State intervention is suspect, self-regulation does not work, and relying on the free market made the media little more than an instrument for other economic and political interests. A moment in September 2010 is particularly relevant. Sorin Ovidiu Vantu, one of Romania's media moguls, was charged with helping a fugitive escape, and was arrested. Vantu made his fortune by organising an investment fund that functioned in fact as a Ponzi scheme. He acted using intermediaries, and Nicolae Popa was one of them. Popa was convicted of fraud and sentenced to 15 years in jail, but before being arrested he left Romania and was living as a fugitive in Indonesia. During all of this time, Vantu provided him money. Popa was finally arrested in Indonesia and was to be extradited to Romania. The Romanian prosecutors provided recordings in which Vantu is talking with Popa about money and strategies to avoid prosecution. Although the case was quite clear, Vantu's media outlets attacked the prosecutors and debated conspiracy theories about Basescu's interest in arresting Vantu. Many eminent journalists paid by Vantu defended him. The general impression was that a media owner is "more equal" than regular citizens, and that a case against them represents an attack on media freedom.

The only sustainable solution for Romanian media is to go back to basics. Relationships between the state, journalists and media owners need to be redefined. The state should be more active in enforcing the anti-concentration rules that already exist but are poorly implemented. Instead of proposing and supporting measures meant to punish journalists, Romanian politicians should debate with their organisations about how to regulate the industry intelligently. The main problems of the profession, which now is threatened more by the owners than by the state, need to be addressed. Serious rules against cross-ownership and media concentration, as well as enforcement of the journalists' rights as employees, could be acceptable forms of state regulation. But they must be openly negotiated with the journalists. Self-regulation still must prove its benefits, but it is the only solution for improving ethical standards. The state and its decision-makers should accept that ethics cannot be enforced by authorities' decisions. The state should support media NGOs and professional journalists' associations working to make self-regulation more effective.

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The case of Slovakia

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1. Introduction

The architects of the post-communist transformation in Central and Eastern Europe (CEE) did not see liberal democracy as a utopian concept. However, as one of the revolutionists, Adam Michnik, later admitted, there was one *utopian motif* after all: the *utopia of the west*.¹ After 1989, Slovakia started its democratic transition under these utopian circumstances as part of Czechoslovakia. Unlike its more successful counterparts, this first utopian stage was followed by some *rude awakenings*² (in 1993 and after 2006) and more putative *utopias* (1998). Slovakia suffered every imaginable growing pain of a new democracy (after 1989), as well as of a newly constituted state (1993). These perhaps unique circumstances make the Slovak case one of the most interesting democratic transitions in CEE, especially in the media sector.³ As we shall demonstrate in this study, its media policy is no exception to this audacious claim.

Media policy changes and the roles of the mass media in Slovakia were incongruous – particularly in the case of public service media. Two generations had never experienced the three most important features of the new social order: liberal democracy, a market economy and a free media. This had been a major contributing factor to the persistent lack of political consensus concerning the financial and political independence of the public media from the governing political parties. Consequently, suspicious – and indeed, confrontational – attitudes of some Slovak politicians towards the criticism of the government in the media were not anomalous (especially in the years 1992-1998 and 2006-2010). Formally promised and legally guaranteed independence of the public service media has *de facto* never been accomplished. The Slovak public at large, however, accepted the watchdog role of journalists already by the mid 1990s.⁴

Media policy development in Slovakia was also affected by the size of the country and the composition of its inhabitants. Slovakia's population is only 5,4 million, of which, up to 20% are estimated to be minorities. The two largest minorities are Hungarians (500,000) and Roma (estimated 350,000 to 400,000). While members of both minorities typically understand the Slovak language, most do not read nor buy Slovak language press.⁵ Hungarians in Slovakia tend to watch foreign (Hungarian) broadcast media and buy newspapers and magazines in their native

¹ A. Michnik, "The rebirth of civil society", public lecture at the LSE as part of the Ideas of 1989, Public lecture series (1999), available at: http://www.lse.ac.uk/Depts/global/Publications/PublicLectures/PL10_TheRebirthOfCivilSociety.pdf (last visited on 23/10/2010).

² K. Jakubowicz, *Rude awakening: Social and media change in Central and Eastern Europe* (2007).

³ A. Školkay, "Slovak government tightens its grip on the airwaves", 8 *Transition*, No. 72 (1996) 18, and A. Školkay, "The role of the mass media in post-communist transition of Slovakia", in S. Szomolányi and J. Gould (eds), *Slovakia. Problems of democratic consolidation. The struggle for the rules of the game* (1997) 187.

⁴ L. Šrámek, "Verejnost' a etická samoregulácia" [The public and ethical self-regulation], 36 *Otázky žurnalistiky* No. 1 (1994) 53, at p. 53-56.

⁵ The Roma minority members in Slovakia have been socially and educationally underserved for years. The average literacy of Roma is lower than the national averages, thus the consumption of printed media in this minority is almost non-existent.

language.⁶ Moreover, Slovaks usually also watch and read foreign Czech-language media.

All these particularities of media consumption place a clear limit on the advertising market size and its potential for growth. Small media markets employ fewer journalists, and opportunities for high-level professional education and self-development are also limited. Considering the relationship between journalism and politics, small countries with relatively closed cultures – such as Slovakia – run higher risks of nepotism and favouritism based on personal connections.

Slovaks' primary source of information has historically been through radio and television. People prefer to watch television, but significantly regard radio as being more trustworthy. For decades, the Public Service Radio (PSR) *Slovenský rozhlas* (SRO) has held the highest levels of public trust and, until the early 2000s, popularity.⁷ More than 75% of Slovaks older than fourteen years listen to broadcast radio on a regular basis; it is the second most popular medium after television and has played a vital role in politics and cultural life in Slovakia. Numerous public opinion surveys show that throughout the 1990s, as well as in the early 2000s, Slovak radio was one of the most trusted institutions, compared not only to other media, but also to other institutions like armed forces, police, government, etc.⁸

The most popular medium in Slovakia is television. Programmes of the Slovak Public Service Broadcaster (PSB) *Slovenská televízia* (STV), as well as the news content of *Markíza*, the most influential private owned broadcast, used to be heavily influenced by politics. This continued throughout the late 1990s. Privately-owned electronic media are still critical of the government, but they have shifted from criticising policy substance to uncovering politicians' encounters and scandals. Since 2000, the influence of market forces on the daily work of the journalists has grown.⁹ Already in 2001, Martin M. Šimečka, then editor-in-chief of the daily *Sme*, noticed a general shift from a political to an economic influence: “*The power of the media has moved from the world of politics to that of economics. Now the world of business threatens the independence of the media much more than any politician does*”.¹⁰

Most recently, editors' decisions about news content have been largely shaped by market rules. Viewership preferences, considerable production costs, potential legal costs, political pressures and business interests do not favour investigative journalism.¹¹ In short, the long-term experience of private television networks has suggested that it is simply not profitable to produce such programmes. It is significant

⁶ ENRI EAST 2008-2011, FP7-SSH collaborative research project (2008-2011), available at: <http://ff.ucm.sk/Slovensky/Katedry/politologia/doc/machacek/strucna%20sprava%20%20ENRI%20EA%20ST.pdf> (last visited on 23/10/2010), at p. 6.

⁷ “ÚVVM: Najviac dôverujeme hasičom, armáde a verejnoprávnym médiám” [IPOR: We trust firemen, the army and public service media most], [slovakradio.sk](http://www.slovakradio.sk/inetportal/web/index.php?lang=1&stationID=5&page=showNews&id=16558), 2/06/2004, available at: <http://www.slovakradio.sk/inetportal/web/index.php?lang=1&stationID=5&page=showNews&id=16558> (last visited on 23/10/2010).

⁸ See European Commission, Directorate General Communication, Eurobarometer 72, at: http://ec.europa.eu/slovensko/news/eurobarometer_72_sk.htm (last visited on 23/10/2010).

⁹ Z. Krútka, “Postavenie novinára v spoločnosti” [The position of the journalist in society], 49 *Otázky žurnalistiky* No. 3-4 (2006), at p. 236.

¹⁰ M. M. Šimečka, “Ten years after: The case of Slovakia”, in P. Bajomi-Lázár and I. Hegedüs (eds), *Media and politics* (2001), at p. 201.

¹¹ J. Glovičko, “Kauzy na obrazovkách skončili” [Causes on the screen are over], *SME*, 2/08/2010, at p. 5, and I. Nagyová and E. Žitňanský (eds), *Korupcia na Slovensku a jej spracovanie v médiách* [Corruption in Slovakia and its presentation in the media] (2001).

that in recent years and months, most investigative programmes have disappeared from the private networks. Watchdog journalism has become the almost exclusive domain of a few mainstream broadsheet newspapers and weeklies. While investigative programmes by the PSB could balance the entertainment focus of the private television networks, because the PSB is informally controlled by the government, it has not been courageous enough to showcase scandalous cases involving the governing political parties and politicians. Political investigative journalism by the PSB has usually been supported by superintendents only where opposition political parties were concerned. The most scandalous affairs of the governing political parties gained only minimal coverage, especially in the years 2006-2010. There was at least one publicly known case, when the PSB was hesitant to televise an investigative report. In October 2009, a reporter criticised the government's funding of a social enterprise in Bardejov.¹² The report was stopped through the personal intervention of the director just hours before the scheduled broadcast. The report finally aired later, but the employment contract of its author expired in January 2010 and has not been renewed. The PSB's regulatory council found no professional impropriety on the part of the author.¹³

The ownership of the media in Slovakia is mostly foreign, but domestic media are present in the market as well. Three important media are still co-financed by the state: the public service broadcaster *STV*, public service radio *SRO*, and the news agency *TASR*. Media owners are mostly joint-stock companies, independent from the government. Nevertheless, the distance between the business actors and the political sphere has been narrowing. The nature of this new relationship lies in economics rather than in politics.

The financial groups behind the media own diverse business assets and are keen to influence policy outcomes. In the past, this influence took quite overt forms. For a short period in 1997-1998, the founder and co-owner of the first independent television network in Slovakia (*Markíza*), Pavol Rusko, granted exclusively positive coverage to the opposition fighting against the authoritarian government of Vladimír Mečiar. In the early 2000s, the same owner of *Markíza* established a political party and used his network for the political promotion of this party. Rusko became the Minister of Economy, but his fragile party with no grassroots support survived only one parliamentary term (2002-2006). Even though Rusko did not have a broadcasting monopoly, this short development has been labelled by some Slovak scholars as *Italianisation*¹⁴ or, perhaps even more precisely, *Berlusconisation* or *Gaullisation*.¹⁵

The relations between the government and journalists have been very diverse, depending on the preferred political style of the governing political parties. Slovakia became famous for its "media war" between 1993 and 1998, when the government of Vladimír Mečiar openly fought against most of the independent media and did not

¹² This report criticised the use of EU funds for financing social enterprises, which were under the purview of the Ministry of the Labour and Social Welfare.

¹³ "List Reportérov STV Rade Slovenskej televízie" [The letter of reporters of the Slovak Television to the Council of the STV], *medialne.sk*, 12/10/2009, available at: <http://medialne.etrend.sk/televizia-tlacove-spravy/list-reporterov-stv-rade-slovenskej-televizie-2.html> (last visited on 23/10/2010).

¹⁴ Slovenian communication Professor Slavko Splichal introduced this term. He defined the *Italianisation* as a rapid re-nationalisation of the media combined with a direct political control and monopoly over broadcasting. See S. Splichal, *Media beyond socialism: Theory and practice in East-Central Europe* (1994).

¹⁵ A. Školkay, "Research on mass media in Central/Eastern Europe and Southern Europe" in M. Glowacki and B Ostrowska-Dobek (eds), *Comparing media systems in Central Europe* (2008) 27.

mind using the PSB as a government propaganda channel. The situation changed radically in 1998, when the reformist government of Mikuláš Dzurinda assumed power. Initially, the press almost exclusively supported the government. The popularity and the positive coverage of Dzurinda's government gradually waned after the country entered the European Union (EU) in 2004. In recent years, government hostility towards the media returned under the auspices of the Prime Minister Robert Fico (2006-2010). Dissatisfied with its negative coverage and the rise of tabloid journalism, the government introduced strict regulation of the right to reply and the right to correction for print media. At the same time, the Fico government's decision regarding the digital switchover practically closed the market for any new major broadcasting station. The new government of Iveta Radičová, who became Prime Minister in July 2010, promised some changes to Fico's Press Law and radical changes in public service media financing. Critics of the Press Law say it establishes more obligations than it offers rights to the journalists. The vague formulations led requests for reply and corrections from hundreds of politicians and business people, most of them refused on formal grounds.

Slovakia has developed most of the necessary features of an established democratic media landscape, as defined by Juan Linz and Alfred Stepan.¹⁶ This has happened in spite of insufficient media policy strategies from almost all governments in power since 1989. The media market has been privatised and deregulated, commercialised, initially de-monopolised and lately partly once more concentrated especially in the television sector. The depoliticisation of the selection of the public service media's leadership and supervisory boards remains an issue to be resolved. Journalists themselves are facing a fight for higher editorial independence, better labour conditions, and consequently professionalisation promoted by their employers.

2. The media landscape in Slovakia

Slovakia's media market is relatively small and limited by advertising market size.

2.1 The media market

The most popular medium is television with three main networks (including three channels of public service broadcasting, two major television channels with their two subsidiary channels with lower viewership owned by two independent owners), one news television, and a number of local (municipal) and regional stations.

There are about thirty radio broadcast channels, in addition to nine stations of public service radio, *Slovenský rozhlas*.

The print media landscape is represented by over 1,100 titles, but circulation and readership surveys confirm a long-term decline. Only about 55% of adults read the daily press and even fewer (52%) read weeklies on a regular basis.¹⁷ According to

¹⁶ J. Linz and A. Stepan, *Problems of democratic transition and consolidation. Southern Europe, South America, and post-communist Europe* (1996).

¹⁷ "Čítanosť tlače a sledovanosť televízií podľa prieskumu MML-TGI" [Print readership and television viewership according to MML-TGI survey], medialne.sk, 4/11/2009, available at: <http://medialne.etrend.sk/tlac-monitoring/citanost-tlace-a-sledovanost-televizii-podla-prieskumu-mml-tgi.html> (last visited on 23/10/2010).

another source, almost 28% of the population read printed newspapers and more than 14% read online newspapers.¹⁸

Online media are still limited to younger generations, with the Slovak online community preferring entertainment instead of democratic participation.

Untypically for such a small market, Slovakia has two newswire agencies (*TASR, SITA*).

The print media market is the most developed media segment in Slovakia. While there were many attempts to establish party (or partisan) daily newspapers in the past, today all dailies claim to be independent from the political parties. All major Slovak language newspapers have different (mostly foreign) owners and there is a relative ideological and content competition. Two tabloid papers are market leaders with a combined readership of about 32% of the adult population and four remaining regular newspaper titles share a 22% readership.¹⁹ The most popular paper in Slovakia is the tabloid *Nový Čas* (New Time) with a daily circulation of between 135,000 and 150,000 copies. Almost one in every four adults in Slovakia reads this daily regularly, but its readership has significantly declined.²⁰ Its main focus is entertainment and sensationalism, not excluding politics. Its main competitor is one of the few surviving latecomers (founded in 2006), the tabloid *Plus Jeden Deň* (*Plus One Day*) with a circulation of approximately 60,000 copies. The third and fourth most popular newspapers are *Sme* (*WeAre*) and *Pravda* (*Truth*) with variable circulations between 50,000 and 55,000 copies and readerships of about 7-8 %. Their main difference is in their ideological orientation. For almost twenty years, *Sme* has been a proud fighter for liberal democracy with fiscally conservative views. *Pravda*, the successor of its communist namesake, started as a social democratic paper before going through a mainstream family newspaper phase, only to become a leftist daily again in 2010.²¹ Both *Sme* and *Pravda* have uncovered important political controversies and are considered leaders of watchdog journalism in Slovakia. The business daily *Hospodárske noviny* (Economy News) sells around 18,000 copies. It targets business and political elites and its readership is around 3%. Rather than covering political scandals, it provides political and business leaders with a platform for rational discussion and exchange. There are also special types of daily newspapers: the advertisement-only paper *Avízo* (10,000), the regional (East Slovakia) daily *Korzář*

¹⁸ P. Rankov, "Slovensko a paradigmatické zmeny súvisiace s komunikáciou" [Slovakia and Paradigmatic Changes Related to Communication], 1 *Knižnica* (2009), available at: http://www.snk.sk/swift_data/source/casopis_kniznica/2009/januar/03.pdf (last visited on 23/10/2010) at p. 3-6.

¹⁹ V. Polakovičová, "MML-TGI: Jeseň 2009 a jar 2010 sa niesli v znamení televízií", [Autumn 2009 and spring 2010 were marked by televisions], *StrategieONLINE*, 28/05/2010, available at: <http://www.strategie.sk/sk/sedy/prieskumy/media/mml-tgi-jesen-2009-jar-2010-niesli-v-znameni-televizii.html> (last visited on 23/10/2010).

²⁰ See "Čítanosť tlače (MML + OMV)" [Readership of the Press (MML + OMV)], available at: http://www.strategie.sk/sk/reklama/data/media/citanost_tlace/ (last visited on 23/10/2010).

²¹ G. Šipoš, "Pravda si zo svojich čitateľov robí dobrý deň", [Pravda makes fun of its readers], *Slovak Press Watch*, 24/08/2010, available at: <http://spw.blog.sme.sk/c/239202/Pravda-si-zo-svojich-citatelov-robi-dobry-den.html#ixzz0xbkeGW5V> (last visited on 2/10/2010), and T. Czwitkovics, "Denník sa konečne začal správať marketingovo a smeruje na 40-percentnú cieľovku. Tá sa pri stánkoch zatiaľ nezberá" [The daily has finally started to behave in a marketing way and it heads toward 40-percent target group. However, it does not gather at newsstands], *medialne.sk*, 10/09/2010, available at: <http://medialne.etrend.sk/tlac-clanky/ako-sa-zmenila-pravda.html> (last visited on 23/10/2010).

(23,000), the Hungarian-language daily *Új Szó* (23,000) and the sports daily *Šport* (est. 23,000).²²

Slovakia has around thirty privately owned radio broadcasters and a network of public service radio (PSR) stations.²³ The Slovak PSR network has nine stations with the three newest broadcasting digitally only. In contrast to the past, most people listen to the privately owned radio stations. In the early 1990s, PSR broadcasting was an important agenda-setter and this still remains the most important function of radio broadcasting in Slovakia. The most popular radio station is *Rádio Express* (traffic updates and music) with 21-22% listenership, followed by the first PSR channel *Rádio Slovensko* with 17-18% of all listeners. *Fun Rádio* is in third place with 14-15%. The music station *Jemné Melódie* has a listenership of 7-8%, the PSR channel of regional reports *Rádio Regina* 6-7%, and *Rádio Europa 2* 5-6%.²⁴

There are three major television broadcasting players in Slovakia, two of them in private hands and one a public service broadcaster *Slovenská televízia* (STV).²⁵ Privately held *Markíza* is the market leader with a 26-27% market share and about 60% viewership. It is trailed by another private broadcaster *Joj* with 18% market share and about 35-38% viewership. The first PSB channel *Jednotka* is third in the rankings (13% market share and 25% viewership), followed by the second PSB channel *Dvojka* (6,6% market share and 3,2% viewership).²⁶ One specialized TV outlet is the news television channel TA3 with a market share of only 2%. However, it plays an important role in shaping elite discourse and serves as a valuable source of breaking news in crisis situations.

In spite of many legislation and financing changes, Slovak PSB remains a politically contested terrain. In 1993-1998, it served as a propaganda channel for Vladimír Mečiar's government. During the next governments of Mikuláš Dzurinda (1998-2006), it was perhaps less critical than desired, but stayed far away from any governmental propaganda. It did not return to its propagandist past during Robert Fico's government (2006-2010), but it tried to ignore or to minimise the social and economic consequences of major government scandals. In addition Prime Minister Fico was granted far more airtime than his predecessors.²⁷

Data about the broadcasting forms in Slovakia have undergone dynamic shifts recently. It is assumed, that satellite broadcasting (with 35% share) has been picking up and is now slightly ahead of the cable television (33%). About 18% of viewers use

²² StratégieONLINE, "Audit nákladov tlače" [Print costs audit], April 2010, available at: http://www.strategie.sk/sk/reklama/data/media/audit_nakladov_tlace/ (last visited on 23/10/2010).

²³ There were 48 licence holders for radio broadcast, including 15 for digital broadcast, at the end of 2009, but not all of them actually broadcasted. See Board for Broadcasting and Retransmission, "Správa o stave vysielania" [Report of the state of broadcasting], available at: <http://www.rada-rtv.sk/sk/spravy/?aktualitaId=1048> (last visited on 23/10/2010).

²⁴ StratégieONLINE, "Počúvanosť rádii (MML + OMV)" [Radio Listenership MML + OMV], available at: http://www.strategie.sk/sk/reklama/data/media/pocuvanost_radii/ (last visited on 23/10/2010).

²⁵ There were 149 licence holders for TV broadcast at the end of 2009, including 16 for digital broadcasting. See "Správa o stave vysielania".

²⁶ Medialne.sk, "Sledovanosť TV (MML + OMV)" [TV Viewership MML + OMV], available at: http://www.strategie.sk/sk/reklama/data/media/sledovanost_televizii/ (last visited on 23/10/2010).

²⁷ G. Šipoš, "Rybníček vs Nižňanský: za koho bola STV pred voľbami provládnejšia?" [Rybníček vs Nižňanský: Who made the Slovak Television more pro-governmental before elections?], Slovak Press Watch, 5/06/2010, available at: <http://spw.blog.sme.sk/c/231156/Rybnicek-vs-Niznansky-za-koho-bola-STV-pred-volbami-provladnejšia.html#t2#ixzz0vXjhHtiW> (last visited on 23/10/2010).

terrestrial (over-the-air) television broadcasting.²⁸ The first digital terrestrial multiplex started in Slovakia in December 2009. It includes most popular television stations and is available to 93% of the population²⁹. There already started analogue broadcast switch-off in some regions of Slovakia.

Internet media usage is determined by lower penetration than in other countries in EU. In 2009, internet penetration was comparable to Bulgaria and Hungary, i.e. under 50% of population. Broadband penetration in Slovakia was similar to Bulgaria or Romania - around 10%.³⁰ The number of internet users however, has been growing steadily by 5-7% yearly since 2008. The newest data show that in 2010 almost 60% of the population used internet³¹, most of them at home³². Still, the internet gap is clear, considering that almost 30% of the population have never used Internet with internet users being mostly younger people (18-39 years old) and people with higher levels of education.

The primary function of internet use in Slovakia seems to be information (primarily related to work) and entertainment. Less than a half of internet users are involved in chatting, blogging or online communities.³³ Approximately one third participate in major social networks. Internet played an important role in the informational campaign concerning the introduction of the Euro in 2008 and 2009. For 11% of the population, it was the most efficient source of Euro zone accession information and ranked as second in all media (after television).³⁴

All daily newspapers and most magazines have their own internet websites. In general, online news media takes four different forms. First, the online-only news websites (Aktualne.sk); second, print media websites with similar but not identical content and separate editorial staff (*Sme* and Sme.sk since 1999, *Nový Čas* and

²⁸ I. Krasko, "Satelit útočí na káblovku. Podľa prognóz Towercomu sa satelit tento rok stane rozšírenejším ako káblová TV" [Satellite attacks the cable TV. Towercome forecasts that satellite will become more widespread than the cable TV this year], *Trend* (2010), available at: <http://www.etrend.sk/trend-archiv/rok-2010/cislo-15/satelit-utoci-na-kablovku-2.html> (last visited on 23/10/2010).

²⁹ Ministry of Transport, Posts and Telecommunications, "Prvý multiplex v prevádzke", [The first multiplex in service], 8/01/2010, available at: <http://www.digimedia.sk/?IDE=68161> (last visited on 23/10/2010).

³⁰ P. Šebo, "Do you CEE? Internet v strednej a východnej Európe" [Internet in central and Eastern Europe], *StratégieONLINE*, 26/02/2010, available at: http://www.strategie.sk/files/casopis/2010/februar/Strategie02_2010_35.pdf (last visited on 23/10/2010).

³¹ "Internetová populácia rastie, internet využívajú vyše 2 milióny Slovákov" [Internet population is growing; Internet has been used by more than two million Slovaks], *Sme.sk*, 9/05/2010, available at: <http://pocitace.sme.sk/c/5364624/internetova-populacia-rastie-internet-vyuzivaju-vyse-2-miliony-slovakov.html#ixzz0vpIJIQXU> (last visited on 23/10/2010).

³² TNS SK, "Počet aktívnych používateľov internetu sa medziročne zvýšil" [The number of internet users has increased annually], 20/05/2010, available at: <http://www.itnews.sk/spravy/internet/2010-05-20/c133687-pocet-aktivnych-pouzivatelov-internetu-sa-medzirocne-zvysil?ref=rss> (last visited on 23/10/2010).

³³ "Podľa prieskumu TNS aktívne využíva internet 53.7 % Slovákov," [According to the TNS survey the internet has been actively used by 53,7% of Slovaks], *itnews*, 31/03/2009, available at: <http://www.itnews.sk/spravy/prieskumy/2009-03-31/c80720-podla-prieskumu-tns-aktivne-vyuziva-internet-537-slovakov> (last visited on 23/10/2010).

³⁴ "Euro: Internet bol v infokampani dôležitejší než v iných štátoch" [Euro: The internet in information campaign was more important than in other countries], *Živé*, 4/05/2009, available at: <http://www.zive.sk/euro-internet-bol-v-infokampani-dolezitejsi-nez-v-inych-statoch/sc-4-a-282473/default.aspx> (last visited on 23/10/2010).

cas.sk); and third, online news based mostly on already printed content (*Hospodárske noviny* and its Hnonline.sk). Finally, the daily newspaper *Pravda* allows access to its printed version online only after 9:30 a.m.

There is a slow but growing trend toward pay-per-read services for copyrighted content as well as for archives. Some print media have gone online only – for example the leftist weekly *Slovo* in July 2010. Most of the attempts to create online-only newspapers or cultural weeklies have suffered from a lack of advertising revenues and consequently ceased publication. However, there are two successful news websites with their own editorial staff (aktualne.sk, actuality.sk). Both the public service news agency *TASR* and its privately held competitor *SITA* publish a limited selection of their news releases online.

All electronic media offer limited versions of their content online. Some of them have created specialized news-only websites (*Markíza* has *Tvnoviny.sk*) and most of them have chosen to grant online access to full-length versions of their programmes. They include mainly news and current affairs programmes (as a result of copyright).

The most successful online news portal is *Sme.sk*, established by the daily newspaper *Sme*. It ranks third among all internet portals and is the leader as far as news is concerned. In addition to its written content, *Sme.sk* introduced a video news section *Tv.sme.sk* and the website features many interactive tools to attract visitors. The most interesting of these is *zajtrajsie.sme.sk* which is a betting platform for predicting future news events. *Sme.sk* also features social bookmarking (*vybrali.sme.sk*) and blogging services (*blog.sme.sk*). The best readers' blog entries are occasionally published in the printed paper.

The second most popular news website is *Topky.sk*, originally co-founded by the market leader tabloid newspaper *Nový Čas*. Today, *Topky.sk* is a branch of the portal *Zoznam.sk*.³⁵ In third place is the online-only news website *Aktuality.sk*, a mixture of tabloid news with rather conservative commentaries. The top fifteen internet websites in Slovakia also include online news websites of major newspapers and television broadcasters such as *Pravda* (*Pravda.sk*), *Markíza* (*Tvnoviny.sk*) and *Joj* (*Joj.sk*).³⁶ In order to engage with its viewers, *TV Markíza* created a special section *Somreporter.sk* (I report), which allows its viewers to upload their news photos and videos for the use of TV news producers.

Slovakia has almost 1.5 million Facebook users, dominated (82%) by younger generations (16 – 34 years).³⁷ Only a few Slovak media have established a presence on Facebook. The leaders are *Sme* with more than 39,000 fans, and the television news programme *TV Noviny Markíza* with 31,000 fans.³⁸ The microblog website, *Twitter.com* has only 3,080 users in Slovakia³⁹ and the Slovak Twitter community has been growing at a much slower pace than the Facebook community. Similarly to the

³⁵ Topky.sk (also known as Bleskovky.sk) started as a joint venture of Nový Čas and the internet company Zoznam.sk. Zoznam.sk unilaterally ended the cooperation with Nový Čas in April 2008 and took over the popular news website.

³⁶ Mediaresearch and TNS, "Návštevnosť internetu" [Internet popularity], May 2010, available at: http://www.strategie.sk/sk/reklama/data/media/navstevnost_internetu/ (last visited on 23/10/2010).

³⁷ Facebook, "Statistics Slovakia", available at: <http://www.facebakers.com/countries-with-facebook/SK/> (last visited on 27/09/2010).

³⁸ As of 27 September 2010.

³⁹ According to the auditing webpage SlovakiaTwitter.com.

situation on Facebook, *Sme* and *TV Noviny Markíza* have gained the most Twitter followers.⁴⁰

Rather than social networks, personal and institutional blogs seem to be of greater importance as far as democratic and racist/xenophobic discussion and civil society development are concerned.

Following its transformation, TASR made some of its content available online. Its financing, through subsidies from the Ministry of Culture, has been considered controversial and the new government has already undertaken to change the agency's status.

2.2 Journalists' background and education

The journalism profession in Slovakia was reborn after the fall of communism in 1989/1990. Political elites starting the democratic transition in Slovakia preferred a poetic transformation, i.e. they believed professionalism would develop from the ethics and veracity of the writers. There have never been formal requirements for the journalism profession and many of the most respected journalists did not study journalism or indeed humanities, but technical specialisations. The lack of regulation also opened the gates for lower professionalism standards, a trend typically connected to commercialisation. Today, it is not unusual to find high school graduates or first year journalism students writing for the mainstream media. More than a quarter of journalists do not have college degree and in the group under thirty years old this figure is almost 40%.⁴¹ The reason for hiring young and inexperienced writers has a clear monetary and (un)ethical basis: the salary costs of these journalists are lower than the salary expectations of professionals with relevant experience, and these young journalists are more willing to follow unethical orders from their superiors. Some observers suggest that these market pressures⁴², giving preference to lower levels of education and experience, are major contributors to the journalism controversies found in Slovakia.⁴³ Unfortunately, the expected levels of professionalism and ethics have never been achieved and this has made it much easier for various vested interests and lobby groups as well as public relations agencies to influence media output.⁴⁴

Journalism education in Slovakia started off with one Department of Journalism at Comenius University in Bratislava, established in 1952. A wealth of new educational opportunities have arisen since 1989, but the quality of education for journalists has not improved, in fact the opposite has often been the case.⁴⁵

⁴⁰ As of 27 September 2010.

⁴¹ Krútka, "Postavenie novinára v spoločnosti", p. 236.

⁴² R. Sťahel, "Etika v médiách" [Ethics in media], 45 *Otázky žurnalistiky* No. 1-2 (2002) 108, at p. 108.

⁴³ A. Šolkay, "Teória a prax žurnalistiky na Slovensku" [Theory and practice of journalism in Slovakia], 44 *Otázky žurnalistiky* No. 3-4 (2001), at p. 161.

⁴⁴ R. Sťahel, "Etika v médiách", p. 109, and J. Glovičko, "Rybničiek: Televíziu treba resuscitovať" [Rybničiek: The television must be resuscitated], *SME*, 27/07/2009, available at: <http://www.sme.sk/c/4949987/rybnicek-televiziu-treba-resuscitovat.html#ixzz0zmMQX3LI> (last visited on 23/10/2010).

⁴⁵ A. Šolkay, "Chaos v textoch, chaos v hlavách" [Chaos in texts, chaos in heads], 16 *Fórum* No. 2 (2006), at p. 3 and 11.

The Utopia of democratic media development in Slovakia faced its first threat in 1993, when Slovakia became an independent country. Prime Minister Vladimír Mečiar wanted to use the media to “build the state and nation”. Criticism of the government was considered treasonous and unpatriotic, and inspired from abroad. The decimated press, which had only just started its professionalisation, was clearly divided on political lines and has never been reunited, despite journalistic supporters of national populism becoming marginalized. After 1998, the journalists’ enemy was gone and the process of professionalisation began, as did the second *utopia* in Slovakia. This lasted only about two years until it was forced out by the liberal market. Simply put, professionalisation was outrun by commercialisation. Decent progress has been made in subsequent years, but the profession is still far from being established and unified around a common set of journalistic standards. According to a survey of the non-governmental organisation Slovak Press Watch and its partners from 2008, almost 75% of Slovak journalists themselves claimed low professional levels and 56% of respondents noted low ethical levels among their colleagues.⁴⁶ In journalists’ own words, these two issues were the most important problems facing their profession.

The problems described above originate at least partially in market pressures. Summarized by Z. Krútka, the chair of the Slovak Syndicate of Journalists, less than one fifth of journalists are protected by any form of union contract. In addition, one third of journalists are formally freelancers, even though they actually work permanently for a specific outlet.⁴⁷ The total annual income of journalists is only slightly above the national average.⁴⁸ In the words of M. Kollár, director general of the newswire agency SITA: *‘The journalists’ quality and the (in)ability to pay them appropriately, is the first and the key reason for (lack) of quality in wire agencies...’*⁴⁹

The nature of politics and business requires the use of all available tools for maximizing political and business power respectively. As a consequence of the absence of professionalisation and the strong push for commercialisation, neither journalists in public service media nor those in the private media are sufficiently protected from these pressures.⁵⁰

2.3 Media literacy and media status in society

Considering media literacy assessment, Slovakia fares at the threshold of ‘basic’ and ‘medium’ levels. It is not far from more developed countries like Slovenia or Poland, but it is fifth from the bottom among twenty-seven European Union countries.⁵¹ The

⁴⁶ Slovak Press Watch et al., “Názory slovenských novinárov na vybrané otázky mediálneho prostredia” [Views of Slovak journalists on selected issues of the media environment] (2008), available at: <http://www.dbm.cz/pfile/2Vysledna%20sprava.pdf> (last visited on 23/10/2010).

⁴⁷ This way the employers save on tax and benefits.

⁴⁸ Krútka, “Postavenie novinára v spoločnosti”, pp. 235-237.

⁴⁹ K. Sudor, “Prekáža mi, že existuje TASR” [I mind the existence of TASR], SME, 31/07/2008, available at: <http://www.sme.sk/c/3998846/miroslav-kollar-prekaza-mi-ze-existuje-tasr.html> (last visited on 23/10/2010).

⁵⁰ L. Rešovská, “Mestské noviny: aké sú?” [Municipal newspapers: what are they?], 19 Fórum, No.4, (2008), available at http://www.ssn.sk/source/np_forum/000202.pdf (last visited on 23/10/2010).

⁵¹ European Commission, Directorate General Information Society and Media, “Study on assessment criteria for media literacy levels”, available at: http://ec.europa.eu/avpolicy/media_literacy/docs/studies/eavi_study_assess_crit_media_lit_levels_europe_finrep.pdf (last visited on 23/10/2010).

primary information source is television, followed by radio, print outlets and internet. In contrast to the first decade of democratic transition in Slovakia, modern media consumers choose passive roles and consume entertainment rather than analytical news. Mainly in the last six years, news content has shifted from substantive description to reporting focused on personalities, scandals and sensationalism. Numerous TV networks have introduced special news formats informing solely about crime (*Kriminoviny*) or showbusiness (*Prominoviny*, *Smotánka*).

Internet use in Slovakia is focused mostly on quick information gathering, communication and entertainment. There is only one webpage - *Azet.sk* – where the users spend on average more than twenty minutes. In other cases, the time does not exceed five to six minutes. Internet discussions are usually anonymous and thus emotionally laden and lacking sophistication.⁵² *Aktualne.sk* features a blog section designed for political and social celebrities and *Trend* weekly features economists' opinions on its *Blog.eTrend.sk*. The most popular platform available to all internet users is *Blog.Sme.sk* with over 12,000 individual blogs. Estimates suggest Slovakia has over 20,000 bloggers.⁵³

Interestingly, the 72nd Eurobarometer opinion poll from November 2009 suggested that Slovaks had comparatively higher media trust than citizens of other EU countries. Approximately three out of four Slovaks trusted radio (17% above EU average) and television (25% above EU average) the most. The press scored lower, with 55% (but still 13% above EU average).⁵⁴ Refined data ranked television *Markíza* as the most objective news source for 26,4%. Second was PSB with 19,7%, third news broadcast *TA3* with 16,5%, and fourth *JoJ* with the trust of 14,9% of viewers. Approximately 20% of respondents did not answer the question.⁵⁵ This data reflect a preference for a particular television news rather than anything else. However, historically, the levels of trust in broadcasting reflected a bias and politicisation (or lack thereof) in the programming. This can be assumed from the fact that when the PSB was highly politicised, its trust sank to or below 50%. Traditionally, the less politicised PSR has enjoyed high trust levels in the last twenty years.

Lower levels of trust for print media must be assessed in a broader context. First, newspaper readership is only about 50% of the population. Second, the audience predominantly prefers tabloid journalism. Therefore, it can be argued that all daily press readers (more or less) trust their paper, but that at least a section of the readers do not take tabloid information for granted. This seems to be a rational explanation for the lower trust of print media.

3. Media policy in Slovakia

If we define policy as a course of actions adopted and pursued by a government, it seems that Slovakia has till 2006 not really had a proper media policy. There was only

⁵² A. Školkay, "Challenges of Regulation of the Blogosphere", in B. Klimkiewicz (ed.), *Media freedom and pluralism. Media policy challenges in the enlarged Europe* (2010) 157.

⁵³ "Koľko blogov je na sieti?" [How many blogs are on the web?], *Blogovanie.net*, 30/05/2009, available at: <http://www.blogovanie.net/2009/05/kolko-blogov-je-na-sieti.html> (last visited on 23/10/2010).

⁵⁴ See Eurobarometer 72.

⁵⁵ "Najobjektívnejšie je spravodajstvo TV Markíza" [The most objective news is on TV Markíza], *Tvnoviny*, 28/12/2009, available at: <http://tvnoviny.sk/spravy/domace/najobjektivnejsie-je-spravodajstvo-tv-markiza.html> (last visited on 23/10/2010).

one well-planned media policy, drafted and implemented by Robert Fico's government in 2006-2010. However, Fico's controversial media policy decisions have been criticized for their reflection of the government's distrust of independent media reporting as well as their compliance with the business interests of the major private broadcasting players (or at least some of them). The new government of Iveta Radičová has also set clear media policy targets. However, only the next three years will show how many of these political promises will be developed into real policies.

3.1 Actors in media regulation and policy

Slovak media policy is influenced primarily by governmental and, in a limited manner, by non-governmental institutions. While the Ministry of Culture is the most important actor in formulating media policy, its implementation is mostly in the hands of specialised councils. Further regulation is carried out through a number of other state and semi-state agencies. Even though the regulation of the media rests with the government (through legislation and personnel policy), some non-governmental actors are also involved with media policy in Slovakia.

The Ministry of Culture of the Slovak Republic is responsible for drafting almost all media regulation. The Slovak parliament has significant powers to amend drafts or propose new regulations. The Broadcasting and Retransmission Board (BRB) and the Press Council (PrC) are the key players in media policy implementation. The BRB is a semi-state body supervising electronic media only. By contrast, the PrC is a non-governmental organisation (NGO) established by the major publishers' and journalists' associations and has no right to take legal actions. The PrC only monitors compliance with its Code of Conduct on a moral basis. Its decisions are not legally binding and the PrC can not sanction those who refuse to comply with its rulings. Due to some of its controversial decisions,⁵⁶ the credibility of the PrC among journalists has suffered somewhat. This situation has contributed to a new trend, where the courtrooms have become a major venue for the implementation of media policy concerning (not only) the press. As experience shows, this shift has given enormous advantage to politicians willing to gain revenge against media criticism.

The Slovak Television Council (STC) and the Radio Council (RC) supervise the activities of public service electronic media. Financial arrangements are supervised internally by the Supervising Council and externally by the Ministry of Finance, and by the Parliament. Technical issues concerning digital broadcasting and frequency spectrum monitoring are usually under the Ministry of Transport, Post and Telecommunications and the Telecommunication Office. The Anti-Monopoly Office monitors ownership concentration and checks unfair dominance of the market.

Non-state bodies are significantly less powerful in media policy drafting, implementation and assessment. The Slovak Syndicate of Journalists (SSN) with over 2,000 members is the largest organisation. However, many of its members are only occasional writers and freelancers and the organisation does not seem to represent journalistic community at large. Its main actions in the field of media policy are statements and drafting of print media regulation. It creates draft legislation proposals and creates policy statements and papers involving both self-regulation documents

⁵⁶ See 17 FORUM, No. 10 (2006), available at: http://www.ssn.sk/source/np_forum/000143.pdf (last visited on 23/10/2010).

and also ‘hard law’. Nevertheless the organization has been strongly criticised by some of its peers for weak leadership and its inability to fight against the unpopular Press law, passed in 2008. Most directly involved in the fight against the controversial 2008 media law has been a local branch of the International Press Institute and Association of Publishers of Periodical Press.

The aforementioned actors are mostly involved with policy-making. However, informal supervision is carried out by a few important NGOs. The independent Slovakpresswatch (SPW) project, carried out by the INEKO NGO, focuses on fact checking and suspicions of business dependency in reporting. SPW has become very popular for its instant revelations of factual mistakes, plagiarism or of corruption suspicions.⁵⁷ Important political bias reports in the media are occasionally published by the NGO MEMO’98.⁵⁸

Slovakia’s journey towards a free and depoliticised media has taken a little longer than originally expected. In the first phase of legislative changes (after 1989) the process was driven internally and introduced basic principles of a free press. A common feature of almost all subsequent Slovak administrations has been that they usually lacked a comprehensive media policy strategy. Even if they had some plan, it was mostly vague and rarely pursued. It can be stated that Slovak political elites typically did not seem to be genuinely interested in the development of strategic media regulation and most media policy changes were products of special conditions under which they were created. These conditions reflected for example the accession process to the European Union (Law on Broadcasting and Retransmission), personal dissatisfaction of policy-makers with the press (Press Law), or a desire to introduce better governance (Laws on public service media passed in 2003 and 2004).

3.2 Freedom of expression and information

A short journey through the history of Slovakia demonstrates a strong tradition of censorship. In fact, there was almost no tradition of either a free media or the rule of law in post-communist Slovakia.

Fundamental changes in media legislation in Slovakia started as a result of the political and constitutional changes after the fall of communism. This process consisted of dismantling the “socialist” legal system on the one hand and unsuccessful attempts at rearranging an asymmetrical constitutional federative system on the other hand. The former issue was reflected in the liberalisation of print media publishing and distribution, partial decriminalisation of writing and speech, and in the slower emergence of a dual media system, including attempts to denationalise the state-owned electronic media. The latter issue was reflected in a national push to separate Czech and Slovak public service media as opposed to a pressure to defend federal radio, television and some daily newspapers, supported by the federal Czechoslovak government.

The freedom to publish, which re-emerged *de iure* in 1990 with changes in the Press Law, was, however, already present *de facto* in December 1989. The law failed to address editorial secrecy and sanctions for state organisations (including authorities) refusing to provide requested information. The modification of the

⁵⁷ See www.spw.blog.sme.sk (last visited on 23/10/2010).

⁵⁸ See www.memo98.sk (last visited on 23/10/2010).

Criminal Code abolished the criminalisation of activities labelled as “provocation”, “subversion” or “press carelessness”. However, a controversial paragraph regarding “defamation” remained in force for a couple of the next years. Defamation against the state under communism and up until the early 1990s was a crime, but this paragraph had never been applied and was completely removed later. Personal defamation including defamation of members of the government on the other hand, has been utilised on a number of occasions, with some success, including criminal charges, to muzzle journalists.

Changes in the Civil Code have further strengthened the personal rights of citizens, including the right to privacy and the right to financial compensation for illegal interference in their private life, honour and dignity. An amendment to the press law allowed foreign capital entry to the print media market. The Constitution of the Slovak Republic, passed in 1992, established media freedom and freedom of expression at a constitutional level. The Constitutional Court and the European Court of Human Rights have proven to be very important institutions of last appeal.

Federal Act No. 136, passed in 1991, divided the rights and duties in broadcasting between the federal government and the two national governments. The national Acts No. 254 and Act No. 255, also adopted in 1991, legalised the (*de facto* already functioning) national public service media institutions: Slovak Television and Slovak Radio. These were the first laws in CEE establishing public media institutions, based on the experiences of Austria and Germany. This regulation, however, established partial dependency of the media on the state budget, which was later politically abused.⁵⁹ The public service media were financed through obligatory fees, yet until 1995 there were no legal sanctions against those who did not pay. A viable effort to enforce the law and to collect these fees occurred only in the 2000s.

A dual broadcasting system was introduced in 1991 through Law 468/1991. Although amended in several instances, this principal regulation remained in effect for nine years, until its replacement in 2000 (by Law 308). A regulatory licensing body, the Council of the Slovak Republic for Radio and Television Broadcasting (later renamed), was established in 1992 under Act No. 294.

Amendments in 1992 and 1993 changed the method of selection and election of supervisory council members in the public service media. What had initially started as independent bodies, changed in 1993, when the councils began to become politicised. To date this trend has not disappeared. Almost all members of the three supervisory councils (the Radio Council, Council of Slovak Television and Board for Broadcasting and Retransmission) are political nominees, elected by simple parliamentary majority. Informal rules, developed in the late 1990s and early 2000s, however, require some members to be nominated by the political opposition. Formally, there are often so called civic candidates but these are *de facto* political candidates. The election of all these candidates depends on parliament. For all these reasons, public service media have never gained full financial, managerial, and consequently editorial, independence.

Generally speaking, successive administrations in Slovakia have mostly lacked any media strategy. After 1998 the government of Mikuláš Dzurinda took power, and its new Government Council for Mass Media initiated the replacement of

⁵⁹ A. Školkay, “The fight over public broadcasting in the first year of Slovak independence”, 3 South East European MONITOR No.5 (1996) 23.

the 1991 laws. Parliament passed new media regulations for the PSR in 2003 (Act No. 619) and PSB in 2004 (Act No. 16). Under the modified legal framework, a new body, the Supervisory Council, should monitor the financial and business operations of public service media. A slight depoliticisation of electronic public service media was achieved with the introduction of a system for the selection of the director through media councils rather than parliament.

In the following years, discussion about the need for a comprehensive media law started for the first time in Slovak history. However, a lack of political consensus made it impossible to enact such new legislation. Unfortunately, Slovak political elites have never really solved the question of what a ‘public service institution’ is as far as the media are concerned.⁶⁰ Merging of broadcasting regulation and telecommunication regulation, traditionally separated and governed by two independent regulatory authorities, was part of the national discussion. While the two have not as yet merged, this adjustment may nevertheless happen in future.

Changes in media regulation have been made in the light of the *acquis communautaire*. A set of new laws, passed in 1999-2000, and later amendments created the current legal media framework in Slovakia. Although the new regulations were triggered by EU accession, the adoption of new legislation also gave an opportunity to make media policy changes not necessarily required by the EU.⁶¹

One of the laws adopted was the EU Television without Frontiers (TWF) Directive, which was introduced into the Slovak legal system through Law 308/2000 *On Broadcasting and Retransmission*. Since 2000, the act has been amended fourteen times⁶² and it is the most important media law for electronic media. It contains a set of comprehensive rules for television and radio broadcasting, retransmission and since 2009, for audiovisual services on demand as well. The law is a result of the liberalisation process undertaken at the EU level⁶³ and, in part, of technological change.

A new legal framework for public service electronic media was introduced almost simultaneously with Slovakia’s accession to the EU. The *Slovak Television Act* (2004) with its six amendments and the *Slovak Radio Act* (2003) with seven amendments defined public service media as national, independent, informative, cultural and educational institutions, providing their programme services to the public. In practice however, Slovak Television in particular has been subjected to occasional manipulation of its primetime news, political discussions and investigative reporting. This manipulation has been an issue for over twenty years, but it has lately become more sophisticated, less frequent, indirect and more subtle.

⁶⁰ A. Školkaý, “Komentár k návrhu zákona o verejnoprávnych organizáciách” [Commentary on Draft Law on Public Institutions], *Stratégie* (2003), manuscript published previously at strategie.sk.

⁶¹ O. V. Johnson and A. Školkaý, “Media legislation and media policy in Slovakia: EU accession and the second wave of reform”, 11 *Media Research* (2005) 73, at p. 73-75.

⁶² This law also adopted major part of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 202, 30/07/1997, and Directive 2007/65/EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18/12/2007.

⁶³ H. Nieminen, “Towards democratic regulation of European media and communication”, in B. Klimkiewicz (ed.), *Media freedom and pluralism. Media policy challenges in the enlarged Europe* (2010) 3.

The *Press Act* from 2008 spurred considerable controversy and criticism among journalists and publishers.⁶⁴ The main reason for their protests was the introduction of three controversial rights: the right to correction, the right to reply and the right to additional announcement. Non-compliance can be sanctioned with financial fines of up to EUR 4,979. The Press and News Reporting Act (the official title of the legislation) limits the absolute freedom of the press because it recognizes rights that force media to publish reactions of the individuals involved in journalists' stories. Proponents of the law argue that this access to alternative opinions creates a more equal situation in the media space. Previously, it was difficult to get a quick reaction to media reports published. On the other hand, the Press Act has introduced a new right for the publishers, broadcasters and news agencies (and all their representatives) to obtain truthful and comprehensive information from public bodies in time. The new law, however, has not set sanctions for non-compliance.

As far as the three controversial rights are concerned, research has confirmed that the feared flood of requests for corrections, replies and additional announcements only partially materialised.⁶⁵ As a consequence, however, journalists face stronger pressure for self-censorship or double fact-checking, and the media have additional costs for legal counselling in deciding the eligibility of correction requests. Nevertheless, the new Slovak administration has already announced its plan to abolish the right to reply for public figures.⁶⁶

The new government also plans to transform public service media and to change their financing rules. So far, fees for public service media are regulated by the Act on *Payment for Services to the Public Provided by Slovak Television and Slovak Radio*. The primary financial source of both institutions is the compulsory monthly fee paid by households and employers as defined by law. For its calculation, consideration is given to the number of employees and electricity accessibility. Traditionally, citizens were reluctant to pay these fees and the regulatory bodies had difficulties in collecting. Under the new plan, these fees should be abolished. Sceptics agree that the current system is far from guaranteeing editorial freedom⁶⁷ but they also acknowledge that public service media would be even less independent without these fees. The European Broadcasting Union has urged the Slovak government to retain

⁶⁴ "Nový tlačový zákon: Takto môže zmeniť noviny!" [The new Press Act: This is the way it can change newspapers!], Topky.sk, 27/03/2008, available at: <http://www.topky.sk/cl/10/229028/Novy-tlacovy-zakon-Takto-moze-zmenit-noviny-?from=bleskovky> (last visited on 23/10/2010), and Slovak Syndicate of Journalists, "Pripomienky SSN k návrhu zákona o periodickej tlači a o zmene a doplnení niektorých zákonov (tlačový zákon)" [SSN comments on a draft law on periodicals and about changes and amendments of some acts (Press act)], 19/06/2007, available at: <http://www.ssn.sk/source/document/000115.doc> (last visited on 23/10/2010).

⁶⁵ L. Kočíšek, "Noviny plné opráv a odpovedí? Obavy z tlačového zákona sa nenaplnili, tvrdí štúdia" [Newspapers full of corrections and answers? Fears of the Press Act have not been fulfilled, study says], 11/05/2009, available at: <http://medialne.etrend.sk/tlac-spravy/noviny-plne-oprav-a-odpovedi-obavy-z-tlacoveho-zakona-sa-nenaplnili-tvrdi-studia.html> (last visited on 23/10/2010).

⁶⁶ Platform of the Government "August 2010", available at: <http://www.vlada.gov.sk/data/files/6257.pdf> (last visited on 23/10/2010), at p. 36.

⁶⁷ See for example: D. Jancová, "Zrušenie poplatkov nie je všeliek" [The abolition of fees, however, is not a panacea], 26/06/2010, available at: http://spravy.pravda.sk/zrusenie-poplatkov-nie-je-vseliek-drx-/sk_domace.asp?c=A100626_110111_sk_domace_p29 (last visited on 23/10/2010).

the licence fee as the means of financing Slovak Radio and Slovak Television rather than shifting to direct government subsidy.⁶⁸

The *Act on Digital Broadcasting*, adopted in 2007 and amended twice⁶⁹ regulates the digital broadcasting of programme services but does not apply to content services accessible through the internet if these services are not accessible via another manner of transmission. As a result of this law, Slovakia was obliged to undertake a digital switch-over. The technical conditions set by this legislation caused some controversy because it became almost impossible for new major television stations to enter the Slovak market. As put by Ondrášik: ‘*It only strengthened the competition of current players.*’⁷⁰ This politically motivated setting of standards (to the advantage of a few major established terrestrial broadcasting operators) and its follow-up actions led to politically motivated personnel changes at the Telecommunication Office. Its chief, Branislav Máčaj, was dismissed by the government for his criticism of the unfairness of these rules, in particular since he did not agree with the strong indirect involvement of the major television broadcaster, TV *Joj*, in the selection of multiplex providers. Máčaj identified clear private business interests in the new regulation, followed by a public tender: ‘*The success of the Towercom company in the public tender was expected, in the way the cards were dealt*’ (i.e. manipulated in favour of a concrete company). The reason for this alleged manipulation of the tender was the ownership connection between Towercom as a provider of digital multiplexes and television channels *Joj* and *TAS* as broadcasters, with the political support of the major political party (then in power) Smer-SD.⁷¹ While the private sector did not want any additional business competition, the major governing political party wanted to avoid a new broadcaster, with possibly critical content, entering the media landscape before the 2010 parliamentary elections. Indeed, a later report stated that shortly before the elections, the owners of TV *Joj* blocked at least one news report criticising the political party Smer.⁷²

After Máčaj’s dismissal, the Telecommunication Office immediately cancelled the first multiplex provider tender with an official explanation related to changes in the frequencies spectrum.⁷³ In other words, alleged changes in technical conditions were offered as an excuse for the cancelled tender. Towercom subsequently won a new tender, but both Towercom and its owner J&T (a major investment group

⁶⁸ European Journalism Centre, “EBU urges Slovak government to retain licence fee”, 05/10/ 2010, available at: http://www.ejc.net/media_news/ebu_urges_slovak_government_to_retain_licence_fee/ (last visited on 23/10/2010).

⁶⁹ This act adopted parts of Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC and Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6/10/1993.

⁷⁰ B. Ondrášik, “Media ownership, regulation, concentration, and competition in the Slovak republic”, in M. Glowacki, B. Ostrowska-Dobek (eds.), *Comparing media systems in Central Europe. Between commercialization and politicization* (2008), at p. 210.

⁷¹ “Šéf Telekomunikačného úradu rozpráva na Fica” [Chief of the Telecommunications Authority tells on Fico], *Etrend*, 27/11/2008, available at: <http://ekonomika.etrend.sk/ekonomika-slovensko/sef-telekomunikacneho-uradu-rozprava-na-fica.html> (last visited on 23/10/2010).

⁷² M. Tódová, “J&T v Joj stopla reportáž o financovaní Smeru” [J&T stopped a coverage on financing of Smer on TV Joj], *SME*, 20/05/2010, available at: <http://www.sme.sk/c/5383939/jt-v-joj-stopla-reportaz-o-financovani-smeru.html#ixzz10RYI0EQ5> (last visited on 23/10/2010).

⁷³ “Výhrady TÚ k digitálnej stratégii po odvolaní predsedu zmizli” [TA’s reservations about the digital strategy disappeared after the President’s withdrawal], *Živé*, 12/01/2009, available at: <http://www.zive.sk/vyhrady-tu-k-digitalnej-strategii-po-odvolani-predsedu-zmizli/sc-4-a-280891/default.aspx> (last visited on 23/10/2010).

involved in various business operations with sometimes controversial background) rejected any accusations of involvement in this manipulation.

Private broadcasters were also successful in postponing the digital switchover by one year, arguing they were unprepared to accept unclear conditions for this process.⁷⁴

The European Commission openly criticised Máčaj's dismissal and launched legal proceedings against Slovakia.⁷⁵ Under this pressure, the parliament changed the procedure for the dismissal of the director of the Telecommunication Office and the Commission ended its action.⁷⁶

General rules for audiovisual production in Slovakia were introduced through the *Audiovisual Act* of 2007.⁷⁷ The *Act on Audiovisual Fund* was passed a year later. It established a much-needed grant scheme for Slovak film-makers and thus was very welcome. The first selection of the beneficiaries, however, was strongly criticised. About 20% of the available sources were given to the chair and the vice-chair of the Council of the Audiovisual Fund.

In 2008, the Slovak parliament passed the *Act on Press Agency of the Slovak Republic* and finally transformed the state-owned newswire *TASR* into a public service media with its own independent regulatory board. The act literally demands balanced, pluralistic and objective coverage. Interestingly, with the exception of short periods, *TASR* has always been reasonably balanced in political coverage. However, the indirect contract-based subsidy from the Ministry of Culture which constitutes a major financial source for the agency has become arguable. Financing matters as well as other issues have thus motivated the new government to announce changes to this law.⁷⁸

Freedom of expression and information in Slovakia has been assessed by many institutions and could be characterised as fluctuating and relatively inconstant. This is a result of regulatory changes, media market development, as well as the political style of governing politicians.

The *World Audit Democracy Report* suggested in November 2009 that Slovakia ranked 25th among 150 countries in the Press Freedom Index.⁷⁹ Thus, Slovakia was situated not only geographically, but also normatively, in between Hungary and Poland, which is a fair observation. Interestingly, a correlation can be observed between the freedom of the press index and the level of corruption perception. Taking this into account, the allocated level of press freedom seems to be rationally justified.

⁷⁴ A. Školckay, "DTV in Slovakia", in W. Van den Broeck and J. Pierson (eds), *Digital television in Europe* (2008), at p. 181-186.

⁷⁵ "Máčaj sa bojí o budúcnosť slovenského televízneho vysielania", *Tvnoviny*, 15/05/2009, available at: <http://tvnoviny.sk/spravy/ekonomika/macaj-digitender-vyhra-towercom-udajne-spojeny-s-j-t.html?ar=> (last visited on 23/10/2010).

⁷⁶ "EK uzavrela konanie proti Slovensku pre odvolateľnosť šéfa TÚW [European Commission closed the case against Slovakia for revocability of the chief of the TA], *Itnews*, 25/05/2010, available at: <http://www.itnews.sk/spravy/telekomunikacie/2010-06-25/c134411-ek-uzavrela-konanie-proti-slovensku-pre-odvolatelnost-sefa-tu?ref=rss> (last visited on 23/10/2010).

⁷⁷ Act on Conditions of Evidence, Public Dissemination and Storage of Audiovisual Works, Multimedia Works and Sound Records of Artistic Output.

⁷⁸ Platform of the Government, "August 2010", p. 36.

⁷⁹ World Audit, "Democracy table November 2009", available at: <http://www.worldaudit.org/democracy.htm> (last visited on 23/10/2010).

The 2009 *Reporters sans Frontières* report ranked freedom of the press in Slovakia in 44th place (together with Spain) and with eleven negative points among 173 countries.⁸⁰ The fluctuation in Slovakia's ranking is best seen in this report. Only a year earlier, Slovakia was in seventh place, together with countries like Sweden and Switzerland. Since the index is based on journalists' personal assessments, the dramatic change most likely mirrored journalists' frustration with the passage of the new Press Act, verbal attacks from the government and the growing number of defamation cases.

According to *Freedom House*, Slovakia was a *free* country in 2009, along with eighty-nine of 194 countries examined.⁸¹ However, the International Press Institute in its World Press Freedom Review for 2009 strongly criticised Slovakia's passage of the Press Act.

All these evaluations and rankings seem to reflect the difficult situation of press freedom in Slovakia.⁸² A survey among journalists in Slovakia conducted in 2008 presented some interesting results concerning political and financial pressures in the media. Almost half of the journalists surveyed (48%) claimed to have faced political pressures from state authorities and/or advertisers and about the same number (51%) from media owners. Significant pressures from editors were also reported (47%).⁸³

Historically, the most difficult time for press freedom was the period 1993-1998, when the government was headed by Vladimír Mečiar. This was also confirmed in the surveys of Holina and Brečka in 2006, conducted with 313 and 374 journalists respectively. The worst journalists' rating was recorded for Vladimír Mečiar (1993-1998), followed by Robert Fico (2006-2010), and the second government of Dzurinda (2002-2006). The lowest level of political anxiety between the press and the government was observed during the first government of Mikuláš Dzurinda (1998-2002). The journalists also confirmed that Mečiar and the political style of his government was one of the most traumatic moments in the history of the Slovak media. Back in 1997, 64,3% of journalists felt political pressure, while in 2005 this number had decreased to 49,5%.⁸⁴ Obviously, this trend was reflected in the media policies of the governments in question.

3.3 Structural regulation

Structural regulation of the Slovak media market has mainly focused on licensing and ownership matters. The print media are not subjected to licensing procedures, but television and radio licensing is regulated in detail. PSB and PSR are not subject to licensing but their broadcasting is specifically defined in exclusive laws.

⁸⁰ Reporters Without Borders, "Press Freedom Index 2009", available at: <http://en.rsf.org/press-freedom-index-2009,1001.html> (last visited on 23/10/2010).

⁸¹ Freedom House, "Freedom in the World 2010 Survey Release", available at: <http://www.freedomhouse.org/template.cfm?page=505> (last visited on 23/10/2010).

⁸² For comparison with earlier analyses on similar issue see A. Šolkay, "Sloboda masmédií na Slovensku a vo svete v roku 1994" [Freedom of media in Slovakia and the world in 1994], 37 *Otázky žurnalistiky* No. 4 (1995) 275.

⁸³ Slovak Press Watch et al., "Názory slovenských novinárov na vybrané otázky mediálneho prostredia", at p. 8.

⁸⁴ B. Ondrášik, "The Slovak press law: History and its impact on free media", available at: <http://www.branoondrasik.sk/research-reply.pdf> (last visited on 23/10/2010), at p. 8.

3.3.1 Licensing rules

The licensing process in Slovakia started in times of strong political polarisation and was thus heavily politicised. Since then, the situation has changed. Generally speaking, licensing standards in Slovakia are now similar to those in other EU countries. The following examples, however, illustrate the heavy politicisation of licensing procedures in Slovakia in the mid 1990s.

The first licence for nation-wide terrestrial television broadcasting was only awarded in 1995. Before that, the Slovak Parliament twice refused to approve licences for private nation-wide television broadcasting. With the tacit approval of the then Prime Minister Vladimír Mečiar, the first nation-wide privately held terrestrial television station went on air in late August 1996 and, contrary to expectations, provided airtime for criticism of the government. The introduction of private nation-wide television required not only foreign financial aid but also domestic political backing.

Another case of political intervention happened in the case of the *Radio Free Europe (RFE)* broadcast to Slovakia. The Slovak Ministry of Telecommunications tried to cancel the right to use the frequency spectrum for its Slovak language broadcast on AM frequencies in 1993/1994. The official explanation was that those frequencies were required for Slovak Radio broadcasts in the future. Ironically, the management of public Slovak Radio publicly denied such needs. The unofficial reasons were related to open criticism of the Slovak government in its broadcasts. Finally, the government reluctantly agreed to extend RFE's broadcast rights for Slovak AM frequencies.⁸⁵

The Licensing Council was under strong pressure in 1998, when the Minister of Culture Ivan Hudec (a member of Mečiar's government) strongly criticised the licence given to Radio Twist in Eastern Slovakia.⁸⁶ Radio Twist was considered a key antigovernment radio outlet.

Since then, licensing processes have been depoliticised. Today, the BRB awards licences without the involvement of parliament whereas previously, nation-wide licences issued by the BRB had to be approved by parliament. There has never been a condition to pay high fees for frequency utilization in Slovakia. Frequency use requires only a standard administration fee and a reasonably set (one could actually argue very low) additional fee, defined by the geographical size of the area to be covered by the broadcaster. The process is regulated by two almost identical laws: the older Act on Broadcasting and Retransmission and the recent Act on Digital Broadcasting. After Slovakia's digital switchover, scheduled for 2012, analogue terrestrial broadcasting will no longer exist.

The licensing conditions are very detailed, but in principle, each beneficiary can be granted only one licence valid for eight years for a radio programme and twelve years for a television programme service. In the case of digital broadcasting, one subject can get additional licences only for the digital broadcasting of monotype television (for example, an exclusively advertising channel). Unsuccessful applicants

⁸⁵ A. Školkay, "Journalists, political elites and the post-communist public: The case of Slovakia", 12 *Journal of Communist Studies and Transition Politics* No.4 (1996) 73, at p. 73-77.

⁸⁶ J. Füle, "Médiá" [Media], in G. Mesežnikov and M. Ivantyšin (eds) *Slovensko 1998-1999. Súhrnná správa o stave spoločnosti* [Slovakia 1998-1999. The global report on the state of the society] (1999) 590, at p. 599.

as well as holders of a revoked licence have the right to appeal within fifteen days. A negative appeal decision may be appealed at the Supreme Court.

In the case of print media, the owner or publisher has an obligation to register with the Ministry of Culture of the Slovak Republic. In the event of no official reply being provided in due time, this is considered as an approval.

3.3.2 Ownership rules

According to domestic legislation, the broadcasting licence is not transferable to another legal or natural person, not even if the company or parts of it are sold. One of the biggest controversies in recent Slovak media history has been the campaign called *Let's Rescue Markíza*, triggered by a failed attempt to transfer the broadcasting licence indirectly. In the summer of 1998, only a few months before the parliamentary elections, an alleged new owner (backed by court ruling) entered the premises of the television network *Markíza* with a group of security guards and tried to take over the station. Back then, *Markíza* was the only national terrestrial broadcasting not controlled by the government, and its news programmes heavily criticised Mečiar's government. There were rumours that even the official state secret service was involved in this case.⁸⁷ Opposition politicians took this opportunity to portray themselves as the rescuers of free media.

Current law also bans mutual ownership of a TV broadcaster by an independent TV producer. A periodical publisher, who publishes a title at least five times a week and distributes it to at least half of the Slovak territory, is also banned from owning a multi-regional or nationwide broadcasting licence. Further, one legal or natural person may not be connected via ownership rights with more than one multi-regional or nation-wide broadcaster of either radio or television programme services. In addition to this, there is a ban on any ownership connection with publishers of nationwide periodical press. A legal or natural person can be connected via property rights with more broadcasters – licence owners – for local and regional television or local radio programme services. However, there is a 50% limit on the total size of the population that can be covered by this joint broadcast.

In all other cases there is a general ban on property ownership and personal connection between radio broadcasters, television broadcasters and publishers of nation-wide press. As far as the owners' origin is concerned, the BRB is obliged by law to take into account “an adequate property participation of Slovak persons and their representation in company bodies”, in the event that a licence seeker is a legal person with foreign ownership participation. In other words, it is impossible to have an exclusively foreign owned and foreign managed broadcasting station in Slovakia.

Print media companies are legally required to disclose their ownership structure relations to the publisher, any shareholder with a voting rights share at or above twenty percent, and anyone owning at least a twenty percent interest in property rights. Ownership records are published on the website of the Ministry of Culture and in the first issue of each periodical in a calendar year. Broadcast media must register with the Company Register's Office, whose records are public documents, available online.

⁸⁷ Fúle, “Médiá”, pp. 590-591.

In reality, however, the identification of media owners is quite challenging. For example, recently, after a change in its ownership structure, the editors of the daily newspaper *Pravda* could not figure out the paper's actual owners.⁸⁸

There are no rules prohibiting media ownership by specific organisations, political parties or religious associations. In reality, all attempts by political parties to establish their own daily newspapers have failed. There are, however, some marginal weeklies, bi-weeklies and monthlies which claim open, or at least tacit, support for some parties or their ideologies.

3.3.3 Competition rules

Ondrášik argued that a lively competition can be seen among the large print outlets but a higher concentration prevails in various market segments in Slovakia. In his view, large media chains dominating the market threaten the diversity of the local press.⁸⁹ According to him, television broadcasting is in fact a virtual oligopoly.⁹⁰ This means that there are two major players in the television market, TV *Markíza* and TV *Joj*. To keep their oligopoly at the dawn of the digital era, both stations established 'sister' stations: TV *Doma* and TV *Joj Plus*.

Perhaps ironically, the development of a free media market in Slovakia was purposely slowed down by the public service media in 1990/1991. Their leadership was afraid of private competition and demanded time for market adjustments. Currently, the Act on Broadcasting stipulates that broadcasters can join their resources and broadcast joint programmes only if their audience does not surpass fifty percent of the inhabitants. The Licensing Council and the Antimonopoly Office are obliged to prevent the abuse of a dominant position by any player in the market. However, only in rare cases has the Antimonopoly Office sanctioned the media for unfair competition (such as TASR and some print media in the case of unfair conditions given for commercial use of their electronic databases by data processing companies).⁹¹

As has already been discussed, the current major television players *de facto* closed the market for any new nation-wide television in 2007-2008. In short, although it may seem that competition rules are fair, in reality there are means of preventing any relevant competition from emerging.

Government subsidies for the smaller (non-profit) media in Slovakia are not unusual. In the past, however, state authorities often selected the beneficiaries arbitrarily. Such practices were common throughout most of the 1990s and were driven by the division of publishers into government 'friendly' or 'unfriendly'. To ensure some intellectual quality and plurality, the Ministry of Culture subsidises

⁸⁸ G. Šípoš, "Pre novinára je principiálna vec vedieť, pre koho píše" [It is the principal thing for the journalist to know for whom he writes], 8/09/2010, available at: <http://spw.blog.sme.sk/c/240658/Pre-novinara-je-principialna-vec-vediet-pre-koho-pise.html> (last visited on 23/10/2010).

⁸⁹ Ondrášik, "Media ownership, regulation, concentration, and competition in the Slovak republic", p. 210.

⁹⁰ *Ibid*, p. 224.

⁹¹ See "Protisúťažná praktika" [Anticompetitive practices], Article 39 of the Act No. 136/2001 Coll., Verdict of the office: fine, available at: <http://www.antimon.gov.sk/480/3475/rok-2009.axd>, and "Protisúťažná praktika" [Anticompetitive practices: infringement], Article 39, Verdict of the office: 300,000 SKK, <http://www.antimon.gov.sk/480/3398/rok-2008.axd> (last visited on 23/10/2010).

a number of marginal intellectual journals without detailed quality criteria for aid allocation.

A new feature of Slovak public service media was introduced in 2009. These media were offered the opportunity to sign Contracts with the State, which allocated financial resources for non-commercial public service mission programmes (e.g. educational programmes for children). Clearly, state media policy includes many measures to guarantee production for minorities and children in public service broadcasting which otherwise may not be of interest for private television or radio businesses.

There are no known recent cases of competition problems in the print sector. The Antimonopoly Office is monitoring the market situation, but it should be noted that its actions are rather reactive. The office does not approve mergers before they happen. Mergers are only controlled in cases where the global turnover of the implicated parties is set to reach at least forty million EUR annually, with at least two participants having an annual local turnover (in Slovakia) of around 12 million EUR, or one participant having a local turnover of 16.6 million EUR and another having a global turnover of 40 million EUR.⁹² The Antimonopoly Office follows the financial dictum of antimonopoly regulation and does not cover such criteria as content diversity.⁹³

Recently, there have been some concerns about television ownership concentration. According to the BRB, it transpires that the first level of ownership (official owners) did not show any signs of concentration (i.e. everything seemed to be according to legislation). However, this agency is not authorised to investigate second and third level ownership connections.⁹⁴ In other words, the law does not allow an in-depth search for real owners, and thus for possible cross-ownership or other illegal behaviour.

3.4 Content regulation

Content regulation is usually most controversial area of regulation because it is a 'visible', and at the same time, morally-laden issue. In fact, content regulation causes controversy at two major levels: political and moral. All Slovak governments since 1989 have been notoriously dissatisfied with the media. Their criticism has varied from a standard and often justified accusation of unprofessionalism or unethical behaviour due to incorrect claims and accusations, through to criticism of overwhelmingly negative coverage and to various forms of media conspiracy, usually suggesting that journalists' motivation to criticise the government was paid for from abroad.⁹⁵ Consequently, there were various attempts to regulate the content of the media. Some were legal and soft, but there were some case of personal intimidation as well (e.g. during Mečiar's governments in 1993-1998 in one journalist's

⁹² B. Ondrášik, "Slovakia", 53 *Otázky žurnalistiky* No.1-2 (2010) 126, at pp. 126-127.

⁹³ Personal telephone conversation with V. Ferko, Press secretary of the Antimonopoly Office, Bratislava, 23/09/2010.

⁹⁴ Personal telephone conversation with the director of the Office of the Council for Broadcasting and Retransmission, Bratislava, 23/09/2010.

⁹⁵ A. Školka, "Úlohy médií v politickom diskurze na Slovensku" [The roles of media in the political discourse in Slovakia], in J. Vopálenký (ed.), *Médiá na prahu tretieho tisícročia* [Media on the threshold of the third millennium] (2003), at pp. 95-112.

neighbourhood somebody distributed leaflets accusing him of homosexuality⁹⁶). Paradoxically, it was Mečiar's government that first called for ethical self-regulation of journalists. The controversial government's coalition members even drafted a *Declaration on Ethics in Journalism* in 1993.

Another form of criticism—moral—fought against the sudden flood of pornography and sexual topics after 1989. Later, it focused on personal offences against moral integrity and honour (libel and defamation cases), and the protection of minors. Only quite recently, in the last ten years or so, has there been discussion about open and latent racism in media reporting. Previously, only the English language newspaper, *The Slovak Spectator* covered racism and discrimination cases in Slovakia. A study by Vitaliya Bella from early 2003 suggested that most articles about Roma published in four Slovak daily newspapers were factually correct and professional. However, the most read tabloid paper *Nový Čas* was found to report in a negative and incorrect way on Roma relatively frequently. At the same time, the overall representation of Roma in selected Slovak daily newspapers reflected typical negative stereotypes (or negative realities) of Roma.⁹⁷

So far, Slovakia has not particularly addressed the issue of copyright protection in the media sector. Nevertheless, some bloggers have discovered numerous cases of copyright infringement and plagiarism.⁹⁸ One of the most debated cases of copyright breach was, ironically, related to a member of the BRB (the media supervisory board), Pavol Dinka. He was accused of false attribution of another blogger's study to (Dinka) himself.⁹⁹ Interestingly, Dinka had written books on media considered as propaganda for Robert Fico's government.¹⁰⁰

Media content issues were raised in many regulatory decisions of the BRB. As these examples demonstrate, controversies with respect to content regulation in Slovakia are not linked with the laws themselves, but rather with their interpretation by the BRB. For example, in November 2007, the Board issued a verbal punishment and ruled that PSR had broken the law with respect to objectivity and impartiality of news and current affairs programmes. The reasoning of the board was that in a political discussion, both the opposition as well as the government should be represented. The broadcast in question featured an opposition parliament member and an NGO representative, without a representative of the government. The Board declared this was not impartial even though it was a fair approach because Slovak radio had actually invited a government representative and made numerous (failed) attempts to secure government representation on the programme. The Board's decision was confirmed in the Regional Court and later in the Supreme Court. It was

⁹⁶ "Neznámi páchatelia spustili diskreditačnú kampaň voči redaktorovi Rádia Twist Karolovi Lovašovi" [Unknown criminals started libel campaign against journalist from radio twist, Karol Lovaš], SME, 15/05/1998, available at: <http://www.sme.sk/c/2152772/neznami-pachatelia-spustili-diskreditacnu-kampan-voci-redaktorovi-radia-twist-karolovi-lovasovi.html> (last visited on 23/10/2010).

⁹⁷ V. Bella, "Obraz Rómov v slovenských denníkoch" [The depiction of Roma in Slovak media], 47 Otázky žurnalistiky No. 1-2 (2004) 17, at p. 17 and 23.

⁹⁸ See for example, G. Šípoš, "Nový prípad plagiátorstva z archívu TRENDU: obeťou Financial Times" [A new case of plagiarism from the archive of TRENDS: the victim is the Financial Times], 25/01/2007, available at: <http://spw.blog.sme.sk/c/78800/Novy-pripad-plagiatorstva-z-archivu-TRENDU-obetou-Financial-Times.html> (last visited on 23/10/2010).

⁹⁹ See <http://bella.blog.sme.sk/c/179515/Pavol-Dinka-spisovatel-publicista-plagiator-zlodej.html>, and <http://www.sme.sk/c/4272054/kritik-medii-pise-ako-plagiator.html> (last visited on 23/10/2010).

¹⁰⁰ O. Bardiovský, "Ideologické písacky" [Ideological writings], 17/08/2010, available at: <http://bardiovsky.blog.sme.sk/c/238435/Ideologicke-pisacky.html> (last visited on 23/10/2010).

the Constitutional Court which cancelled the previous rulings (of lower courts, confirming that the Board decision was correct) on formal and substantial grounds.¹⁰¹ In other words, the Constitutional Court has accepted the arguments of Slovak Radio that, firstly, the Board had not followed formal procedural rules, and, secondly, the Supreme Court as well as Regional Court had not sufficiently dealt with the issue of genuine efforts and achieved results guaranteeing objectivity and impartiality. The Constitutional Court called this Regional Court ruling (which was accepted by the Supreme Court) ‘vague and fuzzy’.

Similarly, the BRB sanctioned Slovak Television for non-impartiality in September 2009. The case involved Robert Fico, the then prime minister. Fico was the sole guest on a regular political broadcast, known for its typical discussion format involving two guests. However, the absence of a representative from the opposition was Fico’s requirement.

Just recently, the BRB penalised TV Markíza with a 10,000 EUR fine for “intervention into the human dignity of the social group of pensioners”.¹⁰² This sanction concerned a primetime news report about the rising costs of social welfare, quoting an expert who argued that there are more pensioners due to better health care.¹⁰³

Previously, there was some controversy regarding the content of public service media. The public service broadcaster must ensure a heterogeneous programme selection with a majority of public interest programming. Obviously, the question has been what constitutes *programming in the public interest*. For example, when the PSB channel broadcast a local version of the international reality show Pop Idol in 2005, most critics pointed out (in contrast to our opinion) that this was not a programme of public interest.¹⁰⁴ Two years later, PSB introduced a similar home-grown programme, based on a selection of the most popular Slovak songs. This show, even though it had a clear commercial target, was easier to defend and to label as a “public service programme”. Consequently, it did not cause any controversy.¹⁰⁵

Finally, to illustrate the Slovak heterogeneity of issues related to media content, in the past, there were suggestions of creating a group of *non-commercial* print media, approved by the Ministry of Culture and subject to lower taxes. By contrast, media outlets with large foreign investments were planned to be taxed three

¹⁰¹ Ruling of the Constitutional Court, IV, ÚS 245/09-42, available at: <http://sk.vlex.com/vid/194622327> or http://www.concourt.sk/search.do?id_submenu=c (last visited on 23/10/2010).

¹⁰² Board for Broadcasting and Retransmission, “Zápisnica č. 14/2010 zo zasadnutia Rady pre vysielanie a retransmisiu, ktoré sa konalo dňa 31.08.2010 o 09:30 hod. v sídle Rady pre vysielanie a retransmisiu” [Minutes of the meeting of the Board for Broadcasting and Retransmission held on 31 August 2010], available at: <http://www.rada-rtv.sk/sk/spravy/index.php?aktualitaId=1046> (last visited on 23/10/2010).

– ¹⁰³ M. Kernová, “Licenčná rada vidí koalície” [The Licence Board sees in the coalition way], SME, 17/05/2010, available at: <http://www.sme.sk/c/5378318/licencna-rada-vidi-koalicne.html> (last visited on 23/10/2010).

¹⁰⁴ T. Popovič, “Analýza: muzikant o SuperStar” [Analysis: A musician on SuperStar], 21/05/2005, available at: <http://zaujímavosti.sme.sk/c/2019811/analiza-muzikant-o-superstar.html> (last visited on 23/10/2010).

¹⁰⁵ Z. Uličianska, “Sledovanosť STV ťahali staré hity” [Viewership of the Slovak TV was pulled by old hits], 9/07/2007, available at: <http://www.sme.sk/c/3385518/sledovanost-stv-tahali-stare-hity.html> (last visited on 23/10/2010).

to five times more than locally owned outlets. This idea extends back to 1995 but has never been turned into a regulation.

3.5 Rules regarding media publishing and broadcasting

Slovakia has witnessed dozens of harsh or controversial court decisions regarding publishing and broadcasting. Troublesome cases are related to excessive damage awards in civil cases, sometimes to the use of criminal charges, as well as to some bizarre justifications for court rulings.

For example, the private Radio *Twist* (later renamed Radio *Viva*) broadcast a press conference of the Minister of Interior in October 2004. The minister announced that the police had accused a local judge of criminal acts. The radio journalist recorded and broadcast the minister's own words, combined with her commentary. Even though the judge's name was never mentioned, the judge later sued the radio and won 33,194 EUR. It turned out that the acts he was accused of had happened, but they were not of a criminal nature. Two rulings stated that it was the media who was responsible for broadcasting, even in cases of politicians' speeches.¹⁰⁶

The second case shows the burden of criticising a judge. A controversial political figure, the chairman of the Supreme Court and later Minister of Justice, Štefan Harabín, sued the newspaper *Pravda* in seven cases. Just to exemplify the unreasonably high payments, in the case of a cartoon, the paper was ordered to pay 100,000 EUR and cover legal costs. The case is still pending at the Constitutional Court. Not only is the requested amount questionable, but so too is the issue of whether cartoons can be a subject of non-material damages related to dignity and honour.

In the third case, the daily *Sme* was ordered to pay 100,000 USD to the government and apologise to all its members who requested it for the following sentence: "*These are the first casualties of a political cold war waged by the government against the citizens of Slovakia*". The statement was published at a time of high political polarisation. The son of the President of Slovakia had been kidnapped and in a chain of events, a man who was helping him – *the first casualty* – had blown up in his car. The case is still pending.

It was estimated that over 430,000 EUR was awarded in non-material damage compensation to Slovak politicians in 2009 alone.¹⁰⁷ The aforementioned ex-Minister of Justice and currently Chief Justice sent a pre-trial notice to a number of media outlets, asking them to pay him 200,000 EUR each for alleged libel in 2009.¹⁰⁸ The PSB was involved in eighteen libel cases for its investigative programmes in 2004-

¹⁰⁶ M. Tódová, "Bývalý Twist parafrázoval Palka, dostal miliónovú pokutu" [The former Twist paraphrased Palko, and received a million fine], 14/11/2008, available at: <http://www.sme.sk/c/4175212/byvaly-twist-parafrazoval-palka-dostal-milionovu-pokutu.html> (last visited on 23/10/2010).

¹⁰⁷ L. Kočíšek, "Úloha sa obrátila. Spoločnosť 7 Plus žaluje Fica" [The role changed. Spoločnosť 7 Plus is suing Fico], 13/01/2010, available at: <http://medialne.etrend.sk/tlac-spravy/uloha-sa-obratila-spolocnost-7-plus-zaluje-fica.html> (last visited on 23/10/2010).

¹⁰⁸ M. Vagovič, "Harabin píše ľuďom, ktorí o to nestoja" [Harabin writes to people who do not care about it], SME, 13/05/2009, at p. 3.

2007. Five cases have been decided already, two in PSB's favour and three against it, with a total in reimbursement charges of 10,000 EUR.¹⁰⁹

3.6 Rules regarding social media publishing

Social media publishing in Slovakia is almost exclusively restricted to the blogosphere. The most popular service, the blog section of the daily *Sme*, created its own Code of Blogger, which has been regularly updated. The code is somewhat similar to the Code of Ethics of the Slovak Syndicate of Journalists. *Sme* bloggers have to give "proper" space to all affected sides of any conflicting topic. Journalists, in addition, should pursue this writing etiquette even in non-conflicting materials. *Sme* bloggers are not allowed to use personal correspondence without permission and after publishing their articles, they can only make small grammar or typo corrections.

3.7 Rules regarding information gathering processes

There is absolutely no regulation of search-engines in Slovakia.¹¹⁰ Slovakia has a law granting access to all public information for any person. Although designed primarily for regular citizens, it has become one of the practical tools for investigative journalists. However, there are two controversial legal rules regarding information gathering processes, both relating to the Penal Code.

First, it is illegal to publish top secret or classified information. This rule says that anyone publishing this kind of information can be imprisoned for up to three years. However, in order to sanction this behaviour, there are other (softer) measures available, too. For example, the National Security Authority (NSA) sanctioned the weekly *Žurnál* (Journal) for publishing select sensitive secret information in 2007. Even though journalists argued that they did it in the public interest, which is supposed to override the classified information regulation, the NSA decided to sanction them with the harshest non-court (financial) punishment.

The second rule concerns the intimacy of oral speech. Publishing illegal recordings and thus causing damage to other people can lead to up to a five year prison sentence. The introduction of this measure was triggered by the threat of publishing scandalous private telephone conversations of politicians or/with business people. The Slovak media provided numerous recordings of this kind.

3.8 Supervision

News reporting requires a balance of sometimes conflicting constitutional and legal interests. In Slovakia, this is done either by NGOs (such as the Press Council), semi-governmental bodies (such as the BRB, STC, RC), governmental bodies (such as the Ministry of Culture) and independent bodies created by the state, such as courts, prosecutors, the police, etc. Major Slovak journalism organisation also adopted a Code of Ethics in 1990. Many editorial offices have their own codes of conduct.

¹⁰⁹ Rady Slovenskej Televízie, "ZÁPIS č. 2/2008 z riadneho zasadnutia Rady Slovenskej televízie 13. februára 2008" [Minutes No. 2/2008 of the regular meeting of the Council of the Slovak Television on 13 February 2008], available at: www.stv.sk (last visited on 23/10/2010).

¹¹⁰ E-mail from Jana Lajdová, Legal Department of Telecommunication Office, 20 May 2010.

These formal codes often lack acceptance or even knowledge among ordinary journalists.

Until 2002, Slovakia did not have any public authority dealing with ethical complaints in the print media. Today, this has become the main responsibility of the Press Council. The council has declared its right to deal with all ethical issues related to the journalists (journalistic profession), but it has only dealt with issues related to print media and, more comprehensively, with issues related to press freedom and access to information. It can deal with some ethical issues on its own initiative too. The plan is to include electronic and online media in its portfolio in the future.

As has already been mentioned, supervisory bodies for electronic media have been strongly politicised. The collapse of their independence already started in 1993 and became infamous during the Mečiar era in 1992-1998. The liberal government of Mikuláš Dzurinda attempted to reverse this negative development. Nevertheless, after all those years, these councils are still politically dependent. The former Prime Minister Robert Fico (2006-2010) openly acknowledged a political agreement on influence division: *'We said to each other in which proportion we would propose these candidates'*.¹¹¹ The Prime Minister meant by this an internal discussion among the then leaders of the coalition parties on the issue of selection and election of the media councils' members.

4. Media policy and democratic politics: an assessment

The media landscape in Slovakia consists of a fully liberalised print and a regulated broadcast market. Formally independent supervisory bodies control public service media. Along with democratisation and liberalisation, the media landscape has been shaped by commercialisation. The relatively small size of the Slovak media market limits the media's financial resources for elaborate reporting and hence negatively impacts the quality of the media output.

Slovakia has attempted to adopt an idealised western European democracy media policy by creating a playing field for privately held media and the demonopolisation and de-etatisation of public service media. This process has never been straightforward and has taken a few sharp ideological turns depending on the politicians in power. The media policy developments of the past twenty years in Slovakia could be characterised as lacking strategy, inconsistent, motivated by political conflicts and charged with politicians' personal animosities. Ironically, although Slovakia (as part of former Czechoslovakia) was the first country in CEE to introduce 'public service media', in general, the media policy decision makers lacked broader expertise as well as perspective.

Slovakia started its democratisation in Huntington's third wave,¹¹² as a part of the Czech and Slovak federation. The transition of Slovakia's media policy can be analysed in three different phases. The first phase (1989-1992), the abrupt dismantling

¹¹¹ "Koalícia si delila médiá" [The Coalition has divided media], SME, 19/12/2007, available at: <http://www.sme.sk/c/3643114/Koalicia-si-delila-media.html> (last visited on 23/10/2010).

¹¹² Harvard Professor Samuel Huntington defined waves of democratisation. They occur in specified period of time, when a significant group of nondemocratic countries choose to become democratic. S. Huntington, *The third wave: Democratization in the late twentieth century* (1991).

of communist media, naive or *poetic* pluralisation,¹¹³ explosion of freedom of speech, and media de-monopolisation was interrupted in 1993, when Slovakia declared independence. The country was acknowledged as a special democratic transition case, a defective democracy¹¹⁴, a late developer¹¹⁵, an awkward state¹¹⁶, or a reform laggard¹¹⁷, just to name a few of the academic literature labels. During this second phase (1992/1993 to 1998), the Slovak administration led by the authoritarian Prime Minister Vladimír Mečiar made controversial media policy decisions, contradictory to the ideals of liberal democracies. Those years of semi-democratic political regime, or illiberal democracy¹¹⁸, were followed by a phase of new democratic consolidation and media commercialisation, starting in 1998. Mečiar's era, however, had a tremendous impact on the legal, financial and professional environment of the mass media in Slovakia. The legacy of this short period contributed to higher levels of political parallelism, delayed media marketisation and froze the process of journalists' professionalisation.

After the split of Czechoslovakia, Slovakia inherited a mostly de-monopolised and pluralist printed press, except for the state controlled newswire agency TASR. Following a political request from Prime Minister Mečiar, TASR founded a completely state owned and government biased daily newspaper *Slovenská republika*.¹¹⁹ Mečiar also took over the popular youth daily *Smena*. However, its core editorial staff left it and established what is now one of the leading daily newspapers, *Sme*. Mečiar financed *Smena* using governmental subsidies until it went bankrupt within a year. Mečiar's administration did not hesitate to use economic instruments (e.g. state and political party advertising) or personal intimidation in the fight against a hostile press.¹²⁰ This delayed public service broadcast depoliticisation and in contrast to its neighbours, completely closed the market for independent nation-wide broadcasters until 1995/1996. During the Mečiar era, PSB news and current affairs programmes were heavily biased. The government tried to legitimise its propagandist actions by emphasizing the media's role in "building the new state".¹²¹ The political control of the broadcast content was maintained both through extra-legal measures (delaying payment of approved subsidies) as well as through political nominations of

¹¹³ K. Jakubowicz, *Business as usual: Continuity and change in Central and Eastern European media*, (2003), at p. 26.

¹¹⁴ K. Henderson, "The Slovak Republic: Explaining defects in democracy", 11 *Democratization* 5 (2004) 133.

¹¹⁵ World Bank, *World development report 2002: Building institutions for markets* (2001).

¹¹⁶ H. Field, "Awkward states: EU enlargement and Slovakia, Croatia and Serbia", *Perspectives on European politics and society* (2000) 123.

¹¹⁷ C. Gati, "If not democracy, what? Leaders, laggards and losers in the post-Communist World", in M. Mandelbaum (ed.), *Post-Communism: Four perspectives* (1996) 168.

¹¹⁸ F. Zakaria, "The rise of illiberal democracy", 76 *Foreign Affairs* 6 (1997) 22.

¹¹⁹ Slovenská republika [Slovak Republic] was later sold to a private company with ties to Mečiar's HZDS. The last issue was published in November 2000.

¹²⁰ G. Šipoš, "Vlastníctvo médií a jeho dosah na nezávislosť a pluralitu médií. Prípadová štúdia: Slovensko" [Media ownership and its impact on media independence and pluralism. Case study: Slovakia], paper presented at the INEKO conference Media, Ownership and its impact on independence and pluralism, 29/10/2004, available at: http://www.ineko.sk/files/konf29102004_sipos.pdf (last visited on 23/10/2010).

¹²¹ As Andrew K. Milton suggests, this is a typical product of new democratically elected governments in the Czech and Slovak Republics. The roots of this explanation can be traced back to the First Czechoslovak Republic, where an 'institutional architecture was created' to help build the new state. See A. Milton, "Bound but not gagged: Media reform in democratic transitions", 34 *Comparative Political Studies* (2001) 439.

senior PSB staff in news and current affairs departments and in supervisory bodies. However, it was difficult to find competent propagandist and manager at the same time. Consequently, there were eight personnel changes in the position of PSB Director General within eight years (1990-1998).¹²²

Even today, each new administration (at least) considers senior leadership changes in public service media. Generally speaking, legislative reforms in Slovakia, similarly to other countries in CEE, have failed to replace 'state' or 'government' control of the PSB with 'public' control; indeed 'public' has been interpreted almost exclusively in terms of political representation.¹²³ Most Slovak politicians have never given up their attempts to secure favourable media coverage. However, to get their messages across, today they prefer to use modern publicity methods rather than direct political pressure or threats.

Since the Mečiar era, broadcast market conditions have changed tremendously. Growing competition and strong commercialisation have challenged public service media in Slovakia. This development seems to have been a helpful factor in gaining more autonomy from political influence. However, there is a sharp distinction between public television and public radio. The public service radio and the newswire TASR seem to be better adjusted to these new conditions than television, although both of them receive direct and indirect subsidies too. Their success in finding solution from budget cuts is that both institutions adjust their performance to their real budgets, not to the exaggerated income expectations and promises.

In general, the extensive commercialisation of television broadcasting has led to failures in providing not-for-profit based content. This has weakened the role of PSB in its normatively assigned role of democratic and civic cultivation. However, this PSB identity crisis is certainly not unique to Slovakia.¹²⁴

The playing field for political parallelism in public service media has been left open through the supervisory councils' membership selection. Members of all four media regulatory boards – broadcasting, public radio, public television, and newswire¹²⁵ - are elected by parliament. As has been shown, albeit with some exceptions, the professional experience of the government's nominees after 1998 has risen and their political and ideological ties have been significantly weakened. Nevertheless, Fico's era again brought more political nominees to the councils. Their political ties were disclosed during the 2010 parliamentary election when some of them became candidates for the former coalition parties.¹²⁶

¹²² See <http://www.stv.sk/stv/o-stv/riaditelia-slovenskej-televizie/> (last visited on 23/10/2010).

¹²³ A. Mungiu-Pippidi, "Complementary vision of economic and democratic philosophies on public TV, From state to public service. The failed reform of state television in Central Eastern Europe", in M. Sükösd and P. Bajomi-Lázár (eds), *Reinventing media, media policy reform in East - Central Europe* (2003) 43, at p. 43.

¹²⁴ A. Wyka, "In search of the East Central European media model – The italianization model? A comparative perspective on the East Central European and South European media systems", in M. Glowacki, B. Ostrowska-Dobek (eds), *Comparing media dystems in Central Europe. Between commercialization and politicization* (2008) 55.

¹²⁵ Newswire TASR was only changed to a public service agency in 2008. Until then, it was financially and strategically controlled by the government through the Ministry of Culture.

¹²⁶ See "Mediálny výbor nepodporil odvolanie členov Rozhlasovej rady" [The Media Committee did not support withdrawal of the Radio Council members], *Medialne.sk*, 10/09/2010, available at: <http://medialne.etrend.sk/radia-spravy/medialny-vybor-nepodporil-odvolanie-clenov-rozhlasovej-rady->

Persistent content politicisation of (mainly) broadcast networks supported the existing political polarisation in the country and the (somewhat later) commercialisation as well as de-polarisation from 1998 onwards led to a declining interest in politics and political participation as well as in 'hard' news among citizens. Due to politically charged polarisation among journalism professionals and the fragile media market in 1992-1998, the establishment of professional journalism standards was outpaced by marketisation and commercialisation. Today, not only political and economic sympathies, but also the editors'/owners' interests impact the selection of news items. Entertainment and the pursuit of increased market share have become the dominant functions in the majority of the media. The evidence can be seen in the relatively stable circulation of tabloid daily papers in contrast to the decreasing circulation of the mainstream broadsheet papers.

The legacy of Mečiar's era also changed the way of creating media content. Karol Jakubowicz made a general observation in CEE countries and stated that the journalists tend to seek leadership, guardianship and prefer conviction-driven journalism.¹²⁷ In Slovakia, this tendency was in many cases intensified. The political divisions, or rather divisions based on a different approach to liberal democracy itself, together with confrontational attitudes of the political elites, were mirrored in journalists' work. As one journalist claimed in an interview almost ten years after Mečiar's era, '*natural developments in the field stopped because journalists did politics*'.¹²⁸ The positive influence of the media on citizens' political participation, together with the campaign of nongovernmental organizations, was so strong that the election turnout in 1998 was the second highest in Slovak history¹²⁹. This high turnout has not been repeated and probably never will be. The canvassing journalism against the government in power disappeared, but positive information about any government policy also became rare. Most journalists adopted a defensive occupational ideology and it has become fashionable to blame the government and its members for all the failures of society.

With the entry of foreign investment and resulting access to additional resources, this situation might have changed, but the parallel influx of tabloid journalism and commercialisation prevented journalists from consolidating their profession and establishing unified codes of conduct. Journalists' salaries are only twenty-two percent above the national average and that this is in many cases far below their expectations.¹³⁰ Moreover, there are almost no labour guarantees not to mention cheap competition from young students. In this environment, representatives of the business and political sectors use various techniques of soft corruption, such as foreign trips, special treats or small presents for journalists in exchange for positive media coverage. Due to the lack of transparency in ownership structures, it has become extremely difficult for a regular audience to distinguish vested interests from independent coverage.

3.html (last visited on 23/10/2010).

¹²⁷ Jakubowicz, *Rude awakening*.

¹²⁸ L. Waschková- Císařová, "Report on news cultures in Slovakia", unpublished report, Project EMEDIATE (2007).

¹²⁹ In the parliamentary election of 1998 voter turnout was 84,12% of the registered voters. Higher turnout was achieved only in the first democratic elections in 1990.

¹³⁰ The national average monthly salary in the 1st quarter 2010 was 725 euro. According to the latest data of the Professional Salary Monitor Merces the average monthly salary of a journalist in Slovakia was 889 euro. The salary range of the survey respondents, who were looking for a job, was 608 – 1142 euro.

The third and so far final phase of media policy development in Slovakia followed the 1998 election of the reformist government of Prime Minister Mikuláš Dzurinda. The main goal of his coalition government was to consolidate democracy and speed up Slovakia's accession to the European Union and NATO. The administration had to adjust to EU regulations in many policy areas and these adjustments included some changes in media regulation. From the point of view of democratic politics, following Slovakia's EU accession in 2004, the media adopted a trend of more or less general criticism. This has contributed to the dominance of negative reporting – a typical media system of reporting. However, the problem is that even in quality media, regular political disagreements are often reported as sensations and serious policy changes typically do not make it through the editors' filters. The tabloidisation of political coverage in the media can be considered as one of the factors contributing to the decreased political participation and political disinterest of the general public in Slovakia in the early 2000s.

Dzurinda's government, just like its predecessors, did not have a media policy strategy. There was an intention to draft new media policies,¹³¹ but Dzurinda's government never fulfilled this promise. Furthermore, the government did not manage to introduce digital broadcasting or transform the state owned and poorly managed newswire agency TASR. However, it passed new laws on public service broadcasting and public service radio prepared by the Ministry of Culture in 2003 and 2004 respectively.

The governing period of the two Dzurinda administrations did not bring major changes to the media environment, but manipulation of the press disappeared. The only significant state intervention into public service media content was the official awareness campaign about the EU accession in 2004, which was co-financed by the European Commission. Generally speaking, Dzurinda's administration improved the government's communication with the media. It started to publish all government proposals online and provided explanatory media kits for key government decisions.

In 2006, the new Prime Minister Robert Fico ended this atmosphere of cooperation (1998-2002) and tolerance (2002-2006) between the government and the media. Robert Fico was personally hostile and rude to journalists and his government was met by a furious press and angry print media publishers. Nevertheless, it was his government that introduced a new media policy. This included radical changes in the indirect regulation of content of the printed press, a push for broadcast digitalisation and the transformation of the TASR newswire service. With the exception of the law concerning TASR, the new regulations put some limits on the press and constrained market access for new broadcasting players.

The Press Law has been strongly criticised by many journalists, publishers, and international organisations. Critics were mostly concerned with the vague formulations and strict regulation of the right to reply to any statement of fact that affected one's integrity, dignity or privacy.¹³² This has caused a rise in self-censorship (as put by critics) or higher levels of fact-checking (as put by supporters) in print outlets. The media also spend more on lawyers, who must decide if the conditions for

¹³¹ M. Šmatlák, "Komentár k návrhu Deklarácie o ochrane a zabezpečení rozvoja mediálneho prostredia" [Comments on the draft of the Declaration on the protection and security of media environment development], 45 Otázky žurnalistiky No. 1-2 (2002) 112, at p. 111-112.

¹³² The Law introduced three forms of reactions: the right to reply, the right of correction and the right of supplemental information.

a published reply are met. Within the first ten months of the new regulations, the three main broadsheet newspapers received over one hundred requests.¹³³ However, only a handful of them were actually printed.

During Fico's government, the conflict between politics and the media entered Slovak courtrooms at an intense level. A growing number of politicians filed civil charges against the media and its publishers. Even more importantly, many politicians requested high compensation payments.¹³⁴ The deputy Director of the International Press Institute Alison Bethel McKenzie, harshly criticised the growing number of libel and defamation lawsuits in Slovakia: '*We are concerned at the repeated use, in Slovakia, of civil defamation cases, accompanied by disproportionate fines targeting the media... Such a trend creates an environment in which independent media may feel pressured and intimidated, and acts as a restriction on investigative reporting.*'¹³⁵ The controversy of these cases is typically a product of an awkward legal interpretation rather than insufficiency in the formal protection of journalists. Again, this is further evidence of the outdated education of (even younger) judges and legal practice traditions of courts in CEE.¹³⁶ Fortunately, numerous libel and defamation cases have failed in higher courts. The threat of a civil lawsuit, but possibly also of criminal charges, however, has taken a toll on media freedom in Slovakia.

Finally, there seems to be a growing trend of association between the media and political clientelism in Slovakia.¹³⁷ A tradition of advocacy, the instrumentalisation of privately owned media, the politicisation of PBS and broadcasting regulation, the limited development of journalism and high corruption levels¹³⁸ are all present in Slovakia and constitute a harmful trend for a democratic media system.¹³⁹

It has been twenty one years since the fall of communism and the rebirth of a free and independent media. The present media landscape consists of both commercial as well as partially transformed public service media. Slovakia aspired to adopt the western European ideal and elusive public service media model, but this proved to be difficult due to concurrent global trends of commercialisation and media liberalisation. Yet just as in the media in CEE, Western European mass media have been hugely impacted by commercialisation and the rise of sensational journalism. Non-commercial public service broadcasting seems to be challenged by these market and technological developments. De-politicisation of PSB seems to be by and large an

¹³³ Ondrášik, "The Slovak press law: History and its impact on free media".

¹³⁴ In one case in May 2010, the Superior Court's president, Štefan Harabin, threatened to sue two media outlets (daily *Pravda* and *Radio Expres*) for defamation and requested 400,000 EUR. The charge was based on a claim that the remodelled bathroom in the president's office cost over 33,700 EUR. The president argued that the published price referred to the cost of the renovation of the entire office.

¹³⁵ N. Jayarajan, "Slovakian Supreme Court president and former justice Minister sues radio station for damage to reputation", 7/05/2010, available at: <http://www.freemedia.at/site-services/singleview-master/4929/> (last visited on 23/10/2010).

¹³⁶ I. C. Kaminiski, "Applying western media law standards in East Central Europe, in M. Sükösd and P. Bajomi-Lázár (eds) *Reinventing media, media policy reform in East - Central Europe* (2003) 67.

¹³⁷ D. C. Hallin, S. Papathanassopoulos, "Political clientelism and the media: Southern Europe and Latin America in comparative perspective", 24 *Media, Culture and Society* (2002) 175.

¹³⁸ Slovakia in 47th place, see NationMaster.com, "Government statistics, Corruption by country", available at: http://www.nationmaster.com/graph/gov_cor-government-corruption (last visited on 23/10/2010).

¹³⁹ K. Jakubowicz, "Finding the right place on the map: Prospects for PBS in post-communist countries", in K. Jakubowicz and M. Sükösd (eds), *Finding the right place on the map, Central and Eastern European media change in a global perspective* (2009), at p. 111.

impossible ideal even in Western Europe.¹⁴⁰ Yet, in Slovakia, the financial situation of PSB is critical. At the time of writing, the senior management forecast and then abruptly denied PSB's early financial collapse. The new country's leadership has announced that it has finally found long-term solutions for public media policy.¹⁴¹ The new Prime Minister Iveta Radičová has already promised to change the controversial Press Law and stressed the importance of moral self-censorship by journalists.¹⁴² The Minister of Culture has announced that both Slovak Television and Slovak Radio will merge and their number of channels will be cut down. This decision should, theoretically, at least, offer a solution to the long-term financial problems of Slovak Television, as well as to the possible legal and practical difficulties in dismissing the current director of STV.

5. Conclusion

If Central and Eastern Europe has been an exciting social laboratory for the rebirth of liberal democracy in the 1990s, then Slovakia has become one of its most challenging cases. It started its democratic path together with all other central European *third wave* countries in 1989, fell back to the semi- or illiberal democracy of national populism in 1992-1998, started a new phase of liberal democracy in 1998, and risked the corrupted manners of nationalist politicians again in 2006-2010. There has never been an overall political consensus on the role of the media in a democratic society, especially on the merits of public service media, and all changes in media policy have reflected the values and principles of those who drafted them. Slovakia has a fully liberalised print and fairly, though not sufficiently (at practical level), regulated broadcast market, a network of relatively independent public service media and decent media freedom assessments. As demonstrated in previous sections, the issues of the Slovak case are linked to previous political parallelism, current malicious court rulings against the media, journalist fragmentation, and growing pressure from commercialisation and vested interests.

Long-term political parallelism used to be the key issue for Slovak media development. If we look at the possible levels and forms of political vs. media dependency, as defined by Hallin and Mancini,¹⁴³ in Slovakia we can identify all of these. Media content used to be heavily influenced by the politicians, especially in public service broadcasting. Media personnel tend to be active in political life and the career paths of journalists are traditionally shaped by their political affiliations. Professional movement between journalism and political public relations is also common.¹⁴⁴ Another sign of political parallelism in Slovakia used to be the

¹⁴⁰ Mungiu-Pippidi, *Complementary vision of economic and democratic philosophies on public TV, From state to public service. The failed reform of state television in Central Eastern Europe*, 31-62.

¹⁴¹ "Krajcer má riešenie pre STV, chce rokovanie koalície" [Krajcer has a solution for STV, he wants negotiations of the coalition], *SME*, 7/10/2010, available at: <http://ekonomika.sme.sk/c/5582646/krajcer-ma-riesenie-pre-stv-chce-rokovanie-koalicie.html> (last visited on 23/10/2010).

¹⁴² M. Terenzani – Stankova, "Slovakia to get luckier with its press code" *Slovak Spectator*, 20/09/2010, available at: http://spectator.sme.sk/articles/view/40152/2/slovakia_to_get_luckier_with_its_press_code.html (last visited on 23/10/2010).

¹⁴³ D. C. and P. Mancini, *Comparing media systems. Three models of media and politics* (2004), at p. 26.

¹⁴⁴ Just recently, the columnist for *Sme* and former controversial editor-in-chief of economic weekly *Trend*, Rado Baťo, has become a spokesperson for the new government.

partisanship of media audiences. This polarisation dates back to the Mečiar government, when the media were clearly divided along ideological lines and their support or opposition to the government. The governments' attempts to manipulate coverage are notoriously linked to the public service broadcaster *Slovenská televízia* and its news programming. Complete editorial independence of PSB in Slovakia will require changes in the supervisory council selection procedures and the creation of a new financing framework.

More recently and importantly, the courts seem to be increasingly impacting press freedom in Slovakia. The fact that in 2009 alone, the media were ordered to pay over EUR 430,000 to Slovak politicians can mean only one of two things: either the journalists are extremely unprofessional or the politicians demand outrageous compensation which the courts approve. Numerous controversial rulings seem to suggest that the latter is more likely correct.

Generally, the politicians' choice to go after a medium is dependent on their political party culture and personal style. Governing politicians of the last four years (2006-2010) used civil lawsuits extensively. This behaviour has created an impression that courtrooms can be used for content regulation, exorbitant compensation requests and publicity stunts. Obviously, the issue here is not the existing law. The controversy arises mostly over the awkward interpretation and relatively weak protection of the defendants which is also related to illiberal (continental) interpretation of freedom of speech..

A serious issue for Slovak journalism has also been its lower professionalisation level. The autonomy of journalists is weak, professional norms are *de facto* not required and public service orientation has become obscure. As Liehm explained, our society found itself in a moral vacuum after 1989.¹⁴⁵ And this vacuum also applied to journalism.¹⁴⁶ Furthermore, this moral vacuum was replaced by immoral market pressures. Contrary to general belief, the quality of journalism does not result from the (correctly identified) low quality of higher education in Slovakia in general and in journalism in particular. It is the primary market that determines the quality of journalism in Slovakia in the private sector and, to a large degree, politics in the public sector.

Additionally, Slovakia has suffered from the strong politicisation of the public sphere. Thus, before journalists were able to formally professionalise, they would become strongly polarised. To make things even more challenging, after 1998, when polarisation weakened and the possibility of professionalisation re-emerged, media owners were already engaged in a new fight, that being the fight for increased market share and lower production costs. The political pressures from the past were substituted by these new economic pressures and numerous studies show how media commercialisation has impacted on the public sphere. As Hallin and Mancini put it,

¹⁴⁵ A. Liehm, "The role of culture under the communist and post-communist eras", in H. Garner (ed.), *Central and Southeastern Europe in transition*, (2000), at pp. 43-47.

¹⁴⁶ E. Lauk, "How will it all unfold? Media system and journalism cultures in post-communist countries", in K. Jakubowicz and M. Sükösd (eds), *Finding the right place on the map, Central and Eastern European media change in a global perspective* (2009) 193.

“commercialisation is the most powerful force for homogenisation and globalisation.”¹⁴⁷

In line with global trends, the aforementioned commercialisation also impacted media content in Slovakia. This trend has been especially significant in television broadcasting. Substance and issue-focused news programmes have been superseded by new formats covering personalised conflicts, crimes and showbusiness. This shift has already been linked to citizens’ growing cynicism regarding politics and politicians,¹⁴⁸ which seems to be happening in Slovakia too.¹⁴⁹ However, trust in politics and politicians seems to be related in part to often exaggerated expectations towards a new government.¹⁵⁰

The influence of media owners, politicians (and their utilisation of public service media), high levels of corruption, unreasonably high compensations in libel and defamation cases and often bizarre justifications of courts’ and regulators’ decisions and rulings, journalists’ professional fragmentation, and global commercial trends seem to be the key determinants for the future of media policy and democracy in Slovakia.

In spite of all the criticisms and drawbacks, the Slovak press, with all its weaknesses, has been one of the strongest players in the democratisation process in Slovakia since 1989. Through sometimes rough interactions with the public as well as the political sphere, beyond any doubt it has helped Slovakia to become a democratic transition success story.

¹⁴⁷ D.C. Hallin and P. Mancini, “Americanization, globalization and secularization”, in F. Esser and B.S Pfetsch, *Comparing political communication. theories, cases, and challenges* (2004), at pp. 38 – 44.

¹⁴⁸ D. Swanson, “Transnational trends in political communication. Conventional views and new realities” in F. Esser and B. Pfetsch, *Comparing political communication. Theories, cases, and challenges* (2004), at pp. 45 – 63.

¹⁴⁹ “Prieskum: Dôvera vo vlády a parlamenty v Európe prudko klesá” [Survey: Confidence in governments and parliaments in Europe has plummeted], SME, 20/05/2010, available at: <http://www.sme.sk/c/5385051/prieskum-dovera-vo-vlady-a-parlamenty-v-europe-prudko-klesa.html> (last visited on 23/10/2010), and O. Gyárfášová and M. Velšic, “Šesť neusporiadaných téz k problému slovenská verejnosť a ekonomické reformy” [Six random theses on the problem of the Slovak public and economic reforms], available at http://www.ineko.sk/files/Slovenska_verejnost_a_transformacia.pdf (last visited on 23/10/2010).

¹⁵⁰ European Commission, Directorate General Communication, Eurobarometer 68, available at: http://ec.europa.eu/public_opinion/archives/eb/eb68/eb68_en.htm (last visited on 23/10/2010).

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The case of Spain

Susana de la Sierra, Emilio Guichot, Marina Mantini, Sara Medina, Irene Sobrino

1. Introduction

Spain is a young democracy, compared to other long-established regimes, as the Constitution drafted after Franco's dictatorship dates from 1978. Whilst it would be too theoretical a debate to discuss here whether or not it is a federal state, Spain is a territorially decentralised country. It is divided into seventeen decentralised entities called *Comunidades Autónomas* (Autonomous Communities), which have their own basic political norms: the Autonomy Statutes (*Estatutos de Autonomía*). The Autonomous Communities have all some legal competences and, therefore, their own policies concerning the media. It should also be noted that Spain is a medium-size country, with nearly 45 million inhabitants, and some asymmetries between regions. This implies that, even if all the Autonomous Communities are in principle able – from a constitutional point of view - to develop their own media policy, in practice this is not the case. That is indeed a reflection of what happens also in other areas, as there are some Autonomous Communities that push forward their own policies more than others. And it is an interesting research question that could be the object of a case-study in the future. Also, the per capita income of Spanish citizens very much varies from region to region and from city to city. And there are still differences in access to certain services between those living in cities and those in rural environments. As a result, the relationship between media and democracy should be addressed bearing in mind that many inequalities still exist in the country.

The report, whose purpose is to provide a background of the situation of media policies in Spain, is divided into the following parts. Firstly, a thorough historical review will be set out. The reason for its length is the fact that history has played a decisive role in the framing of today's media law in Spain. In other words, it could be argued that historical and cultural influences are too strong in Spanish law for it to adapt to new contexts. Secondly, the legal framework will be discussed. The focus will be on the constitutional provisions that recognise freedom of expression and information, and the limits on their exercise. An explanation will also be given of how the Central State and the Autonomous Communities are granted competences to act in the media sector. Then, thirdly, more specific sub-constitutional norms will be explored, focusing on the main legal bases for the development and functioning of each type of media. The analysis will proceed with the discussion of specific content regulations, such as the legally-protected conscience clause for journalists, the protection of certain rights such as honour or privacy, access to public documents and copyright rules. Finally, an assessment of the relationship between democracy and the media will be provided. It will then become clear that the structural conditions of the Spanish media market, resulting from history and from recent legal frameworks, pose some difficulties in guaranteeing a market that is really free and competitive and which allows consumers to truly choose products and journalists to exercise their activity in an environment that is protective but also free.

2. The media landscape in Spain

The Spanish Constitution entered into force in December 1978, definitively concluding the authoritarian regime that had been imposed by General Francisco

Franco after his military rising against the Republic in July 1936. During the dictatorial period, no rights and freedoms were guaranteed as they would have been in a democratic country. Even less so, of course, the freedom of expression or freedom of the press, as these would endanger the regime. This authoritarian system lasted for almost forty years but it was not homogeneous throughout that time period. In the 1960s, the regime opened up slightly,¹ and this allowed for a revision of some laws concerning the media, which at that time were mainly the press and radio. From this period is the Press Statute, passed in 1966 which – paradoxically - is still in force.

It is indeed therefore not possible to understand the current situation of the mass media in Spain without looking back at the historic evolution of the Spanish state and its society, from the civil war through the Dictatorship to the period of transition to democracy. The pillars of the current system were laid between 1975 and 1990. However, the regulation has changed recently, a new Statute on Audiovisual Communication has been passed (implementing the Audiovisual Media Services Directive – hereinafter AMSD - in Spanish law) and a new media landscape is being shaped, naturally not only due to internal factors but also to international dynamics. Market pressures have led communications groups to merge, and new information and communication technologies are forcing the traditional media to go with the flow and constantly evolve.² At the same time, society is changing, migration movements cause fluctuating and changing situations in the audience, whereas the contemporary hyper-exposure to informational messages causes a continuous need to a reciprocal adaptation between the transmitter and the receiver. This means that several communication channels are used at the same time, the relationship between transmitter and receiver is not bidirectional, and the contents of the message are constantly renegotiated.³ In order to understand the current mass media market it is necessary to place it in its cultural and social context, which is in turn the result of a historical evolution that greatly influences present processes.

The following lines will be devoted to presenting a brief history of the mass media in Spain, focusing on the birth of the main mass media (the press, radio, television and new online media services) and their development up to now. In this section the contemporary media landscape will receive detailed and thorough attention.

The historical review of the media communication system will be divided into the following stages: the evolution of the printed press and radio during the Second Republic (1931-1936); political advertising and propaganda in the Spanish Civil War

¹ On this, see mainly E. Chuliá, *El poder y la palabra. Prensa y poder político en las dictaduras. El régimen de Franco ante la prensa y el periodismo* (2001) and, by the same author, 'La Ley de Prensa de 1966. La explicación de un cambio institucional arriesgado y de sus efectos virtuosos', *2 Historia y política: ideas, procesos y movimientos sociales* (1999) 197. See also, as a written testimony of scholars during the dictatorship, G. Dueñas, *La Ley de Prensa de Manuel Fraga* (1969); M. Fernández Areal, *Libertad de prensa en España, 1938-1971* (1971). See also J. Terrón Montero, *La prensa de España durante el régimen de Franco. Un intento de análisis político* (1981). A bibliography for the study of the history of the press in Spain can be found in J. Altabella, *Historia del periodismo español. Programa y fuentes* (1987).

² An updated study on the situation of the media in Spain is the yearly report of the Advertising Agency *Zenith*. See the 2010 report on <http://www.zenithmedia.es/zenithlibrodemedios.pdf> (last visited on 12/10/2010).

³ For the concept of "flow", in the context of communication, see A. Semprini, *La società di flusso* (2003); for the processes of negotiation and renegotiation in communication theory see J. Lozano, C. Peña Marín and G. Abril, *Análisis del discurso. Hacia una Semiótica de la interacción textual* (1989).

(1936-1939); and the Franco Dictatorship, i.e. when the bases of the mass media system that still exists in Spain today were founded. This period was characterised by governmental control and censorship (with a distinction between the first period, 1939-1966 and the second period, 1966 until the death of the dictator in 1975); the transition to democracy (1975-1990), during which the mass media played an important function; and the current years of democratic government, a time in which democracy is being consolidated and the mass media system undergoes profound changes.

This division is coherent with the historical analysis and the opinions of scholars and experts in Spanish mass media history. Historians have noted how the press, radio and television influenced events and promoted important changes in the course of history, thus contributing also to framing democracy. The relationship between politics and broadcasting was very close throughout the Franco period, so that the phases used to study the dictatorship usually coincide with those established for television.⁴ It is also useful to note that newspapers and the press in general were born as political and ideological expressions of political parties and trade unions. Therefore, they performed the same function as “house organs” do today in companies.⁵ Indeed, throughout Spanish history, the printed press has assumed more ideological and radical opinions than the political parties themselves, and has played an important role in different crucial historical changes (the Second Republic, the Franco dictatorship and the transition to democracy). As argued by Fuentes Aragonés,

*Possibly one could formulate a historical rule that, with exceptions, then became more or less generalised: that newspapers and magazines linked to one ideology or other kept more radical and partisan views than those of the political parties or trade unions to which they were attached.*⁶

2.1 The Second Republic (1931-1936)

The Second Republic lasted from 1931 until the military uprising of 1936. Some authors prefer to consider its course extended until 1939, the year in which the civil war ended. It actually succeeded another dictatorship, namely that of General Primo de Rivera (1923-1930), which contained no relevant elements for today’s understanding of the relationship between media and democracy. The Republic had a brief [but eventful] history,⁷ and some facts that need to be highlighted from the point of view of freedom of expression and democracy. First, it should be noted that press distribution and consumption during this period were widespread. Secondly, radio took its first steps. Thirdly, it can be assumed that the Republic was designed also to protect rights and freedoms, and, indeed, a specific court was established to guarantee the enforcement of the Constitution (*Tribunal de Garantías Constitucionales*). Yet at that time mechanisms to ideologically and politically control the press were still recurrent. Fourthly, the role of the press in the Second Republic can be compared to

⁴ See E. Bustamante, *Storia della radio e della televisione in Spagna (1939-2007)* (2007), at p. 2.

⁵ A *house organ* is a magazine or periodical published by a company in order to promote that company’s products.

⁶ J.F. Fuentes Aragonés, “De la confrontación al consenso: el papel de la prensa en la Segunda República y la Transición” in R. Quirosa-Cheyrouze y Muñoz (eds), *Prensa y democracia. Los medios de comunicación en la Transición* (2009), at p. 68.

⁷ A. Pizarroso Quintero, *De la Gazeta Nueva a Canal Plus. Breve historia de los medios de comunicación en España*, (1992). The same author has published *Historia de la prensa* (1994).

the active one it has played in other periods of history, such as the transition to democracy starting around 1975. Notwithstanding this, even if it can be argued that the press led the Primo de Rivera dictatorship to the Second Republic, i.e. towards a liberal regime, it also contributed to the establishment of another dictatorship, that of General Franco, with the consequent censorship and media control.⁸

This was an exciting time for the mass media, especially for newspapers, considering that all were politically engaged. Due to their influence on public opinion, the term “Paper Parliament” (*Parlamento de Papel*) was created. However, a strict censorship control gradually started to appear, as an aggressive and violent climate built up in society and later culminated in the military *coup d'état* by General Francisco Franco. This is the time when the political polarisation of media began, a polarisation that can be identified even today. Also significant was the role of news agencies, which began to take their first steps at this period. Additionally, the radio became consolidated as an important broadcasting medium. The Government of the Second Republic pushed through the adoption of several statutes and regulations concerning radio broadcasting, and created the first Ministry of Communications (*Ministerio de Comunicaciones*).⁹ Nevertheless, if we compare the Spanish situation with that of England or Germany, the development of Spanish radio was less extensive than in other European nations.¹⁰ This was clear from the European Lucerne Plan of 1934, which divided and assigned waveband frequencies – where radios had to operate - to European states. The licences assigned to Spain exceeded the real necessity of the country.

2.2 The Civil War (1936-1939)

The Civil War¹¹ was a relevant period for the initiation of the propaganda system, which was later used for political purposes during General Francisco Franco's regime. It was also relevant for the development of a new type of media, sound cinema, in particular, with reference to news (propaganda) documentaries. One of the first and main concerns of the Franco side from the beginning of the Civil War was the control of the press and other media. The basic architecture of what would subsequently be the regime's propaganda apparatus, for nearly four decades, was forged during the war. In 1938, Franco's faction passed the Press Statute (*Ley de prensa*),¹² which came into being on a provisional basis, but lasted until 1966. The Statute conceived the

⁸ As pointed out by Fuentes Aragonés, “De la confrontación al consenso: el papel de la prensa en la Segunda República y la Transición”, the Spanish press in these two periods was characterised by tension and political radicalisation. Thus, indirectly, it contributed to disseminating the opinion of a need for a “strong hand” that could restore order.

⁹ The first National Plan on Radio Broadcasting dates back to 1931, whereas the Statute on Radio Broadcasting, from 1934, established a state monopoly of this activity. Moreover, in this very same year of 1934, the central State gave the competence on broadcasting services to the regional Catalan government (evidently to be exercised in its territory only). Yet the Catalan government never took advantage of this new power, due to the outbreak of the Spanish Civil War in 1936. It should be noted that in 1934, some important riots took place in different parts of Spain, thus showing the discontent of certain sectors of the population.

¹⁰ See Pizarroso Quintero, *De la Gazeta Nueva a Canal Plus. Breve historia de los medios de comunicación en España*.

¹¹ Cf. in general Pizarroso Quintero, *De la Gazeta Nueva a Canal Plus. Breve historia de los medios de comunicación en España*; L. Díaz, *La radio en España, 1923-1997* (1997); A. Pizarroso Quintero, “La guerra civil española: un hito en la historia de la propaganda”, 2 *El Argonauta Español* (2005).

¹² 22 April 1938 (BOE/Official Journal 23/04/1938).

press as a public service and provided that public institutions could participate in the management of newspapers and also in determining the content of information. State interference was thus institutionalised. It is also interesting to underline the existence of extensive foreign press presence.¹³ Moreover, many foreign correspondents (as well as international cultural personalities, such as Ernest Hemingway or Henry Cartier Brésson) came to write and describe the dramatic events in Spain. Numerous documentaries and films testifying to the increasing role of the new mass media were produced, even though they were mostly propaganda voices. It should be added that the anarchist and the communist groups also took advantage of propaganda. The phenomenon of *disinformation* or *black propaganda* (*propaganda negra*) that exaggerated or distorted facts and news also dates from this period. This technique was used equally by both parties, the groups sustaining the legitimate Republic and those against it.

Clearly, the strict relationship and interdependency between the mass media and public institutions in Spain, or more precisely, the symptoms of the lack of independence of the media in Spain with regard to public power, became apparent. At the same time the printed press experienced severe censorship, regulated by the aforementioned Press Statute of 1938 and conditioned by the news agency EFE, which was created in 1939 and which still exists today as the major Spanish news agency. Public Radio, *Radio Nacional de España*, was created in 1937, in Salamanca.

It is difficult to assess the relationship between media and democracy during this war period, as, by definition, strictly speaking no state whatsoever exists and, therefore, no political regime, either democratic or authoritarian, can be identified. Notwithstanding this, it is important to understand the dynamics that were created, as they greatly influenced the landscape in later years. Indeed, during the Civil war, the information media became increasingly politicised and polarised, something that will emerge as a characteristic of the mass media that led to social division and which still exists even today. Like the other mass media, even local radios became a propaganda tool.

2.3 The dictatorship of General Francisco Franco (1939-1975)

As already mentioned the period of Franco's dictatorship made a considerable mark on the evolution of the mass media in Spain and produced the lowest level of freedom of expression and information.

Historians divide this time into two periods: the first one stretches from 1939 to 1966 and is usually called "The dark years" (*Los años oscuros*).¹⁴ During this period the dictatorship slowly evolved and consolidated itself. The second period, from 1966 to 1975, is characterised by a certain opening-up of the regime, both domestically and internationally, and it laid the foundations for the future transition to democracy.¹⁵ This does not mean, though, that there was an intention to undertake such a transition at the time. This division of the dictatorship applies perfectly well to

¹³ The Italian Dictatorship led by Mussolini created a especial task force for its propaganda in Spain, directly dependent on the Ministry of Foreign Affairs (*Ufficio Stampa e Propaganda della Missione Militare in Spagna*, instituted in Saragossa in 1937).

¹⁴ A. Pizarroso Quintero, *De la Gazeta Nueva a Canal Plus. Breve historia de los medios de comunicación en España*, at p. 159.

¹⁵ As will be explained later, 1966 was a landmark for the history of the media in Spain.

media development, as 1966 was indeed a crucial year for the freedom of expression and information.

The dictatorship saw the consolidation of a mixed-service radio system (public and private, the only case in Europe), which characterised Spanish radio from its beginning in the early years of the twentieth century.¹⁶ Then, between 1953 and 1962, the regime was internationally consolidated and integration into the international economy started, thus putting an end to autarky. This led to the setting-up of a Spanish Public Television (TVE) that still exists today. An important change was the arrival of Manuel Fraga Iribarne to the leadership of the Ministry of Information and Tourism, in 1962. Manuel Fraga Iribarne, who still serves for his political party, the Popular Party (now in the opposition), has been a controversial figure, as he was in charge of the censorship system run by the aforementioned Ministry and he later formed part of the democratic institutions.¹⁷ He was the author of the Press Statute of 1966, which – amazingly, in the new democratic framework - is still in force.¹⁸ Even if it is impossible to talk of freedom of expression at that time, the difference between the 1938 and the 1966 law lies in the lack of compulsory prior censorship after 1966. As the Spanish writer Miguel Delibes put it: “*Before, they forced you to write what you did not feel, now they are satisfied with forbidding you to write what you feel; at least something has been gained*”.¹⁹ Until 1966, indeed, it could be argued that there was a monopoly system, whereby the State provided information, this being, of course, of a propagandistic nature. Yet from 1966 on, with the new Statute fervently advocated by Manuel Fraga Iribarne, the Minister of Tourism and Information, there was a partial opening towards greater freedom, thanks also to the rapid spread of television, which had started to broadcast on a regular basis in Spain (although initially only in Madrid) on 28 October 1956. This situation did not mean, of course, that the freedom of expression and information was recognised, as only once the Dictator had died in 1975 could a real – and therefore non-programmatic – discourse on rights and freedoms be politically and legally implemented.

The propaganda system which was established in 1938 and consolidated in the 1950s cohabited with extensive censorship.²⁰ Those media that did not respect censorship would be sanctioned and this was, among others, one of the reasons for the slow development of the press in Spain, which was below the European average. This may be seen as the reason for the Spanish disaffection to newspapers which characterised society until the early 1980s (and in part, even today).²¹

¹⁶ Spanish Radio organised itself both on the public and on the private initiative and private stations operated by frequencies assigned by the State.

¹⁷ He has published several books – not academic ones, certainly – that may enlighten those interested in getting to know that period better. See, for instance, his memories: M. Fraga Iribarne, *Memoria breve de una vida pública* (1980). E. Chuliá interviewed him for her research on the Press Statute of 1966, as stated in her publications already quoted.

¹⁸ Statute 14/1966, 18 March, Print Press and Printing (*Ley de Prensa e Imprenta*), BOE/Official Journal 19/03/1966.

¹⁹ M. Delibes, *La censura de prensa en los años 40 (y otros ensayos)* (1985), at p. 5.

²⁰ In order to control news and texts, a system of instructions (*consignas*) was established and, as a consequence of this, the bodies of the authoritarian regime felt free to send texts to newspapers and magazine editors so as to have them published. This is similar to the “Veline” system in Italy, used during the dictatorship of Benito Mussolini.

²¹ See the Yearly *Informe Annual de la Comunicación* [Communication Report] coordinated by B. Díaz Nosty from 1989 to 1992.

From 1969 onwards, Franco's control of radio and television was absolute even if incipient attempts to fight against the regime began to emerge, precisely when the public television broadcaster reached a certain maturity. At that time one of the peculiarities of the National Radio and Television (*Radiotelevisión Española*: RTVE), which is still operating, was the military presence on the boards of the broadcasting system, alongside journalists and professionals.²² Indeed, like in other fascist regimes, there was a particular ideology, which in this case was that of National-Catholicism, but not a highly-structured propaganda system (like, for example, the ones developed under the authorities of Hitler or Mussolini). It worked with official speeches, but did not have its own public propaganda space. This does not mean, however, that it was not aggressive or repressive. On the contrary: for instance, the profession of journalist was fully controlled by the State and access to it could be denied if the opinions of the individual concerned were not in accordance with the official doctrine.

As stated above, television broadcasting in Spain started on 28 October 1956, although at the very beginning it only reached the city of Madrid. Television coverage gradually expanded and reached all regions in Spain in 1964, the year in which the Canary Islands also received the signal. Until 1988, there was only public television in Spain, and therefore private enterprises were not allowed to broadcast. The television which was established in 1956 used a modulated frequency (FM) radio system and its contents – as was the case with radio – suffered from the same mediocrity as the rest of cultural life in Spain, in contrast to the creativity experienced in the Second Republic.²³ At the same time, we should remember the collaboration of RTVE managers and professionals with the Spanish regime, something which negatively affected the plurality of the contents. Concerning radio, though, it should be added that a certain sector of the Spanish population was eager to receive plural information and many would secretly listen to foreign radio broadcasters. This was an increasing phenomenon that worried the regime greatly and which reputedly helped to open it up slightly. This is so because it provided the means to slowly build up a critical public opinion, at least regarding a certain sector of the population, i.e. those listening to foreign radios.²⁴

During 1962 and 1969, the maturity period of the dictatorship, spectacular economic growth took place along with the first protests by social movements. This is the setting in which the broadcasting system expanded dramatically. The regime never ceased its repression of dissidents and, indeed, the opening-up of the system was not really due to the regime's will, but to internal and external pressure by the citizenship, social movements and international actors.

One of the major "legacies" of Franco's dictatorship concerning the media and, in particular, journalism is the regulation established regarding the profession of journalist. Not only did an Official Register of Journalists exist, but also specific schools were created at Universities to provide training. The Faculties of Information or Communication date from this period and are still the norm today, although they are not compulsory, for gaining access to the profession. Clearly, even if a basic knowledge of certain subjects may be advisable, having everybody follow identical

²² Bustamante, *Storia della radio e della televisione in Spagna*, at p. 12.

²³ See Pizarroso Quintero, *De la Gazeta Nueva a Canal Plus. Breve historia de los medios de comunicación en España*.

²⁴ See F. Franco Salgado-Araujo, *Mis conversaciones privadas con Franco* (1976) p. 343-344.

steps to become journalists could impede a real development of pluralism and, thus, of democracy.

The State Press Agency, EFE, as we mentioned before, was created in 1939 and is still functioning today.²⁵ It quickly became the most important press agency all over America, too, with bases in capital cities such as Buenos Aires, Lima, Asunción, and even in New York City and Manila, where EFE installed its first bridge to the East (historically, the weakest) in 1977. During this time, crucial technological changes were experienced, such as satellite connections or computers.

The final years, from 1969 until the death of the dictator in 1975, coincide with the crisis of the regime. This was not provoked by the physical decline of General Franco alone, but also and, more importantly, due to the ever-growing popular rebellions, frequent workers' and students' strikes, as well as a clear opposition to the dictatorship. There were no legal or structural changes on television or radio, and these media simply consolidated their position. The printed press (newspapers and magazines) also experienced, as already stated, the hesitant opening-up permitted by the Press Statute of 1966.

2.4 The transition to democracy (Transición: from 1975 onwards)

To conclude this historical journey, it is necessary to devote a few lines to the period of the transition from dictatorship to democracy, especially because of the existence of controversial opinions regarding this period. According to some, the mass media played an important role in accelerating the transition to democracy. Yet many academics and historians consider that radio and television did not undergo any remarkable change in this period.²⁶ As far as the printed press is concerned, it played a similar role to the one played in the Second Republic. It acted as a driving force to create a critical public opinion and to foster the implementation of rights and freedoms. Indeed, these years were characterised by the growing relevance in quality and impact of the daily newspapers and magazines. Nevertheless, contrary to what was typical in the republican period, the Transition was inspired by a model that did not accept radicalisation or policy "brutalisation". The dominant thought was "freedom without rage", and even the leader of the Communist Party,²⁷ Santiago Carrillo, said, "*No Dictatorship, not even the dictatorship of the proletariat*". Newspapers echoed these views, and the word consensus was a trigger and a leitmotiv. Therefore, even if pluralism was slowly acquired in the press, radicalism was out of the system.

As in the previous phases, there was a close relationship between political events and the evolution of radio and television. The climate of political instability, violence and economic problems was not the ideal framework for a change in the model of government control over radio and television. Nevertheless, some important events should be highlighted. In 1977, the "Spanish Radio and Television" (*Radiotelevisión Española: RTVE*) public body became autonomous – and thus more independent, although not entirely. This was one of the results of the "Moncloa Agreements" (*Pactos de la Moncloa*), which were crucial for establishing a legal

²⁵ See EFE official website, available at: <http://www.efe.com> (last visited on 13/10/2010).

²⁶ See in particular J.M. Baget, *Historia de la televisión en España 1956-1975* (1993); E. Nicolás Marín, *La libertad encadenada. España en la Dictadura Franquista 1939-1975* (2005).

²⁷ The Communist Party in Spain was legalised during Easter 1977.

framework for the future democratic system.²⁸ On 29 December 1978 the Spanish Constitution was published in the Official Journal and thus a new political and legal framework for the media was also established. Article 20 of the Constitution recognised the freedom of speech and freedom of information. On the basis of this article, a Statute on Radio and Television was passed in 1980,²⁹ and was complemented by a Statute allowing the Autonomous Communities to have their own television channels.³⁰ The Statute on Radio and Television was first applied in 1981 and it included elements that did not really permit the development of a system independent of political control. This was so because only one public television broadcaster (and no private ones) was allowed and the political party in power still conditioned very much its activities. Later on, in 1988, the first steps were taken towards allowing private broadcasters to enter the Spanish arena.³¹

Finally, it should be noted that in the 1980s and 1990s, under the socialist governments (from 1982 to 1996), Spain was pierced by a movement of renewal and cultural experimentation, often promoted by public institutions (known as *movida*). This cultural innovation spread to television programmes too. At the same time, a peculiar phenomenon that characterises broadcasting in Spain, and which started during the transition to democracy, was regional television. The Autonomous Communities (or at least some of them) started to create and run their own channels. Their functioning was rather heterogeneous and did not necessarily mirror the national system until 1983, the year in which – as already stated – a Statute on the so-called “third channel” was passed. This Statute allowed Autonomous Communities to actually create their channels, but subject to certain legal conditions. The Federation of Autonomic Radio and Television Organisms (*Federación de Organismos de Radio y Televisión Autonómicas: FORTA*) also dates from this period.

In conclusion, the transition to democracy implied the loss of an opportunity to create a broadcasting system free of state control, something which is a necessary condition for a democratic and independent mass media system. It is not by chance that one of the Spanish specialists in communication has argued that

*The history of Spanish radio and television during the last years of Franco and the transition, but also largely during democracy itself and at least until 2006, cannot be understood without taking into account the early framework created by the dictatorship and applied to television from its beginnings.*³²

With regard to the printed press, as underlined by Seoane and Sáiz, “*neither the opening-up brought on by the 1966 Press Statute nor the expectations awakened*

²⁸ See Bustamante, *Storia della radio e della televisione in Spagna (1939-2007)*.

²⁹ Statute 4/1980, 10 January 1980, *De Estatuto de la Radio y de la Televisión*, BOE/Official Journal 11/1980, 12/01/1982.

³⁰ Statute 46/1983, 26 December 1983, on the Third Television Channel (*Del Tercer Canal de Televisión*), BOE/ Official Journal, 4/1984, 5/1/1984.

³¹ Statute 10/1988, 3 May 1988, on Private Television (*De Televisión Privada*), BOE/ Official Journal 108/1988, 5/5/1988.

³² E. Bustamante, “Radiotelevisión en España: entre el franquismo y la democracia”, in R. Quirosa-Cheyouze y Muñoz, (ed.), *Prensa y democracia...* (2009) at p. 307. The year 2006 is mentioned, because a new Statute was passed then, Statute 17/2006, 5 June 2006, on Radio and Television belonging to the State (*Radio y Televisión de Titularidad Estatal*), BOE/Official Journal 134/2006, 6 June 2006, repealing the abovementioned 1980 Statute.

by the democratic transition and the conquest of freedom of expression resulted in a significant increase in global diffusion”.³³

As stated above, the press played an important role in the transition, as it furthered this process, but this was not translated into greater enthusiasm on the part of readers.

2.5 The media landscape under various governments

Early socialist governments (1982-1986; 1986-1989; 1989-1993; and 1993-1996) were unable to put a definitive end to Franco’s legacy in the topic we are dealing with. Broadcasting was still considered in this period a public service, with the intrinsic limitations that this concept in its classical version usually brings with it in relation to free competition. Indeed, the delay in the admission of private operators to this market hampered competition between broadcasters, a competition that almost only existed for the sake of competing for advertising spaces. This led to a “private commercial” programming model as qualified by Enrique Bustamante. In 1995, a new Statute was passed, regulating satellite and cable television.³⁴

Under the governments of the Popular Party (1996-2000 and 2000-2004) the broadcasting system did not receive the boost it should have been given in this period, when liberalisation and deregulation were key concepts. In fact, the broadcasting system reached a situation of financial collapse.³⁵ The willingness to apply European regulations and to allow private broadcasters to act with greater freedom in a liberalised market was indeed clear.³⁶ Yet in practice this did not work and broadcasting remained a highly regulated sector, with few operators active in the market and with many constraints. In part three of this report a presentation will be made of how the liberalisation of the broadcasting sector is now intended to become more real, thanks to a new Statute passed implementing the Audiovisual Media Services Directive. The Spanish Statute does not only implement the Directive, but goes further and regulates aspects which were not envisaged in the European norm.

As far as the printed press is concerned, the 1980s and the 1990s were important decades, as newspaper sales took off. Yet they generally remained below the European average.

³³ M.C. Seoane and M.D. Sáiz, *Cuatro siglos de periodismo en España* (2007), at p. 309.

³⁴ Statute 37/1995, 12 December 1995, *On Satellite Telecommunications (De Telecomunicaciones por Satélite)*, BOE/Official Journal 297/1995, 13/12/1995, and Statute 42/1995, 22 December 1995, *On Cable Telecommunications (De Telecomunicaciones por Cable)*, BOE/Official Journal 306/1995, 23/12/1995. The latter was later repealed by Statute 32/2003, 3 November 2003, *General de Telecomunicaciones* (General Statute on Telecommunications), BOE/Official Journal 264/2003, 4/11/2003.

³⁵ A recent Statute has been passed precisely on the financing of public broadcasters: Statute 8/2009, 28 August 2009, *On the financing of the Public Corporation of the Spanish Radio and Television (De financiación de la Corporación de Radio y Televisión Española)*, BOE/ Official Journal 210/2009, 31/8/2009. The main novelty is the fact that no advertising is allowed on public television channels and a tax has been imposed on telecommunication companies to contribute to RTVE’s budget. This was something private broadcasters had been demanding for a long time.

³⁶ It should be remembered also the relationship between José María Aznar, Spanish Prime Minister at the time, and Silvio Berlusconi, Italian Prime Minister and owner of the private broadcaster *Telecinco* in Spain.

2.6 Mass media in Spain: the contemporary landscape

A crucial moment has now arrived for the mass media in Spain, as the whole environment is rapidly changing. The most obvious example of this is the Internet, with its new format – compared to other more classical media –, social networks, and especially the interface between different media. Also the integration between telephone systems, computers and television characterises the current changes. Television in particular is undergoing many transformations: the analogue switch-off, the possible merger between channels, the disappearance of advertising on public television and pay-digital terrestrial television (DTT).

These changes will have an impact both on consumption and on programming, and there will be a possible fragmentation of the audience and therefore a change in advertising funding, given the general situation of economic recession.³⁷

The main characteristic of the media in Spain is that they continue to meet certain ideological logic, although commercial ideology is very much present (especially in the case of large international media groups). In the mind of consumers buying this or that newspaper or watching certain television news symbolises a sharing of ideas or membership in a certain political party.

There were five multimedia groups in 2009 (*Prisa, Vocento, Godó, Unidad Editorial, Planeta*), although the trend is for this figure to increase. There are five national daily newspapers (*El País, ABC, El Mundo, La Razón, Público*) and, so far, four free national newspapers (*Qué, ADN, 20 Minutos, Metro*), which have become very popular. Daily sports newspapers are also very popular and two of them exist on the national scene (*AS, Marca*). As far as radio is concerned, there are 6 public radios (*Radio Nacional de España, Radio 3, Radio 4, Radio 5, Radio Clásica y Radio Exterior*), as well as regional and local radios. Concerning the private ones, the following can be mentioned: *Cadena Ser, M80, Los 40 Principales, Cadena Dial* (all of them owned by *Prisa* Group); *Unión Radio, Punto Radio, Radio Marca, OndaCero* and *COPE* (owned by the *Conferencia Episcopal*, i.e. the Catholic Church). In 2009, there were six national analogical TV channels (*TVE 1, La 2, Cuatro, Telecinco, La Sexta, Antena 3*), all of which have now turned digital. On the digital scene, five of the national channels are public (*TV 1, TV 2, 24h, Clan, Teleduarte*), and there are many more private ones.³⁸ Concerning satellite TV, there is one operator, *Digital +*, which was the consequence of a merger between the two previous operators (*Via Digital* and *Canal Satélite Digital*). *Telecable, Ono* and *Euskaltel* were the three cable operators, and *Imagenio, Orange* and *Jazztel* were the ADSL providers.

2.6.1 Printed press

Today, the situation of the print press is delicate, as new technologies (in particular, the Internet) have caused a general stagnation common to all countries in the Western world. In Spain, circulation is high due to the specialised sports press and to regional newspapers, even if the number of outlets has been reduced. In addition, newspapers

³⁷ See Zenith, “Los medios de comunicación en España y Portugal 2009” [Media in Spain and Portugal 2009]. ZenithOptimedia is part of the world's largest media services group.

³⁸ See the full list: Ministry of Industry, Tourism and Trade, “Operadores TDT”, available at: <http://www.televisiondigital.es/Terrestre/OperadoresTDT/Paginas/OperadoresTDT.aspx> (last visited on 13/10/2010).

and magazines have embarked on a race, competing amongst themselves by offering promotions of all types of products, such as DVDs, books or even mugs.³⁹ With regard to magazines, in particular, there is a shortage of good-quality small press in Spain. Another peculiar phenomenon, that of the yellow press (*prensa del corazón*), which is also abundantly present in television and radio programmes, remains strong.⁴⁰

The newspaper readership in Spain has not varied substantially in the last decade, but its percentage remains remarkably lower than that of other EU countries.⁴¹ The free press is reaching large audiences and is gaining remarkable commercial strength. The most widely-read newspaper is *20 Minutos*, a free newspaper of national scope launched on 3 February 2000, with an average of 2,889,000 daily readers (in 2008). The second most widely-read paper is the sports newspaper *Marca* (2,597,000) and the third one is *El País*, with a readership of 2,218,000. They are followed by two other free newspapers (*Qué*, 2,255,000, and *Metro*, 1,823,000). *El Mundo* comes only in 6th place, with 1,348,000 daily readers. Newspapers, as stated above, maintain their income rates thanks to product distribution, advertising and merchandising. Women's magazines lead the magazine market, but even this is also stagnated. Most readers are female, despite the prevailing daily intake for men. The highest rate of readership is among persons (both female and male) between 25 and 44.

2.6.2 Television

Television is still the most-consumed media, even more so with the wide range of channels and obviously due to a great extent to all major sporting events, despite their being broadcasted – in many cases - on pay channels. Average daily consumption of television is 227 minutes per person (2008). Most consumers are women between 35 and 54, who prefer *Tele5* and *Antena3*, while men tend to prefer *La Sexta*, *Cuatro* and *TV1*.

The television market is increasingly fragmented, and there is a public entity for radio and television, *Radiotelevisión Española/RTVE*, which broadcasts through two generalist channels of national scope: *La Primera* or *TV1* and *La 2* or *TV2*. In addition, twelve other similar public bodies are grouped around the aforementioned *Federación de Organismos de Radio y Televisión Autonómicos* (FORTA). Each of these regional public broadcasters traditionally had one or two analogical television channels. The transition from analogue television to the digital system – the so called “analogue switch-off” – concluded on 2 April 2010.⁴² The analogical networks belonging to private television companies were *Antena 3*, *Telecinco*, *Cuatro* and *La Sexta*, and they have all turned digital, accompanied by *Vevo TV* and *Net TV*, which

³⁹ *El País*, newspaper leader, joined in 2005 127.8 million Euros. Source: Seoane and Sáiz, *Cuatro siglos de periodismo*, p. 312.

⁴⁰ *Hola*, the most famous and prestigious, started its publication in 1944.

⁴¹ Data sources for all types of media: Gabinete de Análisis Demoscópico (Demoscopic Análisis Office: GAD), *El Informe 2010: Medios de comunicación españoles en las redes sociales* [2010 Report: Spanish media in social networks]; Zenith, “Los medios en España y Portugal 2009”; Asociación para la Investigación de Medios de Comunicación, Estudio General de Medios, *Audiencia de Internet, Abril-Mayo 2010* [Internet Audience, April-May 2010].

⁴² There is an official Spanish government website, where the digitalisation process could be followed and updated information can still be found today. See Ministry of Industry, Tourism and Trade, “Televisión Digital Terrestre”, available at: <http://www.televisiondigital.es/Terrestre/Paginas/Index.aspx> (last visited on 13/10/2010).

were already digital. With regard to local television stations, there are no precise data, since the map of local television and radio companies is very fragmentary. The penetration of cable television is very low compared to other (former) analogical and digital television formulas.⁴³ With regard to Internet television (IPTV), *Telefónica*, the most powerful and widespread telecommunications company, has been promoting ADSL technology not only by offering Internet connection, but also including interactive television services. It started to offer a new ADSL television service in 2005, called *Imagenio*.

2.6.3 Radio

Radio is still fairly widespread, in particular in the morning timeslot and in big cities (probably because of the time needed to commute by car). The Autonomous Communities of Castilla La Mancha and Madrid are the ones that consume the highest number of minutes of radio listening (between 105 and 116 per day), together with Asturias, Cantabria and La Rioja. So far, DAB radio broadcasting technology has failed totally. Very few people have purchased digital radio devices.⁴⁴ Meanwhile, cheaper Internet radio and, more recently, podcasting have gained great popularity as new digital alternatives to analogical broadcasting. Moreover, radio won the fight for popularity on social networks.⁴⁵

2.6.4 Press agencies

The leadership is held by the public news agency EFE. Founded in 1939, as already indicated, it is present in more than 100 countries today. The EFE agency is the worldwide leader in Spanish. In addition to EFE, there are fifty other agencies of diverse characteristics. Some of them, such as *Europa Press*, the second biggest news agency, are of national scope, while many smaller and specialised news agencies are regional.

2.6.5 Internet

The Internet continues its growth in Spain. In April-May 2010,⁴⁶ 52.9% of people (43% male and 56% female) between 25 and 44 years old used the Internet. 86% of the Spanish population have Internet access at home, and, in a decreasing order, for the following ends: mail (87%); information, news and chat (53% and 51%); social networks, videos and music (37% and 31%, for both video and music).

The most-visited traditional mass media websites were *Marca*, *El País*, and *AS*. Internet penetration is greater in Madrid and Catalonia than in other regions.

⁴³ On cable television see, for instance, M. Calvo Charro, *La televisión por cable* (1997); G. Escobar Roca, "La televisión por cable en España: estado de la cuestión", 5530 *Diario La Ley* (24 April 2002) 1; J. Esteve Pardo, "Viejos títulos para tiempos nuevos: demanio y servicio público en la televisión por cable. Comentario a la Sentencia del Tribunal Constitucional de 3 de octubre de 1991 (Cuestión de inconstitucionalidad núm. 2528/1989)", 74 *Revista Española de Derecho Administrativo* (1992) 257; T. De la Quadra-Salcedo, "La Ley del Cable y la televisión local", 1 *Anuario del Gobierno Local* (1996) 59.

⁴⁴ On digital radio cf. M. Fernández Salmerón, *La radiotelevisión digital terrestre* (2009), at p. 40.

⁴⁵ See GAD, *El Informe 2010: Medios de comunicación españoles en las redes sociales*.

⁴⁶ Asociación para la Investigación de Medios de Comunicación, *Audiencia de Internet, Abril-Mayo 2010*.

There is an interesting relationship between the traditional mass media and new social networks. According to the 2010 Report Spanish Mass Media on Social Networks (GAP), 720,000 people follow some mass media on Facebook; 665,000 do so on Twitter and 92,000 on YouTube. Television channels are consumed mostly on YouTube, while radio is the media with the best position on Facebook (335,000 followers). Moreover, the printed press maintains its old leadership on Twitter. In the opinion of experts from the Demoscopic Analysis Office, this is because of Twitter's capacity to broadcast events like sport competitions, elections or demonstrations in real time.

2.7 Journalists' background and education

Journalists during the last years of the dictatorship came from the University Schools of Information or Journalism, as stated before. The Schools traditionally had three areas of specialisation: Journalism, Audiovisual Communication and Advertising and Public Relations. Now new forms of specialised journalism have been included in the official studies (Social Communication, Green Journalism, Advertising etc.) and also numerous Masters' and other courses exist. The official journalists' association is *FAPE* (*Federación de Asociaciones de Periodistas en España*), created in 1922, which now has 48 member associations and 13 others linked to it, even if they are not strictly speaking part of the federation.⁴⁷ All of them represent more than 19,000 associates. As recently as 20 September 2010 the *FAPE* issued the Pamplona Declaration, in which they demand a more professional exercise of journalism, arguing that high-quality journalism makes for high-quality democracy.⁴⁸

2.8 Media literacy and media status in society

Spain has a low media literacy development at institutional level, even if some activities do exist and are currently on the increase. These activities originate from civil society, mainly from associations related to the world of education.

There are no educational programmes in the most important media with the exception of some newspapers that promote the connection between schools and media - or in public television. The development of "Audience Offices", whereby readers and viewers are given a platform to express their opinions regarding the treatment of news in the major mass media, is mainly symbolic. However, users are becoming increasingly more active. Some Audience Protection Associations exist, such as the Communication Users Association [*Asociación de Usuarios de la Comunicación/AUC*].⁴⁹ Only in very recent years has media literacy become a transversal goal in education, but only following the ICT's impulse and forgetting the mass-media. Moreover, regional development of educational policies on media literacy varies considerably: good in some regions, poor in others, almost absent at State level.

⁴⁷ See Federación de Asociaciones de Periodistas en España, official website, available at: <http://www.fape.es> (last visited on 24/09/2010).

⁴⁸ See FAPE, "Declaración de Pamplona", available at: <http://www.fape.es/ptr/vista/vptr002/post.html?D.k=1244301> (last visited on 13/10/2010).

⁴⁹ Asociación de Usuarios de la Comunicación, official website, available at: <http://www.auc.es/> (last visited on 13/10/2010).

With regard to the Spanish Educational System, the compulsory school curriculum (primary and secondary) contains digital literacy and media literacy as part of the skills that students must attain, but currently there are no specific subjects for this area. The annex to Royal Decree 1513/2006, of 7 December, establishes the incorporation of eight basic competences in the curriculum of primary education to emphasise those skills considered indispensable. They refer, amongst others, to the regular use of available technological resources and also to the evaluation and selection of technological innovations, depending on their utility, in undertaking specific tasks. Article 3 of the Royal Decree 1631/2006, of 29 December, establishes that secondary education should contribute to the development of students and their abilities, so as to allow them to develop basic skills in the use of information sources and to acquire new knowledge with critical judgment. This should help them to acquire basic preparation in the field of technologies, particularly in information and communication.⁵⁰

3. Media policy in Spain

3.1 Media regulation and policy actors

In Spain media regulation and policy⁵¹ have been traditionally led by the Ministry of Industry and, coherently, by the Commission of Industry in the Spanish Lower Chamber or Chamber of Deputies (*Congreso de los Diputados*). Yet in some cases there is a different allocation of competences. The General Statute on Audiovisual Communication, for instance, which will be discussed later, was passed in the Lower Chamber by the Constitutional Commission. The fact that, in general, the media are understood as an “industry” from a policy point of view illustrates that they are treated more as a tool than as contents. This may explain why regulations have focused mainly on technicalities, leaving aside other issues, related for instance to fundamental rights. For the protection of those rights one needs generally, though not always, to have recourse to other general norms. Independence, pluralism or democracy do not lie at the centre of those policies.

As far as independent agencies are concerned, three bodies should be mentioned: the State Council on Audiovisual Media (*Consejo Estatal de los Medios*

⁵⁰ This paragraph is a synthesis of: “Media literacy: study on the current trends and approaches to media literacy in Europe”, Country Profile Spain V.4.0 (2007), available at: <http://ec.europa.eu/culture/media/literacy/docs/studies/country/spain.pdf> (last visited on 13/10/2010).

⁵¹ See in general, on the relationship between media and democracy itself, from a regulatory point of view, J. Barata i Mir, *Democracia y audiovisual. Fundamentos normativos para una reforma del regimen español* (2006). There are other works on television, discussing its traditional consideration as a public service: L. Abad Alcalá, *El servicio público de television ante el siglo XXI* (1999); C. Chinchilla Marín, *La radiotelevisión como servicio público esencial* (1988); J. Esteve Pardo, *Régimen jurídico-administrativo de la televisión* (1984); G. Fernández Farreres, *El paisaje televisivo en España* (1997); E. García Llovet, *El régimen jurídico de la radiodifusión* (1991); C. Gay Fuentes, *La televisión ante el Derecho Internacional y Comunitario* (1994); S. González-Varas Ibáñez, “El sector audiovisual, ¿servicio público o mercado?”, 110 *Revista Española de Derecho Administrativo* (2001) 215; J.M. Herreros López, *El servicio público de televisión* (2004); J. M. Souvirón Morenilla, *Derecho público de los medios audiovisuales: radiodifusión y televisión* (1999). A more recent discussion on the characterisation of television and radio as public services, referring also to the funding of public television and radio in the framework of competition law and state aids, can be found in S. Medina González, *Ayudas públicas y libre competencia en el sector audiovisual* (2006). For radio specifically as a public service, see M.A. Martín-Caro Sánchez, *La radio del siglo XXI, un servicio público en la economía global* (2000).

Audiovisuales),⁵² the National Telecommunications Commission (*Comisión Nacional de las Telecomunicaciones*)⁵³ and the National Competition Commission (*Comisión Nacional de la Competencia*). All three have different competences regarding the media, from various perspectives, something which can give rise to discrepancies amongst them. Since all of them are independent bodies, it is difficult to find any coordination or guidance on the exercise of their respective competences. A mechanism to solve conflicting positions would be more than desirable.

Besides State bodies and organs, other actors might contribute directly or indirectly to the framing of media policies. Public opinion, NGOs and other private associations exist in Spain (such as, for instance, the Communication Users Association that was previously mentioned), but they do not – by any means – exercise the type of influence they wield in relation to policy formulation in other parts of the world. Some of these actors are mentioned, when appropriate, in other parts of this report.

3.2 Constitutional provisions and legal implementation

The freedoms of expression and information are recognised in the Spanish Constitution (hereinafter, SC) in Article 20⁵⁴ and are therefore framed within the constitutional category of the so-called “fundamental rights”.⁵⁵ As such, extraordinary constitutional safeguards are bestowed upon the protection of these rights for citizens through a preferential and summary procedure before the ordinary courts, and additionally by an appeal for protection (*recurso de amparo*) before the Constitutional Court (Art. 53.2. SC).⁵⁶

⁵² The State Council on Audiovisual Media will be subject to a detailed explanation later in this report. See on this type of bodies, which also exist in some Autonomous Communities, J. Tornos Mas, *Las autoridades de regulación del audiovisual* (1999).

⁵³ See information on this Commission, Comisión del Mercado de las Telecomunicaciones, official website, available at: <http://www.cmt.es> (last visited on 13/10/2010). Some bibliographical references where questions of interest for this report are discussed are the following: J.M^a. Baño León, “La ordenación del mercado de la televisión y el papel de las autoridades españolas de la libre competencia”, in S. Muñoz Machado (ed.), *Derecho Europeo del Audiovisual. Actas del Congreso organizado por la Asociación Europea de Derecho Audiovisual (Sevilla, octubre 1996)* (1997) 747; L. Castejón Martín (ed.), *Competencia y regulación en los mercados de las telecomunicaciones, el audiovisual y el Internet* (1998); E. Gómez-Reino y Carnota (coord.), *Telecomunicaciones, infraestructuras y libre competencia* (2003); J.J. Montero and H. Brokelmann, *Telecomunicaciones y televisión. La nueva regulación en España* (1999).

⁵⁴ Article 20: “1. *The following rights are recognised and protected: a) the right to freely express and disseminate thoughts, ideas and opinions by word, in writing or by any other means of communication; (...) d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to invoke personal conscience and professional secrecy in the exercise of these freedoms*”. Paragraphs b) and c) of Article 20 of the Spanish Constitution respectively envisage “*the right to literary, artistic, scientific and technical production and creation*”, and “*the right to academic freedom*” and have been considered by the Spanish Constitutional Court as specific projections of the freedom of expression (Decision 153/1985, 7 November 1985).

⁵⁵ The fundamental rights are listed in Articles 15 to 29 of the Spanish Constitution.

⁵⁶ In general, on the constitutional limits for TV legislation, see J. García Roca, “Límites constitucionales al legislador de la televisión”, 24 *Revista Andaluza de Administración* (1995) 11; J.A. González Casanova, “Razones constitucionales de una Radiotelevisión del Estado”, in J. García Jiménez (ed.), *Radiotelevisión española y la Constitución* (1981) 19, J.J. González Encinar, “Televisión y democracia”, in J. Asensi Sabater (ed.), *Ciudadanos e instituciones en el constitucionalismo actual* (1997) 387; L. Parejo Alfonso and M. Bacigalupo Saggesse, “El art. 20.3 CE. El control parlamentario de los medios de comunicación del Estado”, in O. Alzaga (ed.),

According to settled case law, beyond the evident link between both rights as guarantees of “free public communication”,⁵⁷ it is conceptually necessary to differentiate between their contents: while the freedom of expression protects the emission and dissemination of opinions, the freedom of information focuses on the protection of processes of transmission of data and certain facts, as long as the existence of those facts has been proved, i.e. the facts exist and are real.⁵⁸ The autonomous exercise of the freedom of expression has led to constitutional conflicts, but its most conflictive projection usually unfolds when it interacts with the freedom of information - i.e. when the opinion has been disseminated through the media.

Freedom of information does definitively constitute one of the most relevant rights of the ones envisaged in article 20 SC for the very existence of a real democracy. It has a dual character, formed by the right to receive information and the right to inform.⁵⁹ Specifically, the actual content of the right to receive information is conditional upon the scope of the right to transmit the information.⁶⁰

Constitutional case law has steadily argued that the right to inform must meet several criteria acting as limits to its exercise, such as veracity and public relevance of the information, whereas the exclusion of all type of humiliating, insulting or offensive expressions would pertain to the realm of the limits to freedom of expression.⁶¹

One of the main consequences of the fact that freedom of expression and information belong to the constitutional category of “fundamental rights and public freedoms” relates to the *type* of legal instrument that can be used for their implementation at the legislative level. According to Article 81 SC, such function is incumbent on the procedures of the so-called “Organic law” (*Ley Orgánica*), whose main specificity lies in the qualified majority voting (i.e. absolute majority in the Spanish Lower Chamber or Chamber of Deputies) that is required in order for it to be passed. From the very beginning the Spanish Constitutional Court has developed an extremely restrictive interpretation of what should be understood by the “legislative implementation” of a fundamental right that would require, therefore, an “organic” law, instead of following the “ordinary” law procedure. Statutes concerning fundamental rights should only follow the more demanding procedure in order to be passed, according to the Constitutional Court, when the legislator is undertaking a *direct* regulation of a fundamental right or freedom (e.g. Decision 6/1982, of 22 February 1982). Otherwise it could be considered an “attack” on democracy, as future parliaments would find it difficult to overcome the burden of changing a statute that has been passed by an absolute majority.

Actually, it was on the occasion of its decision on the constitutionality of the “Statute on Private Television” of 1988, that the Constitutional Court developed its

Comentarios a la Constitución Española de 1978, vol. II (1997) 555; F. Sáinz Moreno, “La regulación legal de la televisión privada en la jurisprudencia constitucional”, 2 *Revista Española de Derecho Constitucional* (1981) 159.

⁵⁷ Constitutional Court Decision 6/1981, of 6 March 1981.

⁵⁸ Constitutional Court Decision 6/1988, of 21 January 1988.

⁵⁹ Constitutional Court Decision 105/1983, of 23 November 1983.

⁶⁰ Spanish Supreme Court Decision, 17.313/1988, of 9 November, 1988.

⁶¹ See, for instance, the following constitutional Court Decisions, 165/1987, of 27 October 1987; 171/1990, of 12 November 1990; 172/1990, of 12 November 1990, and 52/1996, of 26 March 1996.

most restrictive doctrine on the *Ley Orgánica*.⁶² The Court argued that a *direct* regulation of the freedoms in Article 20 SC should only be understood as that which aims to establish a comprehensively global, essential and exhaustive regulation comprising all the possible constitutional and technical modalities for a specific communications medium (Decision 127/1994, of 5 May 1994, 4th legal reasoning). As a consequence, the regulation of a specific technical possibility of dissemination for a broadcast communications medium (e.g. private television) would not be constitutionally required to follow the organic law procedure. It is interesting to note that the recent General Statute on Audiovisual Communication, which came into force on 1 May 2010, is far more ambitious than the Statute on Private Television. It refers not only to television – both public and private – but also to radio. Yet no constitutional concern regarding its being an ordinary – and therefore not an “organic” – Statute was raised.

Furthermore, as a politically decentralised country, the Spanish system rests on the constitutional allocation of legislative competences between the political levels of government. As regards the territorial “translation” of freedoms in Article 20 SC, the central state level has exclusive power over “telecommunications” and “radio-communication” (Article 149.1.21 SC), as well as of the “basic legislation on press, radio, television and, in general, all means of social communication” (Article 149.1.27 SC)⁶³. According to this pattern, the sub-national levels of government (*Autonomous Communities/Comunidades Autónomas*) have power over the legislative implementation and execution of the basic state laws for the second group of competences.⁶⁴

The delimitation of territorial boundaries as regards the media sector has been a highly controversial matter. One stable parameter applied by the Constitutional Court regarding this question has consisted in arguing that those sets of norms whose regulatory object had a prevailing focus on the technical support or instruments used for media dissemination should be comprised within the exclusive competence of the central state (Art. 149.1.21 CE). However, where the prevailing interest of the given law is not in the *instrument* itself, but in the nature of the media as a social communication and diffusion service directly connected to the exercise of the rights and liberties of article 20 SC, it should then be framed within the shared legislative pattern between territorial levels as per Article 149.1.27 SC.⁶⁵

⁶² An early assessment of what was then still the draft of a future Statute on Private Television can be found in G. Ariño Ortiz, *El Proyecto de Ley sobre Televisión privada* (1987). On private television in Spain see also F. González Navarro, *Televisión pública y televisión privada* (1982); E. García Llovet, “El Estatuto de RTVE y la Ley de Televisión Privada”, in J. Cremades (ed.), *Derecho de las Telecomunicaciones* (1997) 413; J.C. Laguna de Paz, *Régimen jurídico de la televisión privada* (1994); E. Malaret i García, “La financiación de la televisión pública y privada”, in *El régimen jurídico del audiovisual* (2000) 153; S. Muñoz Machado, *Público y privado en el mercado europeo de la televisión* (1993) and *Servicio público y mercado*, vol. III: *Televisión* (1998); T. De la Quadra-Salcedo, “La televisión privada y la Constitución” 15 *Revista de Derecho Político* (1982) 37.

⁶³ The Constitutional Court has constantly held that cinema/film is not a mean of social communication. See S. De la Sierra, *Derecho del Cine. Administración Cultural y Mercado* (2010).

⁶⁴ Cf. M. Carrillo López, “Las televisiones públicas en el Estado compuesto”, in *Régimen Jurídico del Audiovisual* (2000) 225; G. Escobar Roca (ed.), *El derecho de la televisión. Situación y perspectivas en la Comunidad de Madrid* (2004); F. Sáinz Moreno, “Las televisiones públicas en el Estado compuesto”, in *Régimen Jurídico del Audiovisual* (2000) 243.

⁶⁵ See, for all, the Decision of the Constitutional Court 168/1993, 27 May 1993, passing sentence on a constitutional appeal against the General Regulatory Law on Telecommunications, 31/1987 (in particular, its 4th legal reasoning).

3.3 Structural regulation

The principle of free market recognised in Article 38 of the Constitution is valid for all kinds of media. General competition rules without a particular media component are applied to the media. There are no cross-media rules, but specific ones for each type of media. Thus particular licensing, ownership and competition rules exist for the audiovisual media, as we shall see over the following lines.

The general regulation of radio and television is contained in the recent Statute 7/2010, of 31 March 2010, *General de la Comunicación Audiovisual* (General Statute on Audiovisual Communication: hereinafter, *LGCA*). There are other state and regional rules governing public media (including those belonging to the state, regional, and local authorities) and different regional norms relating to regional and local private media.

The new LGCA considers audiovisual media to be services of general interest. Nevertheless, there is a distinction depending on the medium used for transmission: as a rule, operators simply need to communicate their intention to begin their activity to the authorities. However, when these services are provided by terrestrial waves (the means by which most of the Spanish people access radio and television), the operators need a prior licence granted by the competent audiovisual authority (the state or regional one depending on the territorial scope at issue). On the state level, licences are granted by the Government. As for the regional or local level, it depends on the provisions of each regional regulation. Tenders for licensing are governed by the principles of publicity and equality. Licences are granted for a period of fifteen years with automatic renewal unless a third party makes a request at least 24 months before the expiry date. This being the case, a competition process takes place. Licences can be transferred and leased.

The activity of social, non-profit-making audiovisual media services – other than public service media – is subject to licence, which cannot be transferred or leased. Advertising (including sponsoring) is not allowed. Unless authorised by the audiovisual authority, annual expenses may not exceed 100,000 Euros for television outlets and 50,000 for radio outlets.

The LGCA has (minimally) regulated mobile television. This activity requires a licence. A criterion to be taken into account for granting licences is the previous experience of the candidates as providers of audiovisual media services, which may be deemed arguable from the point of view of competition rules. In addition, the LGCA also refers to high-definition television, only to allow its release. In both cases, the LGCA states that the transmission and reception must fulfil the standards established by the European Union.

According to the LGCA, the licensee must be a national of (individuals) or be domiciled in (legal entities) an EEA⁶⁶ State or in a third country under a condition of reciprocity (i.e. those countries should accept also that Spanish nationals or entities have access to their broadcasting market). In addition, individuals or legal entities from third countries may not accumulate more than 25% and 50% of shares in one media company respectively.

Other limits aim to guarantee a certain pluralism of information. In television, the initial rule, under the aforementioned Statute on Private Television (Statute

⁶⁶ EEA stands for European Economic Area.

10/1988, of 3 May 1988) did not allow the same person to own more than 25% of shares in a private channel, or to accumulate shares in more than one private channel. Later, when the conservative governments were in power (from 1996 to 2004), these limits were relaxed by successive changes in the law, allowing for greater concentration.⁶⁷ Now the LGCA allows for the simultaneous ownership of shares or voting rights in different private licensees, yet with some limits. Regarding state-wide private television, any natural or legal person can acquire a significant stake in more than one station, if the subject fulfils three conditions: the average audience of all the channels in question has been below 27% of the total audience during the twelve consecutive months prior to the acquisition (there is no consequence if this maximum is exceeded *a posteriori*); the stations in question do not occupy more than two multiplexes; and there are at least three different private stations left. In the case of region-wide private television, the only limit is the prohibition of the accumulation of more than one multiplex. As for the private state-wide radio, the same individual or legal entity is not allowed to control, under any circumstances, directly or indirectly, more than 50% of the licenses granted to operate through terrestrial signals in the same area of reference and, in any case, it is not allowed to own more than five of such licenses. On the regional level, no individual or legal entity may control more than 40% of the licences. Moreover, no individual or entity may directly or indirectly control more than one-third of all terrestrial broadcasting licences with full or partial coverage throughout the state territory.

3.4 Content regulation

3.4.1 General norms applicable to all media regarding media publishing and information-gathering processes

As mentioned earlier, the freedom of information and the freedom of expression, included in Article 20 of the Constitution, constitute the constitutional framework for both professional and non-professional communication activity. The Constitution refers to the so-called “conscience clause” and to the protection of journalists’ sources in the exercise of these freedoms, to be regulated by the law. The relevant statute is the *Ley Orgánica 2/1997* of 19 June 1997, *Reguladora de la cláusula de conciencia de los profesionales de la información* [Organic Statute on the Conscience Clause of Information Professionals].⁶⁸ It is intended to ensure independence in the exercise of journalism. It gives information workers the right to ask for the termination of their contractual relationship with the media company when a substantial change in orientation or ideological position of the company takes place, and when the company transfers the journalist to another media belonging to the same enterprise if its genre or ideological position involves a clear break with the professional career of the journalist. The exercise of this right entails compensation. In addition, journalists may refuse to participate in the drafting of information which is contrary to the ethical principles of communication, without penalty or prejudice.

⁶⁷ On media concentration both in Spanish and in former Community law, see F.A. De Abel Vilela, *La concentración de los medios de comunicación social en los Derechos español y comunitario* (2002); and A. Pérez Gómez, *El control de las concentraciones de medios de comunicación. Derecho español y comparado* (2002).

⁶⁸ Cf. prior to the adoption of such a clause T. De la Quadra-Salcedo, “La cláusula de conciencia: Un Godot constitucional”, 22 *Revista Española de Derecho Constitucional* (1988) 53, and part II in 23 *Revista Española de Derecho Constitucional* (1988) 45.

The second paragraph of Article 20 of the Constitution prohibits prior censorship in the exercise of the freedoms of information and expression, and the fifth section provides that the seizure of publications, tapes and other records can only be decided by the judiciary. Consequently, Article 538 of the Criminal Code punishes by disqualification for six to ten years the authority or public official that has exercised prior censorship, except in the cases permitted by law. The measures that can be taken also include the collection of editions of books or newspapers or the suspension of its publication or the dissemination of any radio and television broadcast.

The third paragraph of Article 20 states that a law shall regulate the organisation and parliamentary control of the media dependent on the state or any public entity and shall guarantee equal access to the media of significant social and political groups, respecting the pluralism of society and the various languages of Spain. This is discussed in the section devoted specifically to audiovisual communication.

The fourth paragraph of Article 20 stipulates that the freedoms of information and expression are limited by the respect for constitutional rights and in particular the right to honour, privacy and reputation and the protection of youth and childhood. In this regard, *Ley Orgánica 1/1982*, 5 May 1982, *de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen* [Organic Statute on the civil protection of the right to honour, to personal and family privacy, and to personal image] defines the intrusions that are considered legitimate and illegitimate. When an intrusion is proven, moral damage is presumed to have occurred. Judicial protection includes all measures “necessary to end the trespass”, such as provisional measures, the right to disseminate the ruling in the media and compensation for damages.

Under *Ley Orgánica 2/1984* of 26 March 1984, *reguladora del derecho de rectificación* [Organic Statute on the right to rectification], any person or entity is entitled to correct information disseminated through any media that he or she considers inaccurate and the disclosure of which may cause injury. The law provides a fast procedure with prior formal notice to the director of the specific medium and subsequent legal action. This process is compatible with the exercise of civil or criminal legal action in the form of different lawsuits as a result of the same facts.

Ley Orgánica 15/1999, of 13 December 1999, *de Protección de Datos de Carácter Personal* [Organic Statute on Data Protection], which regulates data protection, applies the same general rules to the use of personal data in journalism, disregarding the possibility offered by Article 9 of the Directive 95/46/EC to grant some exemptions to this kind of activity.

Finally, with regard to the right of honour, the Criminal Code (Articles 205-216) regulates crimes against honour (insults –“action or speech that injures the dignity of another person, or undermining his or her reputation or attacking the esteem of that person” - and slander –“accusation of a crime knowing of its falsity or reckless disregard for the truth”). The penalty for grave slander (i.e. with publicity) ranges from 6 months to 2 years’ imprisonment, which has been criticised by journalists and academics excessively. The penalty for the rest of the cases, that is to say, for non grave slander, is a fine.

Article 105.c) of the Constitution recognises the right of citizens to access government information under the terms established by law. The general statute concerning this subject is Statute 30/1992 26 November 1992, which concerns the

functioning of Public Authorities and administrative procedure [*Ley reguladora de las bases del regimen jurídico de las Administraciones públicas y del procedimiento administrativo común*]. Section 37 of the statute deals with access to public information in an unsatisfactory manner: access is restricted to documents relating to procedures completed and filed; it can be refused when the public or the private interest prevail; it is not regulated in procedural terms; and its exercise is not monitored through an independent supervisory authority. Along with this regulation, there are other relevant norms, including those related to access to environmental information, the re-use of information for commercial purposes or official secrets. The latter dates from 1968, i.e., prior to the Constitution's entry into force, but underwent a major reform in 1978.

Regarding copyright issues, the relevant legal text is the *Real Decreto legislativo 1/1996*, of 12 April 1996⁶⁹, approving the revised text of the Copyright Act. The most controversial issues today focus on printed journalism and the Internet. In particular, journalistic work is considered to be “collective work” and as such the intellectual and economic rights belong to publishers, not to journalists, as the work has been produced under the direction of the publisher. Publishers have to deal with search engines, newspaper clipping enterprises and news aggregators. They argue that the law requires them to obtain approval from the owners of this information and to pay a fee to use it. *Real Decreto 1/1996* allows articles on current affairs broadcasting by the media to be reproduced, distributed and publicly communicated by any other media of the same category, but the source and the author must be mentioned. This right applies only if the author has not explicitly excluded this possibility, and without prejudice to the author's right to receive the remuneration agreed upon or, failing agreement, as deemed equitable. The unauthorised use of television show excerpts by other television channels or Internet pages has also formed the object of dispute in courts. The sentences have always affirmed the right to exclude such an unauthorised use and ordered such practices to cease and compensation for damages to be paid.

3.4.2 Newspapers

Hardly any regulations exist on the printed press in Spain. The existing one is pre-constitutional and is reduced to some provisions of doubtful validity integrated in the aforementioned Printed Press Statute of 1966. In addition, codes of conduct have been adopted in different geographical areas. At the state level reference must be made to the *Código deontológico de la profesión periodística* (Ethics Code of the journalistic profession), signed by the *Federación de Asociaciones de Periodistas Españoles* (Federation of Spanish Journalists' Associations) and approved in 1993. The Code lays down general principles of professionalism and ethics, such as respect for truth and honour, privacy and the image of others, the protection of minors and the more vulnerable members of society and respect for the presumption of innocence. It refers to the status of the journalist, independence and fairness in the exercise of the profession, safeguards against external influences, confidentiality, the promotion of free access to governmental information and respect for copyright. Finally, it establishes a set of guidelines, such as dignity in the means of obtaining information, respecting the right not to provide information, confidentiality of information sources,

⁶⁹ “Decretos Legislativos” are legal norms issued by the Government following a Parliament's delegation. Therefore their legal value is equivalent to that of Statutes.

the distinction between information and opinion, between information and advertising, the refusal of fees or gratuities, and the prohibition of the use of privileged information of which the journalist has knowledge as a result of his or her profession for personal gain.

Political advertising is not banned in the printed press. As for campaign advertising, the law forbids newspapers to raise ordinary rates in election period and requires all media to offer the same contractual conditions to all parties.

3.4.3 Audiovisual

The general rules applicable to any broadcaster whether national, regional or local, are contained in the LGCA. Further, there are specific regulations for each level of government. At state level two Statutes should be mentioned: *Ley 17/2006*, 6 June 2006, *de la radio y la televisión de titularidad estatal* [On radio and television belonging to the State] and *Ley 8/2009*, 28 August 2009, *de financiación de la Corporación de Radio y Televisión Española* [On the financing of the Public Corporation of the Spanish Radio and Television], which have already been mentioned.

The LGCA empowers political entities (State, Autonomous Communities and local entities) to own and provide their own broadcasting service. Public service obligations include the production, publication and dissemination of a set of radio and television channels and online information services for all audiences, covering all genres, designed to satisfy the information, culture, education and entertainment needs of society and to preserve pluralism in the media. The norms governing the public broadcaster in each region specify the content of its public service mission. In addition, the Act establishes a control model of public service, based on rules determining the overall objectives for a period of nine years and developing more concrete and specific provisions in the so-called “contratos-programa” [“framework contracts”] between the respective governments and managers of public broadcasters. The LGCA provides for the control of the fulfilling of these public service missions by the representative state, regional or local assemblies as well as by the respective independent supervisory authority. Other limits are the following: (a) the public broadcasters are not allowed to own shares in private broadcasters; (b) the criteria guiding their editorial direction must be developed by a body whose composition reflects the political and social pluralism of the scope of coverage; (c) at state level, the state may not reserve or assign to public broadcasters more than 25% of the radio spectrum available for television, or more than 35% for radio.

As for funding, as a general principle, public funding cannot sustain operations or content outside the public service mission. Each political entity can institute a public service broadcasting system and arrange its funding mechanism, which in any case must be compatible with current legislation on competition. At state level, Statute 8/2009 (mentioned above) on the financing of the Spanish Corporation on Radio and Television has eliminated advertising from the public state broadcaster (RTVE), a decision which has been endorsed by the LGCA. According to the new system, contributions from the national budget and the revenues from its own productions (i.e. those of RTVE) and sponsors are accompanied by a percentage of the tax on the usage of radio spectrum, the contribution made by private television stations (3% of the gross income for free televisions, 1.5% for pay televisions, not exceeding 20% of RTVE’s budget), and telecom operators (0.9% of gross income, without exceeding 25% of the budget of RTVE). This is an import of the current

French model. Compatibility with market rules and state aids is being checked by the European Commission, which has already considered that the French model implies illegal state aid. So far, regional regulations have not eliminated advertising from their public broadcasters.

The LGCA contains provisions to reconcile the freedoms of information and expression and the freedom to conduct a business with the protection of the rights of users, especially the more vulnerable ones. Thus, the rights and freedoms that are recognised in this framework are the following: a) the right to receive a pluralistic audiovisual communication consistent with constitutional values; b) the right to receive transparent audiovisual communication, identifying the content provider; c) the rights of children, including the establishing of the period of the day in which broadcasts which might harm them are prohibited, the classification of programmes by age and limits to the kind of advertising aimed at the minors' audience; d) the rights of persons with disabilities, under the principle of universal accessibility, with obligations of a predetermined ratio of subtitling and audio description, and a ban on using degrading or stereotypical images of disabled people; and e) the right to participate in the control of audiovisual content, with the possibility of complaining to the audiovisual supervisory authority.

Quota rules and obligations to invest in content production in order to promote the European and Spanish content industry also have a place in the Spanish regulation, and in the LGCA. European quota rules imply the obligation to reserve at least 51% of transmission time for European works, excluding the time conferred to news, sports events, games, advertising, teletext services and teleshopping (following Article 4 of Directive 89/552/EEC). At least 50% of that quota is reserved for European works in any of the official languages in Spain.⁷⁰ At least 10% of transmission time shall be reserved for independent producers and at least 51% of that 10% must be works produced in the last five years.

The financing obligation implies the duty to contribute annually to the funding of the European production of films, documentaries, television cartoons and series with 5% of the income earned in the previous year. This obligation is only imposed on channels that broadcast these products if they are less than seven years old in relation to the date of production. For public television broadcasters this duty is set at 6%. Under the previous rules only cinematographic works should be financed. The inclusion of series was a traditional demand of private television stations, which have their own producers. In any case, this obligation has been widely questioned, as it may conflict with the freedom to conduct a business, and is currently before the courts.

As far as advertising rules are concerned,⁷¹ according to the LGCA (following Article 18 of Directive 89/552/EEC), the proportion of television transmission time devoted to all kinds of publicity is limited. Following the Directive, there are rules relating to the forms and moments of interruption of broadcasts to ensure differentiation between content and advertising and the integrity of the work. In

⁷⁰ This system has been inherited from previous norms and the European Court of Justice has already declared its conformity with Community Law. See ECJ, Case 222/07, *UTECA v Administración General del Estado*, delivered on 5 March 2009.

⁷¹ See, in general, on the relationship between advertising rules in television and fundamental rights, L.M^a. Díez-Picazo, "Publicidad televisiva y derechos fundamentales", in S. Muñoz Machado (ed.), *Derecho Europeo del Audiovisual. Actas del Congreso organizado por la Asociación Europea de Derecho Audiovisual (Sevilla, octubre 1996)*, vol. I (1997) 649.

addition, the LGCA establishes a series of prohibitions and restrictions concerning the advertising of certain products (like tobacco, alcoholic drinks or medical products or treatments). The LGCA prohibits political advertising on public or private radio and television. During election periods, public radio and television stations have a duty to give free airtime to all political groups. The allocation of time and duration is distributed by the administration in accordance with the results obtained in the previous election. Broadcasters also have the obligation to act with neutrality in their reporting of elections.

Spanish law (through the LGCA) has recognised the so-called “right to self-regulation” (in fact, “co-regulation”). It seems strange for the voluntary nature of self-regulatory codes and the existence of their own control mechanisms, but the LGCA empowers independent supervisory authorities to verify the legality of a code, and even to impose financial penalties for non-compliance. Before the existence of this norm, various self-regulatory codes on contents and advertising had been signed. The main codes are the *Código de Autorregulación de contenidos televisivos e infancia* (on television contents and children), adopted in 2004, and the *Código de Autorregulación de la Publicidad dirigida a menores* (on advertising aimed at children), adopted in 2005.

The LGCA recognises the right of operators to contract for exclusive broadcasting, again with some limits. The main one relates to the freedom of information with regard to the so-called events of major importance for society. The state’s supervisory authority, the Consejo Estatal de Medios Audiovisuales (State Council of Audiovisual Media), is in charge of the establishment of a biennial catalogue of the events of general interest to society to be broadcast on free television and with state coverage. However, each event needs to be chosen from a closed list, which contains popular sports events, including the Spanish “Liga de fútbol profesional de Primera División” (Premier league) football match every week. Exceptionally, with a two-thirds majority, the State Council of Audiovisual Media may include other events of major importance for society in the catalogue. The catalogue and the measures for its implementation must be notified by the State Council of Audiovisual Media to the European Commission. This regulation has its origin in the very controversial Statute 21/1997, of 3 July 1997, regulating the broadcasting of sports competitions and events (*Ley reguladora de las Emisiones y Retransmisiones de Competiciones y Acontecimientos Deportivos*, better known as the “Football Statute”) adopted under a conservative government. In practice it was designed to nullify exclusive contracts to broadcast the professional football league matches that favoured a TV operator close to the socialist party. This controversial statute was taken before the Constitutional Court, which in its judgement 112/2006, of 5 April 2006, considered that it did not violate freedom of information or the right to property or free enterprise. The new LGCA, adopted under the socialist government, has maintained the regulation.

3.4.4 Internet

There is no specific regulation of the Internet as a medium of communication, and indeed the courts have refused so far to bestow this status on the Internet as a whole.⁷²

⁷² See, for instance, the decision of the criminal court n° 16 of Madrid adopted on 18 December 2009 (decision n° 531/2009).

3.4.5 Supervision

A new independent supervisory authority of audiovisual media at state level is due to be created soon, following the mandate of Article 44 LGCA: the *Consejo Estatal de Medios Audiovisuales* (CEMA) with important advisory, regulatory, executive and sanctioning powers, licensing excluded.⁷³ The CEMA is composed of nine members elected by the Congress of Deputies by a three-fifths majority from amongst persons of recognised expertise in matters related to the audiovisual sector and appointed by the Government by *Real Decreto* [regulation]. The members are elected for a six-year term and cannot be removed other than for predetermined reasons to ensure the council's independence. The CEMA is assisted by an advisory committee in which civil society is represented. Some Autonomous Communities (Catalonia, Navarra and Andalucía) had already created their own Audiovisual Councils prior to this.

4. Media policy and democratic politics: an assessment

This report on media policies in Spain from a democratic theoretical point of view has explored the most relevant questions under discussion today. The role of history in the framing of media policies is clear. Nevertheless, it seems that this role has been particularly more decisive in the Spanish case for a number of reasons that have been discussed above. The long Franco dictatorship had obvious negative consequences for the exercise of fundamental rights, such as those of expression and information, which are among the most relevant here. Whereas all media were affected by that context, this situation was particularly dramatic with regard to television. This media type came into being precisely during the dictatorship and was then legally (and culturally) shaped in a way that has made it very resistant to changes. The authoritarian environment was, certainly, not homogeneous. Dissident voices slowly found their place in various legal and illegal ways, but it is clear that those almost forty years had a negative impact on the development of a critical public opinion that could contribute to a quality democracy. This might explain, for instance, why Spain is still amongst those countries with a low newspaper readership rate. Stronger policies on media literacy, for instance by increasing the critical approach to media in the school curriculum, may be good instruments for remedying that. Also, citizen participation in decisions concerning media policy should be fostered.

Recent history also explains the approach of the public powers (i.e. the various public bodies *and* the legislator) to media policy. It could be argued that the Spanish public powers and, as a consequence, the Spanish media law, are fairly interventionist. The level of interventionism has evolved over the years and differs from one medium to another. By definition, due to the constitutional context since 1978, the exercise of journalism is well protected, even if this professional sector still raises complaints, some of which have recently – on 20 September 2010 - been set out in the aforementioned *Pamplona Declaration*. The Declaration is based on the

⁷³ Very critical with this Council is A. Boix Palop in this legal blog "*bloc jurídico*". Cf. the following entries: <http://www.lapaginadefinitiva.com/aboix/?p=267> and <http://www.lapaginadefinitiva.com/aboix/?p=281>. See also, by this author, *Transformaciones en el ecosistema mediático y nuevas pautas de regulación administrativa del hecho audiovisual*, 29 Quaderns del CAC (2007), available at: http://www.cac.cat/pfw_files/cma/recerca/quaderns_cac/Q29_Boix_ES.pdf.

concept of quality journalism as an intrinsic element of a quality democracy. Among other claims, it includes the need to protect information sources and the enactment of a Statute on Access to Public Documents. As stated above, a draft for such a Statute has been prepared, but for the moment it lies stagnant. Journalists also claim that an Official Association (*Colegio Profesional*), structurally similar to Bar Associations for instance, should be created, in order to defend not only the particular interests of its members, but also, and above all, the general interest of an adequate exercise of the journalistic profession. This could, of course, have a dark side, as according to some, corporatism may be considered contrary to the essential freedoms that are inherent in the journalistic profession and, furthermore, it could also be seen as an attempt to control private initiatives on the Internet under the heading of “illegal practice of a profession” or “poor quality journalism”. Journalists also propose to put an end to the practice of requiring a Master’s degree in job offers for journalists. On the one hand, it is true that the days when specific training was required to become a journalist are now over. On the other hand, it seems incoherent to argue that an Official Association would guarantee an adequate exercise of the profession and not provide any definition of the educational background for that profession.

As far as television is concerned, interventionism has been more acute, due to the fact that the technical possibilities of broadcasting were very limited in the past. This justified the definition of broadcasting as a public service, even if private companies were admitted to the market in 1988. Today, after the passing of the General Statute on Audiovisual Communication in 2010, the public mission of public broadcasters has been better defined, even if there are still many critics who consider this statute to be a mere “Counter-Reformation”⁷⁴ of the socialist government now in power. Some obligations imposed on private broadcasters discussed in the report may seem more problematic, and may suggest that even if their activities are no longer conceived under the category of public service, a closer look at the contents of the regulation could lead us to conclude otherwise. Scholars and interest groups have long argued that a clarification of the concept of public service with regard to broadcasting is required. This would also imply consequences for advertising (only those broadcasters that do not receive public funding should be entitled to contract advertising companies), as is the case with recent legislation passed in Spain (2009) and accepted by the European Commission. It should also be added that public television has played a vital role in fostering the welfare state in Spain, a line of research that still needs to be followed up.⁷⁵

Political parties and media groups are closely linked to each other in Spain. Even if it is the courts that ultimately decide on conflicts arising in this sector, there is an overwhelming suspicion that every public decision concerning the media will be biased. There are two independent bodies, the National Telecommunications Commission and the National Competition Commission, that have so far dealt with cases related to conflicts arisen in the media market. A third one is expected now, after the entry into force of the General Statute on Audiovisual Communication,

⁷⁴ See E. Bustamante, “La contrarreforma audiovisual socialista”, 172 *Le Monde Diplomatique* (in Spanish), 02/2010.

⁷⁵ Among the very scarce references about this topic in Spain, see J.L. Manfredi, *La televisión pública en la transformación del Estado de Bienestar* (2004). The same author has critically revised the history of television in Spain in another book, focusing precisely on some of the problems that have been discussed here, such as the influence of history in today’s media landscape, or the problems existing in this country concerning digitalisation. See *La televisión pública en Europa* (2008).

namely the State Council on Audiovisual Media. This was a long-standing demand of certain groups, including scholars, as a way of reducing the government's discretionary power over the media. Notwithstanding this, it should not be forgotten that institutions operate in a certain cultural and social environment. To date the independence of similar bodies has not always been an asset in the practice of certain reputedly autonomous bodies in Spain. Also, the powers that were finally granted to this Council include, for instance, the possibility of banning the broadcasting of certain ads. This has been criticised, as it might be considered a modern form of censorship, for it is not a judge, but a public body, that fulfils these functions.

The conclusions drawn from the analysis conducted in previous sections help to identify some of the key issues that require further exploration. First, implementation of the General Statute on Audiovisual Communication is a priority, as many of the problems that have been listed in the framework of media and democracy are related to this very statute and, of course, to the underlying media policy rationale. Secondly, the development of broadcasting in the new digital environment still has some deficiencies. Audiences have not responded as expected to the new digital terrestrial offer, which is wider than the classical one provided by the analogue signal.⁷⁶ This is so possibly because the offer is not as innovative as it should be. Interactive components are still at a very low level of development. This poses the question of possible inequalities amongst the Spanish population, depending on their access to the new channels and the new services, in particular if some of them are only provided after prior payment. The keywords would be net neutrality, digital breach and pluralism. Thirdly, journalism has to face new realities. A comprehensive survey of those realities, including mechanisms to obtain input from public opinion, would contribute to a clarification of what journalism is today and what role it plays in today's democracies. And, fourthly, in direct relation to the former issue, media literacy is also one of the weaknesses of Spanish public policies today. Well-prepared citizens and a critical public opinion familiar with the new media processes will make democracies worthy of their name.

⁷⁶ Cfr. *Contenidos digitales para la nueva televisión*, Telos (Fundación Telefónica), nº 84, July-September 2010.

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The case of Turkey

Esra Elmas and Dilek Kurban

1. Introduction

Mass communication studies have gone through three different periods according to their focus of study. The period from 1910 to 1940, the media studies concentrated on the “bullet effect” of the media on the masses. According to the media studies of the time, media had an absolute power in manipulating the agenda and shaping the passive members of the society. Under the influence of WWI, the media was used by totalitarian regimes as a propaganda tool. During the second period from 1940 to 1960, field research that was mainly carried out in the USA showed that the media impact on the masses was limited. However in the third period from the 1960s until present day, the studies have tried to clarify the ideological features of the media power in relation to its economic structure. Today, as a result of the rapid change in the communication technologies we are in an era that is generally named as the “digital era”. The media ecology has deeply reshaped according to the dynamic that came with the emergence of the internet. The internet has had a destructive effect on traditional horizontal relations between the “sender” and the “receiver” as well as on inequalities in society. Personal blogs and interactive internet sides of the traditional media allowed citizens to become visible and have the chance to speak up, increasing citizens’ participation in the production of media content. Traditional media which consists of large media companies and which usually is dependent on government/state subsidies has lost its monopolistic position in the sector when it could no longer control news content. So the digital age has been named as the “uncontrollable age” and the increase of citizen participation is taken for granted as a gain in the way of democratisation. On the other hand, any effort towards understanding the relationship between media and democracy in a given society, as Daniel Hallin and Paolo Mancini put it, needs to dwell upon several dimensions, including the political, social, legal, economic, demographic and cultural traits of the country in question. This is because these dynamics influence the development of the media and democracy as well as the interdependent relationship between these two. So Turkey, as a transition country both in geographical and socio-political terms and in which journalism emerged as tightly attached to the state politics with the mission of modernising society, needs to be handled in the way that Hallin and Mancini suggest.

The media structure in Turkey falls under the “Mediterranean or Polarised Pluralistic Model” in accordance with the analytical and theoretical framework proposed by Hallin and Mancini that is based on four major dimensions and three media models,¹ namely: (1) the development of media markets, in which they particularly focus on the development of the mass circulation press; (2) political parallelism, or “the extent to which the media system reflects the major divisions in society”; (3) the development of journalistic professionalism; and (4) the degree and

¹ Based on the variation on these dimensions they develop three models for the comparison of media systems in Western Europe and North America: (1) Polarised Pluralist or Mediterranean Model (for Southern European countries, like France, Greece and Italy); (2) Democratic Corporatist or North/Central European Model (Germany, Netherlands, Scandinavian countries); (3) Liberal or North Atlantic Model (United States, Great Britain, Canada).

nature of state intervention in the media system.² According to the Mediterranean Model, “the media in southern Europe share some major characteristics: low levels of newspaper circulation, a tradition of advocacy reporting, instrumentalisation of privately owned media, politicisation of public broadcasting and broadcast regulation and limited development of journalism as an autonomous profession.”³

Today as a typical example of the Mediterranean Model, Turkey has a quite low level of newspaper circulation, while the media is occupied with state or government politics which result in advocacy journalism. On the other hand, the media sector in Turkey is structurally divided into congregations. The owners of the biggest media groups are also involved as investors and shareholders in different sectors of the economy, such as health, education, construction, telecommunication and distribution. Although all these media groups may have different ideological stands and political positions as well as conflicting economic interests, they share the same “mindset” in upholding the “interests of the state” and “national security” above democracy, human rights and media freedom. Thus, the seeming diversity of the media due to the multitude of media companies is misleading. Journalism or any kind of position in the media field is not suitable for professionalism. Moreover, suchlike structure which carries multiple conflict of interests, results in a “mass” in terms of media policy. There are multiple institutions and regulations that shape the media in Turkey which are mainly designed for the state interest rather than guaranteeing the media freedom, a result of specific historical and political reasons. So this report deals with the historical and cultural ruins that result in existing media policy in Turkey.

2. Historical background

This section will provide a brief overview of the political context in Turkey, with a particular focus on the historical development of the state-media relations. The section will discuss the evolution of the media and democracy in Turkey on the basis of the national and international anchors of political and social change: the foundation of the republic and the evolution of multi-party democracy (the national level) and the ongoing democratisation process as part of Turkey’s EU accession (the international level). The evolution of the press, radio and television will be examined during three principal periods (excluding the military regime between 1980 and 1983 during when all means of communication were under the control of the military): the single party regime from 1923 to 1950, the multi-party regime from 1950 to 1980, and the “liberalisation process” between 1983 and 1990. Finally, the impact of the international dimension will be examined on the basis of legal and political developments introduced in the media sector as part of Turkey’s economic liberalisation process in the 1990s and the EU accession process in the 2000s.

In both the Ottoman Empire and the Turkish Republic, journalists played an important role in the introduction of Western values and institutions to society. From 1923, when the republic was proclaimed, until 1945 when a multi-party system was installed, journalists have been instrumental in propagating the modernising reforms

² E. Özcan, “The role of the state in Turkish media in light of Hallin and Mancini’s comparative media systems”, Paper presented at the annual meeting of the International Communication Association, TBA, San Francisco, CA, 04/06/2010, available at: http://www.allacademic.com/meta/p170690_index.html (last visited on 29/10/2010).

³ R. Barış, “The Turkish media landscape”, in G. Terzis (ed.) *European media governance: National and regional dimensions* (2005) 289, at p. 292.

of the one-party regime.⁴ Journalists were both the object and the subject of the state-driven modernisation movements in Turkey. In this sense, the press has traditionally dealt “discussions” rather than “news”.⁵ On the other hand, because of their crucial role in the modernisation project journalists were the potential targets of state/government repression, harassment or pressure. While the dissident press has always been under the pressure of the power, the statist-elitist faction of the press was by and large free of such intimidation. From the outset of the establishment of the state, journalists have always been in a close relationship with politicians and state institutions. In the early-Republican era, most of the journalists were also writers and their literary writings influenced their journalistic reporting. The first journalists of Turkey can be described as “self-thought journalists” and today although there are some media members in the sector who are coming from journalism schools or communication departments, this feature is still valid.

The establishment of the print media in Turkey predates that of the republic. The first paper was founded during the Ottoman times, in the final years of the empire when Mustafa Kemal Atatürk pioneered a war of independence against the Allied powers. The independent movement which culminated in the foundation of the republic in 1923 was based on two primary principles: battle and correspondence. In the transition from a decaying empire to a modern nation state, Mustafa Kemal Atatürk and his staff prioritised print media, the only widespread medium of communication at the time, as a form of reaching out to the masses. The *Hakimiyet-i Milliye* (National Sovereignty) newspaper was established by Mustafa Kemal Atatürk himself in Ankara on 10 January 1920. Later renamed as *Ulus*, the paper aimed at publicising Mustafa Kemal’s major decisions during the War of Independence. The *Anadolu Ajansı* (Anatolian Agency), created on 6 April 1920, shared the same goal. The main objective behind the foundation of *Anadolu Ajansı* was to disseminate to the national and international “true” public news about the Turkish Independence War.

Another example of the instrumentalisation of the media during the years of state formation was Mustafa Kemal’s national tours, which sought to rally support in favor of the Independence War and instill the spirit of nationalism across the country. These trips continued after the Republic was founded, with the aim of consolidating the regime, overcoming educational, health and economic problems, and laying the groundwork for forthcoming reforms. The press was always invited to Atatürk’s appearances, which were joined by military and civilian experts. The creation of the republic was primarily a top-down project, and the press was a vital element for the founding elite to proclaim the republican values. While Mustafa Kemal and the founding elite created their own media networks, they were careful to also establish good relations with the existing media. Soon after the first years of the republic were over, however, state-media relations began to change. One principal reason for this change was the breaking away of a group from *Halk Fırkası* (People’s Party), the political party founded by Atatürk, to launch their own party under the name of *Terakkiperver Cumhuriyet Fırkası* (Developmentalist Republican Party) in 1924.

The support from both the people and press of Istanbul for *Terakkiperver Cumhuriyet Fırkası* as the first opposition party in the history of Turkey began to be

⁴ T. Demirel and M. Heper, “The press and the consolidation of democracy in Turkey”, 32 Middle Eastern Studies, No. 2 (1996) 109, at p. 113.

⁵ E. E. Bilgiç, *The role of the press in the construction of national identity 1934-1937*, unpublished PhD thesis, University of Bosphorus (2010), at p. 27.

perceived as a threat to the regime. Under the pretext of suppressing the Kurdish Sheikh Said Rebellion in 1925, martial law was declared in the southeastern region of Turkey. The *Takrir-i Sükun Kanunu* (Law on the Maintenance of Order) was enacted, which stifled the freedom of the press and quashed any kind of opposition in the country.⁶ In accordance with this law, 13 oppositional journalists along with rebels and dissenting politicians were tried in the Independence Courts (*İstiklâl Mahkemeleri*) and most were exiled. *Terakkiperver Cumhuriyet Fırkası* and 15 newspapers critical of the government were shut down and only those newspapers that had supported the law were allowed to operate.

The 1928 Alphabet Reform which replaced the Ottoman script with the Latin alphabet radically changed Turkish society's relation to its past and is largely responsible for the historical lack of an independent media in Turkey. The transition to the Latin alphabet rendered useless the existing technology that media owners had at the time. The state provided financial support to publishers who were forced to change their technological infrastructure to adjust to the new lettering system. The publishers' financial dependence to the government created an opening for the monitoring and control of ideas.⁷

During the 27 years *Cumhuriyet Halk Partisi* (Republican People's Party - CHP) ruled the country in a single-party government, all forms of opposition were silenced. In 1927, just two years after the first radio broadcasting had started in the world, two public enterprises co-founded a media company and launched Ankara-and-Istanbul-based radio broadcasting. These two enterprises were *Anadolu Ajansı* and *Türkiye İş Bankası*, in the latter of which CHP was a shareholder. The company followed BBC as a model for its *modus operandi* and made a 10-year contract with the government.

In 1936, the company's request for contract renewal was rejected on the grounds that its programming did not live up to the standards of contemporary radio broadcasting. Through an edict issued in the same year, radio broadcasts began to be carried out by the state itself. The company's transmitters were transferred to the Postal, Telephone and Telegraph Authority (*Posta, Telefon ve Telgraf Genel Müdürlüğü- PTT*). In 1939, the Ankara Radio began to broadcast news bulletins in foreign languages for the use of other countries. In its broadcasting about the Second World War, this radio emphasised Turkey's neutrality policy.

Law no. 3837 of 22 May 1940 established –what is today called – the Directorate General of Press and Information (DGPI), a public body which is presently under the Office of the Prime Ministry. Atatürk wrote the preamble to this law, where he defined the purposes of this public body as follows: “On the one hand we need to bring out publications with an aim to defend our national and legitimate cause and to constantly scrutinise the foreign press to understand the flow of ideas,

⁶ One of the three articles of *Takrir-i Sükun Kanunu* read: “The head of the government -with the approval of the president- is entitled to ban any organization, provocation, encouragement and publications aimed at reactionism, rebellion, and disruption of social order, social peace, security and public order. The government may hand over persons suspected of these actions to the Independence Court.”

⁷ Bilgiç, *The role of the press in the construction of national identity 1934-1937*, p. 35.

while on the other hand we need to bring out publications within the nation to produce a union of ideas and spirits as the modern time dictates.”⁸

In 1949, the Izmir Municipality also established a radio station, which was transformed into a state-run enterprise in 1953. Izmir thus became the third major center for radio broadcasting in Turkey after Ankara and Istanbul.

The first decade of radio broadcasting under state monopoly demonstrates the use of radio in the establishment and consolidation of official ideology. The most striking of these was the two year ban on playing Turkish music on radios. In his address to the parliament in 1934, Atatürk had noted that the music being broadcast at the time was far from being perfect and that “it is necessary to collect noble expressions describing elaborate emotions and ideas and process them according to the contemporary music norms.”⁹ Following Atatürk’s speech, the Ministry of Foreign Affairs dictated that Istanbul and Ankara radios play pieces “composed according to Western technique” instead of Turkish music. This ban continued through 1935 and into the first half of 1936. During this period, a considerable portion of the people who had been accustomed to listening classical and traditional Turkish music instead turned their antennas to the radios of Egypt, Crimea and Yerevan to be able to listen to Arabic and Armenian songs which were closer to Turkish music than Western music. Implemented in the name of modernising the society, the ban was just another example of the Turkish state’s use of communication channels as ideological apparatuses in the Althusserian sense.¹⁰ The transition to the multi-party regime did not alter this reality.

Following the termination of *Terakkiperver Cumhuriyet Fırkası*, Atatürk - who was still the president of the country - founded another opposition party in 1930 under the name of *Serbest Cumhuriyet Fırkası* (Free Republican Party). With the termination of this party shortly after its establishment, there remained no medium for the expression of dissent in the country until the 1950s. By 1945, major landowners, the rural population (comprising 80% of the entire population at the time) and the Turkish bourgeoisie were discontent due to heavy taxes (i.e. 1942 wealth tax,¹¹ tax on agricultural products), increasing inflation and land reform. At a time when Turkey had to comply with democratic principles after having signed the UN Treaty in 1945, the close relationship it had with the USSR during the 1920s and 1930s deteriorated. In 1947, to eradicate the USSR’s influence in Turkey, the U.S.A. initiated the Marshall Plan which required Turkey to embrace democracy and free market economy. This stipulation paved the way for the formation of the Democrat Party (DP) and the transition to a multi-party system with DP’s defeat of CHP in 1950 national elections. The press, like the faction of society that brought DP to power, had

⁸ See Directorate General of Press and Information, official website, available at: <http://www.byegm.gov.tr/sayfa.aspx?Id=61> (last visited on 29/10/2010).

⁹ G. Gökçe, “Sanat Kurumlarının Oluşmasında Atatürk’ün Rolü”, 18 *Atatürk Araştırma Merkezi Dergisi* Cilt: VI (1990).

¹⁰ L. Althusser, “Ideology and ideological state apparatuses” in L. Althusser (ed.), *Lenin and philosophy and other essays* (1971) 121.

¹¹ The 1942 Wealth Levy Tax, No. 4305, levied disproportionately high taxes on non-Muslims, discriminating between similarly situated Muslims and non-Muslims for the purpose of transferring wealth from the latter to the former. Non-Muslims unable to pay the high taxes within the one month period were transferred to labour camps around the country. This discriminate treatment ended *de facto* in December 1943 with the release of the remaining non-Muslims from the labour camps, and *de iure* with the annulment of the law in 15 March 1944. See A. Aktar, *Varlık Vergisi ve ‘Türkleştirme’ Politikaları* (2000), at p. 135-153.

great expectations, particularly concerning the democratisation of the country. Among the first issues the DP addressed was the freedom of press. On 15 July 1950, a liberal press law was adopted, soon followed by a law granting journalists social rights. Yet at the same time, legal amendments designed to increase government control over the press and universities were passed in 1953. Press organs critical of the government were subjected to censorship. By 1955, court cases against the press had increased.

The media in Turkey, restricted in its content by the state from its very inception, has often been used as a medium of manipulation.¹² The DP rule between 1956 and 1960 brought legal restrictions on freedom of the press and the closure of the journalists' union. In this period, radio turned into a political apparatus of the government. The names of citizens who joined the Homeland Front, DP's political extension, were announced on a daily basis on the radio to create a surveillance effect on society. In short, radio became a tool for "manufacturing consent"¹³ and monitoring the society.

After the 27 May 1960 coup d'état which brought down DP, the most significant development in mass communications in Turkey was the beginning of television broadcasting in 1967. Public TV broadcasting through the Turkish Radio and Broadcasting Corporation (TRT), established in 1964, gradually became the most innovative and effective means through which the state reached the masses. The TRT television channels, similar to TRT radio channels, began their broadcasting every day with the national anthem. The news headlines followed the order of state protocol, i.e. news related to the President preceded those on the Prime Minister, causing TRT reporting to be labeled as "protocol reporting". TRT started permanent broadcasting in 1974. With the reduction of the price of TV sets, the number of houses with TVs proliferated.

Turkey experienced its second military coup in 1970, which was followed by a period of great political instability, particularly in the final years of the decade. Between 1974 and 1980, TRT became the battle ground for the political struggle between the National Front governments¹⁴ and CHP. Military regimes established after each coup d'état also sought to seize the entire media establishment. September 12th, 1980 coup, Turkey's third, was the first time when a military intervention was announced to the public via TRT. It also marks the beginning of the structural transformation of the political and social life in the country that stretches to present day. This period was characterised by attacks on opposition groups and by a process of uniformisation where even the most benign form of dissent was prohibited and suppressed. The aim was to create a citizenry which was uncritical, non-interfering

¹² One of the prime examples of this were the incidents of 6-7 September 1955, when government instigated violent mobs attacked unarmed non-Muslim civilians and their properties and institutions in Istanbul. The incidents were triggered off by a news in *Istanbul Ekspres Newspaper* that Atatürk's house in Thessaloniki was bombed. At a time when relations with Greece were strained over Cyprus, this news incited attacks on non-Muslim minorities, which were tolerated and even supported by the state. The incidents resulted in the declaration of martial law and the issuing of bans on the press. It was later found out that the news was a product of yellow journalism. See D. Güven, *Cumhuriyet Donemi Azınlık Stratejileri ve Politikaları Bağlamında 6-7 Eylül Olayları* (2006).

¹³ E. S. Herman and N. Chomsky, *Manufacturing consent: The political economy of the mass media*, (1988).

¹⁴ The coalition government established on 31 March 1975 by Suleyman Demirel, constituted of the right-wing political parties in the parliament, was later named as the "First National Front Government." The Second National Front Government was formed in 1977, again by Suleyman Demirel, and remained in power until 1978.

and ready to sacrifice their individuality in the name of the “nation”. The media, especially the television, was the most important tool for realising this aim and was used very effectively. In 1983, the Communications High Council (*Haberleşme Yüksek Kurulu-HYK*), a hybrid civilian and military body, was established to oversee the communication policies of the government. This and similar bodies regulating different walks of social life consolidated the longitude of military tutelage over society.

The final instance of military regime came to an end with the coming to power of *Anavatan Partisi* (Motherland Party- ANAP) under the leadership of Turgut Özal after the national elections in 1983. This marked the beginning of the “liberalisation process” in Turkey. ANAP transformed the economy through free-market reforms. While political and social factors mainly shaped the media in 1980s, “economical factors have become the determinant afterwards.”¹⁵ The private entrepreneurship encouraged by ANAP’s liberal economy policies was also visible in the media industry, where companies entered into a bitter rivalry to dominate the market. This resulted in the transfer of media ownership from “journalist families” to giant companies.¹⁶

The launch of the first private television, “Magic Box” (which was later renamed as Star 1), in 1990 was a landmark event for mass communication in Turkey. Star 1 had to begin its broadcasting via satellite from Germany due to the existence of a constitutional prohibition on private broadcasting at the time. The company was able to circumvent Article 133 which established TRT’s monopoly over all broadcasting activities, mainly because Ahmet Özal, the son of President Turgut Özal, was one of its shareholders. With an amendment to Article 133 in 1993, state monopoly over broadcasting was abolished. In 1994, the Radio and Television Law was adopted, providing the legal framework for private broadcasting.

The launch of a private TV created a dynamic atmosphere with a miscellany of actors. Many thematic channels, such as Kral TV (for music videos and entertainment), were the creations of Star TV. The increase in the number of private channels during the 1990s and the opening of the first private radio in 1992 engendered the diversification in Turkey’s media. Consequently, many issues that were previously considered taboos became debatable. After the 1980 coup d’etat, many hitherto repressed and silenced groups in society emerged in the forefront of Turkey’s public sphere, thanks to the dynamism in the media. Throughout this period, the highest ratings were received by televised debates between public intellectuals who delved critically into the recent history of the country until early hours of the morning.

Turkey’s economic transformation during the 1980s gave rise to the emergence of very strong media holdings in the next decade. The big capital penetrated from these holdings into the media, which left no room for smaller media groups in the sector. The media holdings’ organic relations with political power

¹⁵ E. Dağtaş, “Uniformity of media in Turkey: Tabloid journalism accompanied by racy popular culture”, Paper presented at the Fifth International Congress on Culture and Development, Havana International Conference Center, Havana (2007), at p. 2.

¹⁶ Ş. Çağlar and S.Ç. Mengü, “Media groups and their market shares in Turkey during globalization”, XI Revista de Economía Política de las Tecnologías de la Información y Comunicación n. 2 (2009), at p. 2.

caused a cross monopolisation¹⁷ in the industry.¹⁸ The Polly Peck Group under the ownership of Asil Nadir was the first group to take the lead in monopolisation. On the other hand, the fastest growing media holding was Doğan Media Group, owned by Aydın Doğan. The result of this change had inevitable consequences for both print and broadcasting media. On the press front, the rapid tabloidisation of newspapers in the 1980s and commercialisation/deregulation of the media in the 1990s generated a tendency toward sensational news journalism. After the passing of the new broadcasting legislation in 1994, concentration in the media sector intensified and commercial media content increasingly became more banal.¹⁹ Turkey's media was once again not functioning as the "Fourth Estate" on two crucial issues: freedom of expression and freedom of access to information.

At the end of the 1990s, the media that has for long been controlled by the state evolved into a tool of manipulation for private capital groups for their political and economic benefits in their relation with governments. The most important consequence of this media model has been the "post-modern military coup" of 28 February 1997. Mainstream media organisations, prompted by Turkey's military establishment, published fictitious news/content on the rise of Islamism. This catalysed public anxiety over the longitude of the secularist regime and created public support for the toppling of the *Refah-yol* (Welfare-path) coalition government between the center right True Path Party (DP) and the Islamic conservative Welfare Party (RP). During its monthly meeting in February, the National Security Council, an executive organ comprised of civilian and military leaders, "advised" RP leader Necmettin Erbakan to resign. The military's message was clear; Erbakan faced a more direct military intervention had he not agreed to step down.

The government was not the only target of the February 28th process. Cengiz Candar and Mehmet Ali Birand, two well-known journalists working for mainstream media, also became the targets of the fictitious news leaked by the Chief of Staff which alleged that they were on the payroll of the Kurdistan Workers' Party (PKK). Based on false documents fabricated by a senior member of the Turkish Armed Forces allegedly based on the testimony of a PKK militant-turned-informant, both journalists were labelled as "PKK agents" by the mainstream media, which did not feel the need to check the accuracy of the information leaked from the military. Journalists implicated in these fabrications were dismissed by the media patrons, while a leading human rights activist also branded as a PKK agent survived an assassination attempt.²⁰

The 1999 national elections resulted in the creation of a coalition government between the Democratic Leftist Party (DSP), Motherland Party (ANAP) and National Action Party (MHP). Meanwhile, RP had an internal schism between the "traditionalists" and the "reformists". The reformist members, who defined themselves as "conservative democrats", founded *Adalet ve Kalkınma Partisi* (Justice and Development Party- JDP), which came to power in 2002. Notwithstanding its

¹⁷ Cross monopolisation refers to the situation where economically strong large companies investing in other sectors begin to own media organs in the interest of gaining prestige and political power rather than making profit.

¹⁸ Dağtaş, "Uniformity of media in Turkey: Tabloid journalism accompanied by racy popular culture", p. 3.

¹⁹ A. Aksoy and K. Robins, "Peripheral vision: Cultural industries and cultural identities in Turkey", A 29(11) *Environment and Planning* 1997 (1997), at p. 52.

²⁰ The PKK informant would years later deny that he has ever made such statements in his testimony.

Islamist roots, JDP formed a single-party government on the basis of a pro-EU agenda, which many considered to be an oxymoron both in Turkey and abroad. Indeed, since the foundation of the republic in Turkey “the depiction of Islam as ‘the other’ or as the symbol of ‘non-modern orientalism’ has always constituted the essential substance of the secular state’s legitimacy itself”.²¹ JDP’s pro-European stand suggested that the “historical mission” of the establishment in Turkey has been, in a way, “stolen”. This mission, defined by Atatürk himself and internalised by the society as “catching up with the level of modern contemporary civilisations” was no more under the monopoly of the state’s establishment. This challenged the preconceptions of the establishment and the mainstream media, which has traditionally allied itself with the regime and its agents, namely the military and high bureaucracy.

The economic crises of November 2000 and February 2001 had serious repercussions for the media industry because some of the media companies also invested in the banking sector. The bankruptcy of a number of large private banks showed that this “business-media-banking cycle is no longer operational” in Turkey.²² The banking crises eventually led to the Banking Regulation and Supervision Agency’s (*Bankacılık Denetleme ve Düzenleme Kurulu- BDDK*) revocation of the banking licences of a number of business groups, which also owned media companies. The management of the bankrupt banks were taken over by the Saving Deposit Insurance Fund (*Tasarruf Mevduatı Sigorta Fonu- TMSF*), making TMSF a big player in the media industry in 2004.²³

The EU process which accelerated with the acceptance of Turkey as a candidate country in 1999 required the undertaking of reforms in the media sector as well as in fundamental rights and freedoms and implied not only fundamental legal changes but an overhaul of the prevalent mindset and dominant culture in the media. A crucial aspect of the democratisation process was the redesign of the relations between the military and the civilian actors in politics, media, academia, judiciary, bureaucracy and civil society. The prominence and indeed domination of the military in all walks of social life and political structure in Turkey made the process of change painful and difficult. The historical role attributed to the media in consolidating the influence of the army through “state-military correspondence” and reproducing the statist political culture made it one of the most crucial actors of the political transition in the country. The Turkish media, especially the mainstream media, was caught in between the state that depended on it for the preservation of official ideology and the society which, as never before, started demanding a truly independent and unbiased media.

3. The media landscape in Turkey

Turkey has a population of 74,816,000, the majority of which consists of young people; 50% of the total population is under the age of 28. This shows that Turkey has quite a young reader population; the majority of readers are between the ages of 16

²¹ U. Cizre, *Secular and Islamic politics in Turkey: The making of the Justice and Development Party* (2008), at p. 8.

²² B. Sümer, *The impact of Europeanisation on policy-making in Turkey: Controversies, uncertainties and misfits in broadcasting policy (1999-2009)*, Phd Thesis, University of Westminster (2010), at p. 115.

²³ *Ibid.*

and 34.²⁴ According to the United Nations Development Programme, the rate of literacy in Turkey is 88.7%²⁵ and compared to its population, the total number of readers (of any kind of written press) is considered to be low. Although 60% of the people in Turkey do not read a newspaper regularly, 90% watch TV on a daily basis.²⁶ Turkey, with 5 hours daily viewing, has one of the highest TV audience ratings in the world.²⁷ According to a report which surveyed TV viewing during the first three months of 2009, the serials and the cooking shows are the most popular programs among the Turkish people.²⁸ News channels and discussion programs have high ratings as well. Besides, Turkish people perceive the TV channels as one of the most reliable sources of information.²⁹

According to the recent data of the Advertisers' Association, advertising spending in Turkey rose by 36.3% in the first half of 2010 to 1.84 billion TL (1.2 billion USD) and is expected to increase by more than 30% by the end of 2010. The total size of the advertising sector is likely to reach 3.7 billion TL by the end of the year.³⁰ Television's share in the advertising market includes 55.59% of the advertising expenditure. The advertising shares of other media forums are as follows: print media (26.70%); outdoor (7.03%); internet (6.59%); radio (2.78%); and cinema (1.31%).

There are 33 communication faculties in Turkey with around 21,000 students. Since 2008, students in Turkey are being given media education starting from the primary school.

3.1 Print and broadcasting media

The media sector in Turkey is structurally divided into congregations. The biggest eight of the 15 media groups are Albayrak, Doğan, Çukurova, Ciner, Çalık, Feza, Doğuş and İhlas Groups. All major private TV and radio stations, newspapers and periodicals belong to these groups. The Doğan Media Group and Merkez Group also have the monopoly over the distribution of the print media through Yay-Sat and MDP, respectively.

Established in 1980, Doğan Media Group is the biggest media holding in Turkey. The Group has eight dailies: Hürriyet, Milliyet, Radikal, Posta, Vatan, Fanatik, Referans and Hürriyet Daily News. Hürriyet and Milliyet have a nationalist and statist position while Radikal has a social-democrat point of view. Posta is a tabloid newspaper and Referans was a financial paper that has recently been merged with Radikal. Doğan Media Group also owns the national TV channels Kanal D, Star and CNN Turk and radio channels Radio D, Slow Turk Radio and Radio Moda. As

²⁴ Barış, "The Turkish media landscape", p. 289.

²⁵ United Nations, "Adult literacy rate (% aged 15 and above), 2007", available at: <http://hdrstats.undp.org/en/indicators/89.html> (last visited on 29/10/2010).

²⁶ H. Nalçaoğlu, "Türkiye'yi Anlama Kılavuzu: Türkiye'de Yaşam Tarzları ve Eğilimler", Ipsos KMG Research Report (2010), at p. 79.

²⁷ G. Terzis (ed.), *European media governance: National and regional dimensions*, (2005), at p. 14.

²⁸ Report of the Radio and Television Supreme Council (Radyo ve Televizyon Üst Kurulu- RTÜK), available at: <http://www.dorduncukuvvetmedya.com/rtukun-arastirmasi-izleyici-en-cok-hangi-programlari-izliyor.html> (last visited on 29/10/2010).

²⁹ Nalçaoğlu, "Türkiye'yi Anlama Kılavuzu: Türkiye'de Yaşam Tarzları ve Eğilimler", p. 77.

³⁰ "Turkey: Advertising spending rises by 36.3 percent in first half of 2010", Financial, 06/08/2010, available at: http://www.finchannel.com/Main_News/Business/69084_Turkey%3A_Advertising_spending_rises_by_36.3_percent_in_first_half_of_2010/ (last visited on 29/10/2010).

for a digital platform, the group has D-Smart, which includes many thematic and pay-watch channels. Moreover, the group provides access for all of the channels on Türksat satellite. It has activities in the field of cinema and advertising through D Productions. Channel Romania D is another investment of the group in Romania. The group also includes Doğan Burda Rizzoli (DBR), a joint venture with the German publishing house Burda and the Italian media corporation Rizzoli.³¹ Doğan runs its own news agency, DHA, and publication house, Doğan Kitap. In the merchandising sector it has D&R.

Zaman has been the most circulated daily in Turkey since 1986. It is also published internationally in Australia, the United States, Azerbaijan, Bulgaria, Germany, Romania, Kazakhstan, Kyrgyzstan, Macedonia, and Turkmenistan. Zaman and the English language daily Today's Zaman were founded by the Feza Group. In 1994, the Group also launched its own news agency, Cihan, and weekly magazine Aksiyon. Feza has a partnership agreement with Samanyolu Group. Both groups are affiliated with the Fethullah Gülen movement, an extremely well organised and close knit conservative community which operates Turkish instruction schools and universities across the world and invests internationally in various sectors of the economy.

Doğuş Media Group was founded in 1999. Its first channel was the news channel, NTV. In addition, the Group is working with international brands such as CNBC, NBA, Billboard, Virgin, and National Geographic.³²

The Albayrak Group was established in 1952. Until 1982 it was active only in the construction sector. The group began publishing the daily Yeni Şafak in 1995.³³ Having liberal and left-wing columnists who are outside the Islamic community the paper has emerged from, the paper “offers relatively broader perspective especially about the controversial issues”.³⁴ Since 2007 it runs TVNET, a news channel.

Ciner Holding was an active company in the automotive and energy sectors under the name of Park Holding. In 2002 the holding entered into the media sector. In September 2007 Ciner Publishing Holding was founded under which Habertürk.com, Habertürk Radyo, Habertürk TV, Ajans Habertürk and Gazete Habertürk are running today. The holding has international TV and radio channels and journals such as Bloomberg TV and Bloomberg HT Radyo. The Turkish language editions of Newsweek, FHM, Marie Claire Maison, Marie Claire, Food and Travel, GEO, and Mother and Baby also belong to the Ciner Group.

Çukurova Holding currently publishes the Akşam, Güneş, Tercüman and Alem newspapers and owns the Show and Sky Turk TV stations. The leader of the GSM sector Turkcell is owned by the Çukurova Holding and Digiturk which broadcasts the national football league matches is another important investment of the group.

The Turkuvaz Group belongs to Çalık Holding. In December 2007 the group bought the Merkez Medya Group from Ciner Holding and so became the owner of the newspapers Yeni Asır (Izmir), Sabah, Takvim, Günaydın and Pas Fotomac, the

³¹ These three media groups together publish 22 magazines in Turkey. See Barış, “The Turkish Media Landscape”, p. 291.

³² Ibid.

³³ Ibid., p. 62.

³⁴ Ibid., p.291.

weeklies Bebeğim ve Biz, Sinema, Home Art, Yeni Aktuel and Gobar Enerji, as well as the TV station ATV.³⁵

According to DGPI, as of 2008, there are 2,459 newspapers in Turkey, 55 of which are national, 23 are regional and 2,381 are local.³⁶ “The print media in Turkey are dominated by national newspapers which have a daily circulation of between 4.5 and 5 million. Regional newspapers do not play an important role, though the big national newspapers have supplements for some of the regions (Aegean, Ankara, Black Sea etc.)”.³⁷ Among the national dailies, according to their average weekly sales, Zaman (651,072), Posta (485,971), Hürriyet (440,345), Sabah (371,007), Habertürk (255,423) and Sözcü (232,812) are the major ones.³⁸ Istanbul and Ankara are the media centers of Turkey. The headquarters of all the national newspapers and broadcasting companies are located in these two cities. On the other hand, Izmir, the western port city of Turkey, is the only city that has a regional newspaper, namely the Yeni Asır, which is known on the national level. The press, with a few exceptions, is characterised by statist and nationalist rhetoric because of its historical ruins that were detailed in the previous sections.

DGPI reports that, as of 2008, the total number of television channels in Turkey is 258, of which 27 are national, 16 regional and 215 local. 65 of these channels are available on cable and 92 on satellite.³⁹ The multimedia groups are the main actors in the private broadcasting market. According to the ratings of September 2010, Kanal D, ATV, NTV, CNN Türk and Habertürk are the top five of the list.⁴⁰ Public broadcaster TRT has 5 national television channels: TRT 1 (general), TRT 2 (culture and art), TRT 3 (youth channel with sports and music programs and broadcasts live from the Turkish National Grand Assembly at specific hours) and TRT 4 (education). TRT also has a regional channel (TRT-GAP) for the south-eastern region of Turkey and two international channels (TRT-INT for Europe, USA and Australia; TRT-AVRASYA for Middle Asia and Caucasus).⁴¹ The most significant change concerning state television TRT in the European Union accession process has been the launch of 24 hours Kurdish language broadcasting on January 1st, 2009. TRT 6 became the first TRT channel ever to exclusively broadcast in a language other than Turkish.

The number of private radio channels currently broadcasting in Turkey is around 1,087 and 100 of them are also available on cable. Of these 36 are national,

³⁵ European Stability Initiative, “Turkey – Armenia manual: Information and contacts to persons and institutions working on Turkey-Armenia relations” (2010), available at: http://www.esiweb.org/pdf/esi_picture_story_-_turkey_armenia_manual_-_august_2010.pdf (last visited on 29/10/2010), at p. 63.

³⁶ “Türkiye'deki gazete, dergi, radyo ve televizyonların sayısı, Basın Yayın ve Enformasyon Genel Müdürlüğünün kayıtları ile gün yüzüne çıktı”, MedyaRadar, 02/10/2008, available at: <http://www.medyaradar.com/haber/gundem-21476/turkiyedeki--gazete--televizyon--radyo-ve-dergi-sayisi-ne-kadar--peki-kac-iletisim-fakultesi-var--iste-cok-iliginc-rakamlar.html> (last visited on 29/10/2010).

³⁷ European Stability Initiative, “Turkey – Armenia manual: Information and contacts to persons and institutions working on Turkey-Armenia relations”, p. 60.

³⁸ “Eylül ayının en çok izlenen kanalı hangisi oldu?”, gazeteciler, 01/10/2010, available at: <http://www.dorduncukuvvetmedya.com/gectigimiz-haftanin-gazete-satis-rakamlari-belli-oldu.html> (last visited on 29/10/2010).

³⁹ “Türkiye'deki gazete, dergi, radyo ve televizyonların sayısı, Basın Yayın ve Enformasyon Genel Müdürlüğünün kayıtları ile gün yüzüne çıktı”.

⁴⁰ “Eylül ayının en çok izlenen kanalı hangisi oldu?”.

⁴¹ Barış, “The Turkish media landscape”, p. 292.

100 are regional and 951 are local radio stations. TRT also has four national radio channels with different broadcasting themes: Radyo 1 (general), Radyo 2 (TRT-FM, native classical, folk and pop music), Radyo 3 (primarily classical music and also jazz, polyphonic and western pop music, broadcasts news in English, French and German) and Radyo 4 (pop music). TRT's international radio service *Türkiye'nin Sesi*/The Voice of Turkey broadcasts in 26 languages. TRT also has ten regional radio stations.⁴²

Additionally there are 14 weeklies selling around 110,000 copies combined. Of these, the four best selling weeklies are *Aksiyon* (founded by Feza Group), *Yeni Aktüel* (Turkuaz Group), *Newsweek* and *Economist*. As a result, the circulation of the weeklies is quite low compared with the dailies.

3.2 News agencies

In Turkey there are a total of 24 news agencies. The official news agency *Anadolu Ajansı* (Anadolu Agency- AA), operating since 1920, is the oldest and the primary source for the press. AA has 41 offices in Turkey and 26 abroad.⁴³ *Doğan Haber Ajansı* (Doğan News Agency-DHA) is the news agency of Doğan Holding and was founded in 1999. It currently has 30 domestic and 19 international offices. The Feza Group has *Cihan Haber Ajansı* (Cihan News Agency- CİHAN), which was established in 1994. The agency has 6 domestic offices. It provides an average of 450 text stories, 400 photos, 180 photo stories and 85 video stories per day. CİHAN also provides news and services in English and Arabic.⁴⁴ *İhlas Haber Ajansı* (İhlas News Agency- İHA) is owned by İhlas Holding. It has 145 offices in Turkey and abroad. *Dicle Haber Ajansı* (Dicle News Agency- DİHA) was founded in 2002 with headquarters in Istanbul, 5 other offices in Turkey and one office in Iraqi Kurdistan. DIHA offers news in Turkish, Kurdish and – occasionally – English.

3.3 Online media

The Internet emerged in Turkey in 1993, for the first time on university campuses and soon after in offices, businesses and homes. According to the Turkish Statistical Institute's survey in April 2010, the access rate household internet use has increased from 30 to 41.6% within one year. Men between the ages of 16-74 amount to 53.4% of the total population while women have a using rate of 33.2%. Internet is mostly used for the purpose of sending e-mails and shopping.⁴⁵ Internet cafes played a massive role in proliferating the use of the internet in Turkey. Many segments of the Turkish society, who have never used a computer or the internet, were introduced to this technology via internet cafes.

Turkey's television and radio broadcasters' increasing use of online services, the proliferation of online daily news papers, political parties' and politicians' accessibility via e-mail, and people's increased awareness about the internet reveals the speed and breadth of internet development in Turkey. However, internet and cell

⁴² Ibid., p. 293.

⁴³ Ibid., p. 295.

⁴⁴ Ibid.

⁴⁵ "Internet Kullanım Araştırması Sonuçları", *Iv.kuvvetmedia*, 18/08/2010, available at: <http://www.dorduncukuvvetmedya.com/internet-kullanim-arastirmasindan-cikan-dikkat-cekici-sonuclar.html> (last visited on 29/10/2010).

phone usage is still very limited and highly expensive for most Turkish people. On the other hand, the ratio and method of internet usage in Turkey differs from region to region. Whereas the use of internet is very high in the “central-west”, it declines towards the “center-east”. Internet use for access to news, and research and educational purposes is lower compared to the use of game, pornographic and friendship sites.

The use of social media is limited due to the lack of requisite technological infrastructure, yet it is quite popular especially among the young people. The use of mobile phones for access to social media sites is higher than that of the internet, particularly among youth. Facebook, twitter and personal blogs are the most common means of using the social media. On the other hand, access to Youtube continues to be blocked since 2007 due to videos which were found by a Turkish court to be insulting of Atatürk. While small enterprises especially in the agricultural sector use the social media in order to sell their products and compete with the gigantic companies, tourism companies consider the social media as a way to reach out to international customers in a short and the cheapest way.

3.4 Minority and alternative media

There are few, yet quite established, minority newspapers run by non-Muslim communities in Turkey. The daily *Iho* and the weekly *Apoyevmatini* address the Greek Orthodox community located in Istanbul. The Jewish weekly *Şalom* was established in 1947. It was published in Ladino until the 1980s. When Ladino could no longer be transferred to the new generation Jews, the paper switched to Turkish, leaving only one page in Ladino. It has a circulation of nearly 3,500 copies and has 500 subscribers abroad. It has a large staff with 40 authors and 15 employees. The Armenian minority has four newspapers: *Jamanak*, *Marmara*, *Lraper* and *Agos*. *Jamanak* is the oldest Armenian newspaper, published since 1908, and *Marmara* is the second oldest, since 1940. Published six times a week, the Friday edition of *Marmara* contains a section in Turkish. Its circulation is around 1,500. Half of the subscriptions are sent abroad to the Turkish Armenian diaspora around the world. *Lraper* is the news bulletin of the Armenian Patriarchate in Istanbul, published in Armenian, Turkish and English.

Agos is the only example of a minority paper that reaches to broader segments of society. Originally established with the goal of breaking the walls between the Armenian and Turkish communities in Turkey, *Agos* is published predominantly in Turkish with only a few pages in Armenian. Following the assassination of its editor-in-chief Hrant Dink in 2007, the paper increased its efforts to reach out to the broader public in Turkey by increasing its Turkish pages, employing new columnists from outside the Armenian community, and adding new sections. The paper is popular among dissident political groups as well as those that want to support the paper in protest to Dink’s murder, and has Armenian, Greek Orthodox, Turkish, Kurdish, Sunni and Alevi staff and columnists. *Agos* started with a circulation of 2,000. By the time of Hrant Dink’s death it had reached around 6,000. Dink’s successor until June 2010 was Etyen Mahçupyan, a reputable public intellectual, and since then Rober Koptaş, who has been a columnist at *Agos* since the 1990s.

Aras Publishing is the only Armenian publishing house in Turkey. It was founded in 1993 by a group of Istanbul Armenians. It has now established itself as

one of the few publishing houses producing works in two languages, Turkish and Armenian. Aras intends to safeguard the cultural legacy of Turkey's Armenians for future generations.

Azadiya Welat is the only daily published in Kurdish. Following a 1991 law that lifted the ban on the speaking and writing of the Kurdish language, weekly Welat was launched in Istanbul on 22 February 1992. Subsequently closed down by courts, the weekly changed its name to Azadiya Welat in 1996. It has been publishing since, albeit with interruptions due to court-imposed bans. In 2003, the paper moved its headquarters from Istanbul to Diyarbakir and in 2006 it became a daily. The paper is distributed across the country and has a circulation between 4,000 and 10,000.

Apart from the minority media, there are only a few examples of alternative media organs that are not owned by any of the big media groups and that emphasise objectivity and impartiality in reporting as well as independence from the state, military, media industry as well as any power structure in Turkey. The most notable alternative media organs are the daily Taraf, the online Bianet and Açık Radio.

Taraf is owned by Alkım Kitapevi, a bookshop chain which is not a part of the gigantic media outlets. Although praised in Islamist circles, Taraf's stance can be described as neither pro-AKP, nor pro-Islam, but anti-military. The paper's daring and harsh reporting against the military led to the Chief of Staff's cancellation of the paper's accreditation for entry into press meetings organised at the headquarters of the armed forces. While the newspaper is sympathetic to AKP circles, it has also criticised the government harshly particularly on the Kurdish question, freedom of the press and police brutality. The paper is a coalition of secular and atheist intellectuals, many with leftist backgrounds, as well as religious writers from the Islamic community. Although its circulation is relatively low, the paper has dominated Turkey's political agenda ever since it was launched in 2007 through publishing confidential documents seemingly leaked by military personnel revealing a series of failed coup attempts by senior military leaders against the JDP government.⁴⁶

Bianet, or BIA, is an online news portal which was initiated as a project in 2003 with the support of the European Union's Initiative for Democracy and Human Rights. The purpose of the project was to establish a countrywide network in Turkey for monitoring and covering media freedom and independent journalism. BIA reports on freedom of expression violations, monitors newspapers' coverage of human rights, extensively covers women's and children's rights and monitors the media's compliance with the ethical codes of the profession.⁴⁷

Açık Radio went on air in 1995 and is an exceptional and independent radio channel which is outside the media establishment. It is a collective where all shareholders have equal shares and is quite close to a non-profit organisation. Its programming is based on citizen/audience participation and it relies on the donations of its listeners collected through biannual drives broadcasted alive on the radio. Açık Radio is a defender of the environmentalist movement in Turkey and has a multi-cultural and liberal stance.

⁴⁶ O. Ogret and S. Martens, "Pressing for freedom: Two centuries of ceaseless struggle in Turkey", *Hürriyet daily news* (2010), available at: <http://www.Hurriyetaidailynews.com/n.php?n=part-iii-requiring-a-gut-feeling-alongside-a-lot-of-guts-2010-06-07> (last visited on 29/10/2010).

⁴⁷ Barış, "The Turkish media landscape", p. 299.

4. The media regulatory framework in Turkey

Economic liberalisation in the 1980s and the EU accession process in the 2000s implied and required the restructuring of the media sector and the undertaking of legal reforms to enhance media independence, pluralism and freedom in Turkey. Successive governments since 1999, when Turkey was officially declared as a candidate for EU accession, in particular the Justice and Development Party which has been in single-party government since 2002, have sought to harmonise the national legal framework with European standards without compromising the official ideology of the state. A further concern has been the ensuring of the continuation of government control over the media. The attempt to simultaneously achieve these mutually exclusive goals has created tensions and contradictions in the development of Turkish media policy and the regulatory framework, which is a characteristic feature of Turkey's reform process in recent years.

4.1 Actors of media policy and regulation

The multiplicity of the media policy and regulatory institutions in Turkey may at times create confusion over their competences and mandates. Three principal types of actors develop policies for the media and regulate the sector: executive bodies, independent regulatory agencies, and self-regulatory professional media organisations. While all three groups of actors are briefly outlined in this section, the mandates and powers of the first two are discussed in the next section on structural regulation.

At the executive level, the Ministry of Transportation is responsible for regulating the internet; there is a Ministry of State in charge of radio and television, which also has the competence over the Radio and Television Supreme Council (*Radyo Televizyon Üst Kurulu-RTÜK*); DGPI under the Office of the Prime Ministry has mandate over the press, including the accreditation of the press for the purposes of relations with the government; and HYK, a body made up of civilian and military officials, is tasked with the oversight and approval of the government's communication policies.

The Information and Communication Technologies Authority (*Bilgi Teknolojileri ve İletişim Kurumu-BTK*) is an independent agency responsible for regulating the internet and mobile communication. BTK's equivalent in the broadcasting sector is RTÜK, an independent agency in charge of regulating private radio and broadcasting.

There are few independent bodies that monitor the media from within the profession. *Basın Konseyi* (Turkish Press Council), established with the initiative of a group of journalists in 1998 for the self-regulation of the press' compliance with professional ethical rules and codes of conduct, is a contentious body whose autonomy from state ideology is widely contested by members of the profession. In recent years, newspapers have started to select ombudsmen among their columnists or editors to respond to readers' concerns and critiques and to monitor the compliance of their paper with ethical rules of journalism. However, newspapers exempt from ombudsmen's mandate their website editions, some of which are criticised by human rights groups for their discriminatory content particularly against women and minorities.

The primary journalist associations in Turkey are: *Türkiye Gazeteciler Cemiyeti* (Journalists Association of Turkey), *Türkiye Gazeteciler Federasyonu* (Federation of Journalists), *Çağdaş Gazeteciler Derneği* (Progressive Journalists Association), *Gazeteciler ve Yazarlar Vakfı* (Foundation of Journalists and Writers), *Medya Derneği* (Association of the Media), *Ekonomi Muhabirleri Derneği* (Association of Economy Reporters), *Foto Muhabirleri Derneği* (Association of Photo Reporters), *Parlamento Muhabirleri Derneği* (Association of Parliamentary Reporters) and *Basın Konseyi* (Press Council). There are two journalist unions called *Türkiye Gazeteciler Sendikası* (Union of Journalists in Turkey-TGS) and MEDYA-SEN (DİSK) but their prominence is low.

The Journalists Association of Turkey represents central and statist tendencies of the mainstream media members. It has members from the Doğan media group as well as from the republican newspaper, *Cumhuriyet*. The Progressive Journalists Association was founded by the leftist media members. The Foundation of Journalists and Writers has a religious identity and the Association of the Media was founded by journalists that are supportive of the AKP government. The Press Council on the other hand is entirely the construction of the Doğan media group. None of these associations have the capacity, ability or will to contribute to the development of media policy in Turkey.

4.2 Structural regulation

There are a number of principal laws that regulate the structure and content of the media in Turkey, all of which have been revised and/or re-enacted within the past decade: the Press Law for the print media; Law no. 3984 on radio and television (for private broadcasting); Law no. 2954 on TRT (for public broadcasting); Law no. 5651 for the internet and mobile communication (“the Internet Law”); Law no. 5809 on electronic communications; Law no. 406 on telegram and telephone (“the Telecommunications Law”). Law No. 2813 on wireless and Law No. 3348 establishing the Ministry of Transportation also include provisions regulating the telecommunications industry.

4.2.1 Licensing rules

As stated earlier, until 1993, there was a constitutional ban on private broadcasting in Turkey. State broadcaster TRT’s monopoly over broadcasting was *de facto* terminated in 1990 with the launch of STAR 1 TV channel, which broadcasted via satellite from Europe. With the emergence of hundreds of private broadcasting companies within a matter of few years, a chaotic situation emerged in the absence of a legal framework to regulate the market. To provide a legal basis to this *de facto* situation, the constitutional ban on private broadcasting was abolished in 1993, followed in 1994 by the adoption of the current Radio and Television Law (no. 3984), which replaced the 1983 law (no. 2954). With this legal amendment, the name of the regulatory body was changed from the “Radio and Television High Council” to the “Radio and Television Supreme Council” (RTÜK).

RTÜK was established in 1994 for regulating private radio and television as well as monitoring their compliance with Law no. 3984. Its main regulatory function was to issue broadcasting permits and licences and assigning frequencies. Its monitoring function entails enforcement powers against private broadcasters that do

not comply with the law. RTÜK's mandate does not extend to TRT, which is subject to a separate law, Law no. 2954, which applies solely to the public broadcasting agency.⁴⁸ Its nine members are elected by the parliament among candidates nominated by political parties represented at the parliament. Individuals related to RTÜK members up to the 3rd degree cannot be shareholders, managers or partners of radio and TV companies. While RTÜK defines itself as "an autonomous and impartial" public body,⁴⁹ its composition "is considered to be profoundly influenced by the political considerations of governments and, thus, substantially undermining the Council's claim of impartiality."⁵⁰ The second ground of criticisms against RTÜK is the punitive powers it has been equipped with in monitoring private broadcasters' compliance with the law. This will be discussed in detail below in the section on content regulation.

Though established primarily as a regulatory body to assign broadcasting frequencies, RTÜK has not been able to perform this function as of today. The agency's repeated attempts from mid-1990s onwards to complete frequency allocations failed due to the interference of the National Security Council, opposition by broadcasting companies, court orders and political battles in the parliament.⁵¹ As part of the restructuring of telecommunications services, in 2002, HYK and Türk Telekom have been made partners of RTÜK "to speed up the process of allocating the frequencies and to end the chaos in an unregulated broadcasting market."⁵² Accordingly, frequency planning has been included within Türk Telekom's mandate. However, this endeavour "has been unsuccessful mainly due to discordance among these regulatory bodies and the pressure of the media conglomerates."⁵³ The commencement of frequency auctions was halted due to government's "fear of retaliation by the media giants" and the National Security Council's intervention "to oblige broadcasters to acquire a national security clearance document which would supposedly prevent the establishment of religious TV channels".⁵⁴ While Turkey has committed to the EU to carry out the frequency allocations in 2011, there is no progress on this front and private radio and television broadcasters continue to operate without licences.

In the meantime, in 2005, HYK decided not to pursue frequency allocations any longer since Turkey had already started to plan the switchover to the digital. While RTÜK had been planning to switchover to digital since 2002, the process halted due to internal rifts between the public broadcasting TRT and private broadcasters.⁵⁵

While RTÜK is tasked with assigning frequencies, BTK undertakes frequency planning. In accordance with its competences outlined in Law no. 5809, BTK is also tasked with advising the Ministry of Transportation on planning the telecommunications sector; following the new developments in technology and

⁴⁸ Barış, "The Turkish media landscape", p. 295.

⁴⁹ See RTÜK, official website, available at: http://www.rtuk.org.tr/sayfalar/IcerikGoster.aspx?icerik_id=80775e05-caec-4a48-bac5-39fd6375da3b (last visited on 29/10/2010).

⁵⁰ Barış, "The Turkish media landscape", p. 296.

⁵¹ For a detailed discussion, see Sümer, *The impact of Europeanisation*, pp. 113-115 and 118-125.

⁵² Barış, "The Turkish media landscape", p. 295.

⁵³ *Ibid.*, p. 295-296.

⁵⁴ *Ibid.*, p. 296.

⁵⁵ Sümer, *The impact of Europeanisation*, p. 144.

providing support for domestic companies in the production of technology; ensuring free competition in the provision of goods and services in the market; and defining and implementing the performance standards for manufacturing of systems and equipments to be used in telecommunications sector. Tasked with monitoring compliance with Law no. 3984, BTK has the power to notify relevant bodies on non-compliance and impose sanctions when required; ban access to the internet on grounds, *inter alia*, of obscenity and child abuse; and take measures for consumer protection.⁵⁶

HYK was established under Wireless Law no. 2813 of 1983. Presided by the Prime Minister or a minister he appoints, the high council is made up of the ministers of interior and transportation, a high level representative from the chief of staff, the general secretary of the National Security Council and the undersecretary of the national intelligence agency. It meets biannually for the review and approval of communications policies. The Telecommunication Authority (*Türk Telekom*), established after the separation in 1995 of postal and telecommunications services hitherto provided together by the PTT and privatised in 2005, is Turkey's telecom operator in charge of providing telecommunications services.

All telecommunications activity in Turkey is regulated under the Telecommunications Law (Law no. 406), which was amended in 2000 and 2001 in order to modernise the provision of services and improve the infrastructure. In 2004 and 2005, the power to provide satellite communication services and the services provided over cable TV has been transferred from Türk Telekom to Türksat Uydu Haberleşme Kablo TV, which was established in 2004.⁵⁷ The privatisation of Türk Telekom was finalised on 2005 with the sale of 55% of its shares to Oger Telecoms Joint Venture Group.

4.2.2 Ownership regulations

The primary legislative motive in the adoption of the Broadcasting Law in 1994 was “to carry out the frequency allocations as soon as possible to regulate the *de facto* operations of the broadcasters, not regulating ownership.”⁵⁸ With RTÜK's failure in its repeated attempts to undertake frequency allocations due to the rifts between private broadcasters and the government, “the mushrooming of commercial broadcasters got out of control and the loopholes in media ownership regulations enshrined in law were abused by the media proprietors to increase their power.”⁵⁹

Article 29 of the Broadcasting Law regulates media ownership in Turkey. It bars, *inter alia*, political parties, associations, unions, professional associations, foundations, local governments, companies from owning media or partnering with media enterprises. Cross-media ownership and foreign ownership is limited to 20%, and foreign investors are barred from having a share in more than one media enterprise. Individuals who have a 10% share or more in a broadcasting company are precluded from entering into public tenders.

⁵⁶ See Information and Communication Technologies Authority, official website, available at: http://www.tk.gov.tr/Eng/abo_boa/func_authority.html (last visited on 29/10/2010).

⁵⁷ The amendments were made pursuant to Law no. 5189 of 16 June 2004 and Law no. 5335 of 21 May 2005. See, Türk Telekom, “legal”, available at <http://www.turktelekom.com.tr/tt/portal/About-TT/Company-Profile/Legal/> (last visited on 29/10/2010).

⁵⁸ Sümer, *The impact of Europeanisation*, p. 130.

⁵⁹ *Ibid.*

And yet, the largest media groups mentioned earlier not only dominate the media sector, but also have investments in many other sectors of the economy and “there seems to be no efficient way to control the concentration of the media ownership”.⁶⁰

4.3 Content regulation

Turkey lacks a unified, coherent and concise content regulation for the media. There are multiple laws and regulations governing different sectors of the media. The overregulation of the media sector has been exacerbated in the EU accession process through multiple “reform packages” hastily adopted by the parliament without having gone through a process of deliberation and consultation with civil society and the media. Each package law carries identical titles which give no indication of their content⁶¹ and contains multiple amendments to various laws, ranging from laws from the criminal code to laws governing the media, and from laws governing the environment to financial regulation. The patch work style of law making has become a characteristic feature of the reform process in recent years, further complicating the already complex regulatory framework concerning the media, fundamental rights and liberties as well as other areas of social life.

4.3.1 Constitutional framework

In recent years, relative progress has been achieved in reforming the constitutional provisions on the media. The 2001 constitutional amendments removed the prohibition in Articles 26 and 28 of minority languages in the expression and dissemination of thought and in media. But, the amendments left untouched wide restrictions attached to the exercise of these rights on grounds of national security, public order, and the integrity of the state with its nation and territory. In case of the violation of these restrictions by print media, Article 28 authorises seizure by court order and allows, where delay poses a danger, immediate seizure by competent authorities, pending a court order within 24 hours. The right to privacy protected under Article 20 is also subject to similar restrictions on grounds of public order, national security, prevention of crime, public morality, public health and protection of rights of others. Under Article 29, there is no requirement to receive prior permit to publish periodicals and non-periodicals. Article 133 guarantees the right of private companies to establish and operate radio and television, subject to conditions laid out in Law no. 3984.

4.3.2 Legislative framework

There are two principal types of laws regulating the content of the media in Turkey: the media-specific laws that directly regulate the sector; and laws in the penal system which severely curtail the content of the media.

⁶⁰ S. Papathanassopoulos, *The Mediterranean/Polarized pluralist media model countries*, in G. Terzis (ed.) *European media governance: National and regional dimensions* (2005) 191, at p. 194.

⁶¹ Typically, the names of these reform packages are “Laws on the Amendment of Certain Laws”.

Media-specific laws

The Press Law, adopted anew in 2004, is a legislation that is liberal on its face and yet quite authoritarian between the lines. Rights that are tenets of free and independent media go hand in hand with severe restrictions that are characteristic of authoritarian regimes. The law protects the freedom of press and the right to information, guarantees journalists' right to protect their news sources, and grants individuals' right of reply to defamatory or untruthful news. At the same time, the law contains a wide catalogue of restrictions. In addition to similar restrictions imposed in the constitution, the law also limits the freedom of the press in the name of "the protection of the independence and impartiality of the judiciary".⁶² Prosecutors widely interpret the concepts of "national security", violation of "territorial integrity" and "disclosure of state secrets" to bring cases against journalists who report news deemed to be against state interests, such as disclosure of human rights abuses by security forces in the name of the fight against Kurdish insurgency, criticisms of the military's interference into politics and disclosure of failed coup attempts by high ranking military officers. Article 11 attributes criminal liability to editors and translators of written work where the author is abroad or unidentified. This provision is being used against editors who have published Turkish translations of foreign language books on controversial political issues, such as Ragip Zarakolu who has been prosecuted for having published books recognising the Armenian Genocide of 1915.

One main difference of the new Press Law is the requirement imposed on printing companies to notify the prosecutor in order to receive publishing permission and to submit two signed copies of each issue to the prosecutor, who is granted the power to seize papers. Under the previous press law, district governors were designated as the authority to notify. The shift of powers from the executive to the judicial branch is potentially restrictive of freedom of press since it enables courts to open cases against printing companies which fail to comply with the red tape. Courts do not refrain from making use of their power to seize printed press on the basis of a very restrictive interpretation of freedom of press and speech.

Law no. 3984 on broadcasting respects the right of reply and rectification,⁶³ guarantees individuals' privacy of life and protects them from offences against their personality beyond the limits of criticism; prohibits broadcasts which "humiliate or insult people for their language, race, color, sex, political opinion, philosophical belief, religion, sect, and any such considerations"; outlaws incitement to hatred and hostility through discrimination; and protects women, minors and the weak against programs inciting to violence and discrimination. On the other hand, it introduces significant restrictions on broadcasting on the basis of, *inter alia*, "the existence and independence of the Turkish Republic, the territorial and national integrity of the State, the reforms and principles of Atatürk"; and "the national and moral values of the community and Turkish family structure".⁶⁴ These amorphous concepts leave a

⁶² Article 3 reads: "The press is free. This freedom includes the right to acquire and disseminate information, and to criticise, interpret and create works. The exercise of this freedom may be restricted in accordance with the requirements of a democratic society to protect the reputation and rights of others as well as public health and public morality, national security, public order and public safety; to safeguard territorial integrity; to prevent crime and the disclosure of state secrets; and to ensure the authority and impartial functioning of the judiciary."

⁶³ Though, compared to the Press Law, the right of reply is held to lesser standards under Law no. 3984, which requires radio and television stations to broadcast disclaimers upon court order only.

⁶⁴ Article 4.

wide margin of appreciation to RTÜK, which has the power to sanction broadcasters which do not abide by these standards. In 2002, amendments made to the law limited RTÜK's sanctioning powers from suspending an entire TV or radio broadcasting operator to suspending the relevant program.⁶⁵ Still, RTÜK maintains significant punitive powers, and continues to be perceived as “a ‘penalising’ body rather than a regulatory one”.⁶⁶

The agency adopts a restrictive interpretation of the law's limitation clauses and imposes disproportionate sanctions against media operators. In 2005 alone, RTÜK asked defence from 20, issued warnings to 33, suspended programs in 9 and fined 4 national television channels for having broadcasted programs “having negative effect on children”; forced a local radio station off the air for 30 days for “disseminating separatist propaganda” and “inciting hatred and enmity”; and suspended two local television channels for “undermining the state and its independence.”⁶⁷ In 2006, RTÜK relied again on Article 4 of Law no. 3984 for initially suspending for one month the broadcasting of the Anatolia's Voice radio station for playing a song about the Kurdish question and subsequently suspending it without limitation in February 2007. Similar sanctions were brought upon local media run by minorities. In August 2004, RTÜK suspended for 90 days the broadcasting of Gün TV and Can TV in Diyarbakır and Hakkari FM radio station in Hakkari, which are provinces predominantly populated by the Kurds.

While injunction of broadcasting is only possible by court order, exceptions are made to this rule where there is a threat to national security and a serious risk of disruption of public order, in which case injunction is possible with executive order (of the prime minister or a minister). Where an order of injunction is made, broadcasters have the right of appeal to the Court of Cassation, which is required to issue a ruling within 48 hours. Courts frequently resort to their injunctive powers under the law. In *Özgür Radyo v. Turkey*, the European Court of Human Rights (ECtHR) found the warning and licence suspensions imposed on a pro-Kurdish radio station to be an infringement of freedom of expression. The Court held that statements made on the radio, which were found by national courts to constitute defamation as well as incitement to violence and separatism, did not incite violence or hate and had already been published by other media organs without being prosecuted.

Public broadcasting falls outside the mandate of RTÜK and is regulated by a separate law, i.e. Law no. 2954 on the TRT. The standards of public broadcasting outlined in the TRT Law are quite similar to those laid out in Law no. 3984 on private broadcasting: protecting the indivisible unity of the state with its territory and nation, national sovereignty, the republic, public order and public interest; consolidating Atatürk's ideals and reforms; and complying with the national security politics and national economic interests of the state. Moreover, “TRT's staff, as public employees, has to act in accordance with the mandate of protecting the priorities of the state”, laid out in Article 9 of the law.⁶⁸

The impartiality of the public broadcaster TRT has always been questioned in Turkey and the agency has been criticised for “its permanent endorsement of the official position of the state and/or government in almost any subject ... and careful

⁶⁵ Law No. 4756 of 21 May 2002 and Law No. 4771 of 9 August 2002.

⁶⁶ Sümer, *The impact of Europeanisation*, p. 135.

⁶⁷ Barış, “The Turkish media landscape”, p. 296.

⁶⁸ Barış, “The Turkish Media Landscape”, p. 296.

avoidance from any engagement with controversial issues.”⁶⁹ In recent years, however, there has been a considerable change in TRT’s broadcasting policy following AKP’s coming to power. Political issues such as Cyprus, relations with Armenia and the Armenian genocide, the Kurdish question and the army’s intervention into politics have started to be discussed and debated on TV and the radio. Programs investigating the country’s recent past and questioning the official history narrated by the state are regularly being aired by the TRT. This change is a reflection of the weakening of the army’s power over politics as part of the process of democratisation in Turkey. With the coming to power of a government whose position on the core political issues in the country is in contradiction with the official position of the state and which, based on its democratic legitimacy, claims the power to set Turkey’s official policies on these issues, the state - i.e. the army - has lost its control over TRT. Having said this, TRT’s impartiality continues to be a matter of contention in Turkey. Opposition parties and mainstream media organs critical of the government criticise public TV for being too close to and partial towards the government and for not standing at equal distance to all political parties.

The Internet Law (no. 5651) was prepared by BTK and entered into force on 23 May 2007.⁷⁰ The law regulates all content on the internet, without making a distinction between traditional press content online and broadcasting online, including the social media. It lays out the obligations and responsibilities of content, space, access and collective use providers as well as internet crimes. The law identifies the following eight internet crimes: encouraging suicide; sexual abuse of children; facilitation of use of drugs or stimulants; provision of substances that are dangerous for health; obscenity; prostitution; gambling; sports betting and games; and crimes regulated in the 1951 Law no. 5816 on Crimes against Atatürk. Courts have unlimited powers to restrict access to the internet in the name of preventing these crimes.⁷¹ In an internationally notorious incident of internet censorship, an administrative court made use of this power to ban Youtube in January 2008.

A relevant law is the 2004 Law on Information, which requires public institutions to respond citizens’ queries within 15 days. Citizens have the right to apply to administrative courts where this rule is not obeyed. Authorities may decline to disclose the requested information on grounds of “state secrets”.

Indirect content regulation

In addition to the above cited laws which are directly relevant for media regulation, the Anti-Terror Law and the Penal Code also regulate the media, in a negative way, through restricting freedom of expression and media freedom. Both laws perceive the commitment of offences through the press and media as an aggravating factor, increasing sentences by one third to a half.

⁶⁹ Ibid.

⁷⁰ Law on the Regulation of Broadcasts on the Internet and on the Fight against Crimes Committed through the Internet, no. 5651 of 4 May 2007.

⁷¹ “Upon the decision of judicial authorities, i.e. Republican prosecutors and courts, the Presidency of Information Technologies Institution (BTK) can ban access to the internet. However, for our Presidency to release such a decision the content and domain of the internet site to be banned must be located outside of Turkey. The Presidency can place a ban on sites originating in Turkey based on a court ruling on crimes committed by the banned site against children and on obscenity”.

The new Penal Code (no. 5237), adopted in 2005, has a number of provisions significantly curtailing media freedom. The law criminalises the encouragement of military personnel to disobedience with the law (Article 319); alienating the people from the military (Article 318); insulting the President (Article 299), the government and military and security forces (Article 301); incitement to crime (Article 214); praising crime and criminals (Article 215); incitement to hatred and animosity (Article 216); incitement of the people to disobedience with the law (Article 217). The sentences under Articles 213-217 and 299 are increased by half and one third, respectively, where the one of the offences is committed through the press or the media.

The restrictive nature of the Penal Code has been taken to the ECtHR which found, in the *Düzgören* and *Ergin* group of cases, the conviction under Article 318 of journalists for having published statements or distributed leaflets considered to incite the abstention from military service to violate Article 10 of the European Convention on Human Rights.

The Anti-Terror Law (no. 3713), as amended in 2006, has similarly restrictive provisions curtailing freedom of press. Article 6(2) makes it an offence to print or publish declarations or leaflets of terrorist organisations. Under Article 6(4), where such offence is committed through the press or the media, the owners and editors-in-chief of the media organs concerned are also liable to a fine. The most problematic provision of the Anti-Terror Law is Article 6(5), which allows the suspension of periodicals for a period of 15 days up to one month by court order or, where delay is detrimental, by a prosecutor. Article 7(2) makes it an offence to disseminate propaganda in favour of a terrorist organisation, subject to 1-5 years of imprisonment. Where such offence is committed through the press and media, the sentence is increased by half. The article also imposes liability to the owners and editors-in-chief of the press and media organs concerned.

The constitutionality of Article 6(5) was contested by former President Ahmet Necdet Sezer before the Constitutional Court on the grounds that suspension of the future publication and distribution of a periodical infringed upon the freedom of the press as protected under Article 28 of the Constitution. In its judgment of 18 June 2009, the Constitutional Court found Article 6(5) to be compatible with the constitution and rejected the president's request for annulment.⁷²

The compatibility of Article 6(5) of the Anti-Terror Law with Article 10 of the ECHR was contested before the ECtHR in the case of *Ürper and Others*. In its judgment of 20 October 2009, the Court observed that the practice of banning the future publication of entire newspapers, whose content was a priori unknown, had a preventive effect on the professional activities of journalists and amounted to censorship. The issue was raised again before the Strasbourg Court. In its judgment of 15 June 2010 in the case of *Turgay and Others*,⁷³ the ECtHR noted in particular that

⁷² Constitutional Court, decision no. 2009/90, Official Gazette of 26 November 2009. In its judgment, the Court pointed out the public interest in combating with terrorism: "...taking into consideration the nature of acts that result in the suspension of the publication of periodicals, the magnitude of damage caused by the commission of those offences through the press and the media, as well as the aim, extent and methods of terror in our country and the facility of the press and media organs to communicate with the masses and the former's influence on society, it has been concluded that the provision in question aims at the continuity of democratic society."

⁷³ ECtHR, *Turgay and Others v Turkey*, nos 8306/08, 8340/08 and 8366/08, judgement of 15 June 2010.

in its judgment of June 2009, the Constitutional Court of Turkey did not take into account the judgment of *Ürper and Others v. Turkey* and once again found the suspension of future publications of a periodical to be in violation of Article 10 of the ECHR.

Countless journalists have been prosecuted under the Anti-Terror Law for having disclosed and published the names of public officials engaged in fight against terrorism, made the propaganda of the terrorist organisation and published the statements or declarations of the terrorist organisation. Two most recent examples of the implementation of the above mentioned laws concern the weekly *Nokta* and *Express* magazines. The incidents that eventually resulted in the closure of *Nokta* in 2007 started with the magazine's publication on 8 March 2007 of the classification by the Chief of General Staff of journalists and media organs on the basis of their accreditation. On 29 March 2007, *Nokta* published sections from a diary reportedly belonging to Özden Örnek, the former Chief of Navy Forces. Based on this diary, the article reported that a group of generals conspired to stage a coup against the elected government in 2004 but were obliged to call their preparations off when Hilmi Özkök, the Chief of General Staff at the time opposed their attempts. Following the publication of this article, on 13 April 2007, the police raided the offices of the magazine, seized its computers and opened an investigation. A defamation case was brought against Alper Görmüş, the Editor in Chief of *Nokta*. While Görmüş was eventually acquitted, his repetitive requests for the inclusion of the coup attempts into the case were rejected by the court. In later years, the allegations of coup attempts proved to be true, but no case was brought against the retired generals for conspiring to stage a coup. Another recent example against freedom of press is the case against İrfan Aktan, who was prosecuted for an article he wrote on the Kurdish question, published in *Express* on 15 October 2009, where he quoted a PKK militant and a PKK publication. Aktan was convicted to one year and three months imprisonment and the editor of the magazine to a fine for having made "the propaganda of the terrorist organisation" in violation of Article 7 of the Anti-Terror Law.

4.3.3 Cultural and political pluralism in the media

As stated earlier, broadcasting in languages other than Turkish was prohibited until recently, exception being made for Armenian, Greek and Hebrew – mother tongues of groups granted minority status under the 1923 Treaty of Lausanne. The Treaty grants not only non-Muslim minorities, but *all citizens* the right to use "any language ... in the press, or in publications of any kind". However, Turkey has, until recently, never allowed any minority group other than the three Lausanne minorities to exercise this right. One of the greatest impacts the EU accession process has had on the media in Turkey was the lifting of this ban and the allowing of public and private radio and TV broadcasting at the local and national level.

The 2002 and 2003 amendments to Law no. 3984 effectively paved the way for broadcasting in minority languages, without explicitly identifying the purpose of the reforms to be as such.⁷⁴ Broadcasting was allowed in "the different languages and

⁷⁴ The scope of the right was gradually expanded through a series of laws. Initially, the reforms were limited to public broadcasting in minority languages, but were gradually expanded over time to extend to private broadcasting.

dialects used traditionally by Turkish citizens in their daily lives”⁷⁵ with the caveat that such broadcasts shall not contradict the Constitution and “the indivisible integrity of the state with its territory and nation.” However, the right to broadcasting was not granted to all minority languages spoken in Turkey. Instead of allowing the exercise of this right upon demand, the government *a priori* identified which languages merited benefitting from the law. The selected minority languages were the Zaza and Kirmanci dialects of the Kurdish language, Circassian, Bosnian and Arabic. The duration, scope and nature of broadcasting in these minority languages were not specified in the laws, but were left to the discretion of RTÜK.

Regulations adopted by RTÜK further restricted the already limited and conditional rights granted by the parliament. The 2002 regulation establishes “direct state control over the content of broadcasting, prohibits children’s programs and the teaching of minority languages, restricts broadcasting to a few hours every week, subjects decisions on the language and dialect of broadcasting and the profile of viewers to bureaucratic authorisation, requires simultaneous and subsequent translation into Turkish for TV and radio programs, respectively, and prohibits broadcasting in violation of national security, general morality and the indivisible territorial and national integrity of the state.”⁷⁶ The 2004 regulation allowed private broadcasting in minority languages at the national level for the first time, but again subject to strict time limitations and red tape. Local and regional broadcasters are required to submit RTÜK an audience profile in order to receive permits. Diyarbakır-based Gün TV unsuccessfully challenged this regulation in courts.

On 7 June 2004, TRT commenced broadcasting in the selected five languages. TV broadcasts are for 45 minutes per day five days a week, while radio broadcasts last 30 minutes each day five days a week. The content and time restrictions imposed on broadcasting, the red tape imposed on local broadcasters and the outdated content of programs have been criticised by minorities who perceive the reforms as an attempt by the Turkish government to deceive the international community by creating a false impression about the protection of minority media in Turkey. AKP Government’s “reforms” on public broadcasting in minority languages continued with the commencement in 1 January 2009 of public broadcasting in Kurdish at TRT 6 radio and TV stations, followed by the launch in April 2009 of public broadcasting in Armenian at TRT’s Voice of Turkey Radio.⁷⁷ While TRT has 6 exclusively broadcasts in Kurdish for 24 hours, broadcasting in Armenian is limited to a total of one hour per day.

Notwithstanding this significant yet limited progress in establishing the regulatory framework for a pluralist media through allowing broadcasting in minority languages, minority media in Turkey continues to be subject to the dual blockade of the state and the mainstream media. Surveillance by the military and the state on the one hand and harassment by the statist and nationalist mainstream media on the other often leads to a degree of self-censorship in the minority media organs. As Etyen Mahçupyan, the successor of Hrant Dink as the editor-in-chief of Agos, points out, “since we have the desire to keep Agos alive and since there is particular pressure on Agos, we implement technical auto-censorship, meaning we say what we have to say

⁷⁵ For the problematisation of this phrase, see D. Kurban, “Confronting equality: The need for constitutional protection of minorities on Turkey’s path to the European Union”, 35 Columbia Human Rights Law Review (2003), at pp. 151-214 and p. 197.

⁷⁶ D. Kurban, *A quest for equality: Minorities in Turkey* (2007), at p. 17.

⁷⁷ The broadcasting in Armenian takes place between 7.30-8 am and 6-6.30 pm every day.

but change the way we say it”.⁷⁸ This often causes the minority media to withdraw from political debates for fear of persecution by the state as well as the mainstream media.

Turkey’s recent history is full of banal incidents where members of the minority media have been prosecuted under the Anti-Terror Law and the Penal Code; discreetly or openly threatened by state agents, military officers, mafia and criminal networks; killed in daylight by “unidentified perpetrators”; tortured by agents of the military regimes; imprisoned for years for having criticised state policies or advocated the rights of minorities; and reported on taboo issues such as clandestine coup attempts by the military, the Armenian genocide, the Kurdish question etc.⁷⁹ One of the most tragic and clear instances of state persecution of dissident journalists has been the conviction of the Armenian-Turkish journalist Hrant Dink for “having insulted Turkishness”, followed by his assassination by agents of a criminal network whose plans were known to the military and police intelligence well in advance.⁸⁰

4.3.4 Non-legal restrictions on the media: the executive and the media

The media and the judiciary are not the only to blame for restrictions on freedom of the press in Turkey. The JDP government in general and the Prime Minister Recep Tayyip Erdoğan in particular have been frequently criticised by both the Turkish media and the international community for their anti-democratic statements, conduct and policies towards the press. Erdoğan became notorious for the civil cases he brought against dissident cartoonists who depicted him as various animals in criticising his policies. Though he lost each of the lawsuits he filed against the cartoonists, the Prime Minister’s intolerance against criticism seems to have not changed. This is evident, for example, in his aggressive position against the Doğan Media Group.

In September 2008, the Prime Minister appealed to the public to boycott the newspapers of the group which implicated the complicity of senior JDP officials in one of the biggest fraud cases in Germany concerning an Islamic charity organisation which was found to have embezzled charitable contributions. The Turkish press severely criticised the government for affording protection to individuals in Turkey pointed by the German court as the masterminds of this scheme, including Zahid

⁷⁸ M. Christensen, “Notes on the public sphere on a national and post-national axis: Journalism and freedom of expression in Turkey”, 6 *Global Media and Communication* (2010) 177, at p. 189.

⁷⁹ Ogret and Martens, “Pressing for freedom: Two centuries of ceaseless struggle in Turkey”.

⁸⁰ On 6 February 2004, Hrant Dink, the founder and editor-in-chief of the Armenian-Turkish weekly *Agos*, published an article in his paper which suggested the possibility of Sabiha Gökçen, Atatürk’s adopted daughter and the first Turkish female pilot who has been the symbol of the educated-modern Turkish women, may have been an adopted Armenian orphan who survived 1915. When this news was covered in front page by *Hürriyet*, the most popular daily, a number of columnists in mainstream media reacted strongly to Dink. Finally, the Chief of the armed forces made a public statement, rejecting as unacceptable the allegations on Sabiha Gökçen and indirectly accusing Dink of threatening national unity and peace in Turkey. This incident made Dink the target of verbal and physical attacks by the media and extreme right wing groups. Meanwhile Dink was convicted of “denigrating Turkishness” on the basis of an indictment which deliberately distorted his writings and portrayed him as a threat to the “Turkish nation.” The media’s overall coverage of the case was extremely biased, making him a target of further nationalist attacks and hate crimes. Eventually, Dink was assassinated on 19 January 2007 by a 17 year old Turkish nationalist who told the police that he killed Dink because he read in papers that the latter hated the Turks. For an excellent coverage of Dink’s life and the responsibility of the media in his murder, see T. Çandar, *Hrant* (2010).

Akman, the then head of RTÜK and the highest executives of *Kanal 7*, a pro-government TV channel. The Turkish press accused these individuals with channelling embezzled funds to Turkey and even claimed that some of the money might have been funnelled to the JDP government. While Germany cancelled the licence of *Kanal 7* INT in Germany, Erdoğan rejected persistent appeals to dismiss Akman from his public position as the head of the media watchdog agency.⁸¹ The JDP government's biggest conflict with the Doğan Media Group was in September 2009, when it levied a record high 2,5 billion dollars fine, which nearly corresponded to the total value of the company's assets, for tax evasion. Finally in 2010, the Prime Minister Erdoğan called on media patrons to dismiss those columnists which criticised the government's economic policies, arguing that their distorted portrayals would serve to destabilise the well functioning Turkish economy. Overall, the JDP government, in particular the Prime Minister, has performed miserably on the freedom of press, taking a harsh position against the dissident journalists and media groups.

Law no. 3984 was initially prepared on the basis of the Council of Europe's Convention on Trans-border Television. RTÜK has recently prepared a draft law amending Law no. 3984 on the basis of the EU's Directive on Audiovisual Media Services, introducing a new concept of broadcasting and paving the way to establishing digital broadcasting. The draft replaces the terms "radio" and "television" with "media services providers" and introduces "services upon demand" as a third category. If and when the draft is approved, the law will increase the share of foreign investment in broadcasting companies from 25 to 50% and enable a foreign company to partner with two national broadcasting companies. On the other hand, though the draft has aspects prepared on the basis of the EU law, it is being criticised for further restricting freedom of expression through enhancing the management and auditing powers of RTÜK and authorising it to block broadcasts.

While there is no special law on penalisation of defamation or protection of privacy, the new Penal Code introduces for the first time a number of safeguards on this issue. Article 133 prohibits wire tapping. Article 132 protects the privacy of communication, making the unlawful disclosure of communication between persons punishable by one to three years of imprisonment and increasing the sentence by half where the offence is committed through the media. Article 134 guarantees the right to privacy, increasing in case of violation the sentence by half where the act is committed through the media. The imposition of additional penalties where the offence is committed through the media shows the real purpose of the law to be deterring the coverage of contentious political issues such as the military, minorities and the Kurdish question. In 2009, Turkey ranked 122nd in freedom of the press, falling 20 places in comparison to 2008 due to a surge in cases of censorship, especially towards the Kurdish media, and efforts by government bodies, the armed

⁸¹ *Deniz Feneri e.V.* (Lighthouse), a German-based Islamic charity organization, was found by a German court to have embezzled 58 million euros in charitable contributions mostly collected from the Turks living in Germany, at least 17 million euros of which were channelled to private enterprises within the Islamic community in Turkey. While the Frankfurt court convicted three staff of the company in Germany, it passed the ball to Turkish authorities stating that the actual masterminds of the fraud were in Turkey.

forces and the judiciary to control media content. In 2010, Turkey ranked 138th out of 178 countries.⁸²

5. Media policy and democratic politics: an assessment

Ever since the late Ottoman era, the media has always been considered to be one of the leading actors of Turkish modernisation. On the other hand, the modernisation process was a state-guided project rather than the result of a collective public demand. Thus, the Turkish media has always been in an interdependent relationship with the state. Beginning from the early republican era, modernisation has also been associated with democratisation. State modernisation was based on the assumption that the more the society was modernised, the more democratic the regime would be. The Turkish media, as both the “subject” and the “object” of this process, has until very recently stood by the state. However in recent years, particularly after the initiation of the EU process which encouraged different social groups to be more vocal and persistent in demanding democratisation, the media landscape and its traditional rhetoric began to go through a political, institutional and mentality change. While a number of reforms were carried out in the areas of press freedom, media regulation and economic liberalisation towards fulfilling the EU’s accession requirements, there remains much to be accomplished to realise media freedom, independence and impartiality. The current ownership system and structure of the media in Turkey fall far short of achieving the democratic ideals.

On the other hand, the emergence of dissident media and the internet during the past decade has provided a growing space for alternative news which cannot pass through the filters of the establishment media. This has made possible citizens’ participation in the production and dissemination of the news, a crucial contribution to the process of democratisation. However, citizens’ participation by itself is not sufficient to establish democracy in the media. Crucial in this regard is the process of “constructing citizenship”. As it happens in the Western cases, the modern state in Turkey aims to create “citizens” by the mediation of education. Apart from the education, communication was another apparatus for the state in order to reach the masses and make them “ideal/proper citizens” under its control. So the Turkish national citizenship has been figured as an institution of the republican regime in which the ideal citizens had to have the basic features of being Turk, Muslim, secular, republican and duty-based–passive at once. So the borders of the ideal citizenship in Turkey refer to the borders of the Turkish media. Turkish citizens as the members or the consumers of the media have a direct affect on it. All these features are maintained by the laws and regulations. Because citizenship in Turkey is not a result of the issue of law but the laws is the result of the state-imagined citizenship.

A number of incidents in the past few years demonstrated that the mainstream media in Turkey lacks the ability and will to function as the “Fourth Estate.” The culpability of daily *Hürriyet* as well as a number of columnists writing in this and other mainstream media in the prosecution, conviction, targeting and eventually assassination of Hrant Dink, and the prosecution of many other journalists, intellectuals and writers who express dissenting political views on the Armenian genocide, the Kurdish question and state policies on these issues has been widely

⁸² Reporters Without Borders, “Press freedom index 2010”, available at: <http://en.rsf.org/press-freedom-index-2010,1034.html> (last visited on 29/10/2010).

commented on,⁸³ as well as the assassination of Hrant Dink and the police raid of weekly periodical *Nokta* in April 2007 to seize leaked documents implicating failed coup attempts by senior military leaders. News stories published in alternative media such as *Nokta* and daily *Taraf* on clandestine coup plans by senior military officers became the grounds for struggle between different media groups. The statist-elitist mainstream media generally underestimated such news while those sympathetic to the government selectively published news that suited JDP's interests and policies. Also during this period, the Internet, the "uncontrollable" media, became the medium through which news that would not be covered by the mainstream media were provided to the public. Particularly striking were secretly recorded voice and video footage implicating senior military officers and political figures, some of which have been used against suspects in criminal cases. Indictments filed against hundreds of defendants in the *Ergenekon* case frequently relied on such footage. The use of the internet for leaking unlawfully obtained documents showing illegal conduct has on the one hand provided the public with the kind of information that the media did or could not provide and on the other hand raised serious issues concerning due process and the right to fair trial of those incriminated by such information.

⁸³ Christensen, "Notes on the public sphere on a national and post-national axis", p. 178.

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The case of the UK

Rachael Craufurd Smith and Yolande Stolte

1. Introduction

The United Kingdom today

The United Kingdom of Great Britain and Ireland (UK) is a constitutional monarchy and a unitary state consisting of four countries: England, Wales, Scotland and Northern Ireland. While the UK is governed by a parliamentary system with its seat of power in London, it has 3 devolved national administrations: Scotland, Wales and Northern Ireland, which all have a range of powers such as health, education and culture. The UK government retains power concerning all matters that have not been devolved.¹ With regard to the media, the UK parliament has reserved matters pertaining to broadcasting, telecommunications, data protection, video recording and cinema licensing/classification, UK Official Secrets legislation, competition (including newspaper mergers) and intellectual property. Reserved and devolved powers may overlap, as for example the Scottish Gaelic television channel can be argued to fall both under language & culture (devolved) and broadcasting (reserved).

The UK has no written constitution. Many rules relating to government take the form of unwritten conventions, though certain measures that can be considered to have constitutional status are enshrined in legislation, such as the Human Rights Act 1998 (hereafter, HRA). At the centre of the British constitution lies the doctrine of the sovereignty of parliament, which the constitutional theorist AV Dicey argued meant that parliament, as the ultimate source of law, can create such law as it determines and that no person or court can override statute law. The UK is, however, a member of the European Union and the courts in the United Kingdom have accepted the primacy of EU law.² Britain was one of the first states to sign the European Convention on Human Rights (hereafter, ECHR) in 1951 and has since adhered to it on an international level. With the coming into force of the Human Rights Act 1998 the ECHR has been afforded enhanced status within the domestic legal systems. The English legal system is founded on the common law, while Scots Law is based on civil law principles with common law elements.

There are currently 62 million people living in the UK, of which the greater majority live in urban areas.³

History of the media in the UK: newspapers

In Britain, licensing of the printed press ended in 1695 and was not renewed. However, in 1712, stamp duty was introduced, a tax levied on each (half) sheet of newspaper, coupled with a tax on news paper advertisements. The stamp duty assured that newspapers were too expensive for the general public and assisted in restricting ownership by raising the publishing costs.⁴ Stamp duties rose significantly over the

¹ Northern Ireland Act 1998, Scotland Act 1998, Government of Wales Act 1998.

² See, for example, *Factortame Ltd v. Secretary of State for Transport (no.2)* [1991] 1 AC 603. The internal effect of EU law (then EEC law) was provided for in the European Communities Act 1972.

³ Office for National Statistics, "Population estimate", available at: <http://www.statistics.gov.uk/cci/nugget.asp?id=6> (last visited on 04/10/2010).

⁴ R. Craufurd Smith, *Broadcasting Law and fundamental rights* (1997), at p. 16.

years to attain this objective. However, the “underground press”, which evaded stamp duty, flourished and the government responded with stronger coercive powers and reduced the stamp duty significantly to make tax evasion less attractive.⁵ From the mid-eighteenth century to the early nineteenth century, a growth in advertising provided the press with the means to become more politically independent.⁶ The radical press carried little advertising; it could initially survive on the proceeds of sales alone, allowing it to be relatively free from economic/commercial influences.⁷ Stamp duty was abolished in 1855,⁸ though the press was still controlled through generally applicable blasphemy, treason and sedition laws.⁹

Advertisers became a powerful force by the mid-nineteenth century when advertising sales became the main form of financing newspapers. A rise in advertising agencies and major national advertisers saw a decline in political prejudice in advertising selection and this practice was slowly abandoned.¹⁰ In spite of this, left-wing newspapers had difficulty attracting advertising as their readership was less affluent. This led some of the radical press to temper their radicalism in order to attract a different, more upmarket, audience while others continued with a small audience, covering their losses by other means of income.¹¹ National newspapers overtook provincial newspaper sales in 1923 and, while newsprint was rationed for a time due to war,¹² sales continued to rise up until the mid-1950s when competition with other types of media, such as radio and television, started to show its effects.¹³ Circulation numbers dropped and many national newspapers were running at a loss by the 1960s.

From the early twentieth century national newspapers were generally owned by “press barons” with varied reasons for owning newspapers, though common reasons were to further a political cause, party or their own political career.¹⁴ Few papers had a wide spread of shareholders. Newspaper chains with national as well as local titles increased rapidly, though it was not till after the First World War, that press concentration became more pronounced with large scale consolidation of regional chains of newspapers.¹⁵ While some papers became less hierarchical and took a more bi-partisan approach to political reporting after the Second World War (hereafter, WWII), this was not universally so and some of the papers became more partisan in the mid-1970s in response to the polarisation of British politics.¹⁶ Concentration of media ownership became more pronounced in the following period as did cross-media ownership, both national and international. The press generally experienced a right wing shift¹⁷ and cross-ownership linked press groups with major

⁵ J. Curran and J. Seaton, *Power without responsibility: the press and broadcasting in Britain* (1991), at p. 14.

⁶ *Ibid.*, pp. 39-40.

⁷ *Ibid.*, p. 18.

⁸ Advertisement duty had been abolished in 1853 and paper duty was abolished in 1861.

⁹ Craufurd Smith, *Broadcasting law and fundamental rights*, at p. 19.

¹⁰ Curran and Seaton, *Power without responsibility*, at p. 40.

¹¹ *Ibid.*, p. 41.

¹² Newsprint restrictions lasted till 1955, due to import difficulties rising from the post-war dollar crisis and the Korean War, see C. Seymour-Ure, *The British press and broadcasting since 1945* (1996), at p. 16.

¹³ *Ibid.*, pp. 16-17.

¹⁴ *Ibid.*, p. 34.

¹⁵ Curran and Seaton, *Power without responsibility*, pp. 50-51.

¹⁶ *Ibid.*, pp. 86-87.

¹⁷ *Ibid.*, p. 124.

interests outside the media, integrating them into core sectors of financial and industrial capital, such as furniture, gas and oil, banking and travel.¹⁸ During the last 15 years, eight media owners have dominated the national press.¹⁹ The local and regional media are even more consolidated with four publishers dominating 70% of the market share across the UK and all but one having significant cross media-interests.²⁰

History of the media in the UK: radio and television

Radio broadcasting started in the UK in 1922 when the British Broadcasting Company, established by the Post Office as a cooperative venture owned by the radio industry,²¹ started daily transmissions as the sole licensed radio broadcaster. The company was restructured in 1927 into the British Broadcasting Corporation, the present day BBC.

In 1934 the British government appointed a committee charged with assessing the viability of setting up a public television service. The committee recommended the BBC should be charged with bringing television broadcasting to the British public as a regular service. The BBC started regular “high definition” broadcasting in 1936, but the service was suspended in 1939 due to the outbreak of WWII, when the aerial was needed for different purposes.²² The service resumed after the war and in 1954 the government decided that a second television channel was to be added, operated on commercial lines. The channel would, however, still be regulated by a public body responsible for imposing public service requirements: the newly inaugurated Independent Television Authority (hereafter, ITA). This new channel would be organised as a series of separately owned regional franchises, each provided with a monopoly of television advertising in its own geographical area.²³ ITV started broadcasting in London in 1955, gradually extending to cover other areas. The first few years were difficult for commercial television, with few advertisers willing to move from traditional forms of advertising to television advertising. However, by 1960 commercial television was making significant profits. By the end of the 1960s there were 16 million TV licences in the UK.²⁴ The 1970s brought Channel 4, a further form of a PSB set up as a non-profitable body, funded by advertising and statutory obliged to cater for tastes and interests not covered by the other two channels.

The election of the Conservative Government under the leadership of Margaret Thatcher in 1979 led to major changes in the state regulation of communications. The Thatcher government was strongly committed to deregulation and felt that the broadcasting sector should be led by the free market model. The new technological developments in the broadcasting sector, such as the arrival of cable and satellite, meant that the once limited spectrum was now capable of expansion and no

¹⁸ Ibid., p. 94.

¹⁹ See House of Lords Select Committee on Communications, 1st report of session 2007-2008, “The ownership of the news”, 27 June 2008, HL Paper 122-1, at p. 41.

²⁰ Ibid., p. 46.

²¹ P. Humphreys, *Mass media and media policy in Western Europe* (1996), at p. 112.

²² Teletronic, “The history of the BBC: part 7”, available at <http://www.teletronic.co.uk/herestv7.htm> (last visited on 04/10/2010).

²³ House of Lords, Communication Committee, First report: “The British film and television industries”, 25 January, 2010, HL paper 37-I, at p. 140.

²⁴ Ibid., p. 143, a television licence is needed to own a television.

longer required the previous level of strict regulation. This led to a media policy aimed at deregulation in order to stimulate competition and provide incentives for innovation that would benefit customers.²⁵ Cable television in the UK was not faring well, mainly due to legal restrictions which prohibited it from generating its own programming.²⁶ These restrictions were lifted in 1980 and the Thatcher government started promoting privately owned cable systems, considering them the main route to more technologically advanced cable broadband systems.²⁷ However, growth of cable remained very slow, until, in 1991, a relaxation of the cable regulations allowed cable companies to carry telephone services next to television.

On 1 November the Broadcasting Act 1990, which aimed to significantly deregulate British television, received royal assent. Satellite television had been launched in 1989 in the UK by Rupert Murdoch's Sky Television, followed by British Satellite broadcasting in 1990. Neither was making a profit and in the final days of the Thatcher government they were allowed to merge, without any reference being made to the Independent Broadcasting Authority. The creation of British Sky Broadcasting (hereafter, BSkyB), marketed as Sky, essentially created a monopoly on the satellite pay TV market. The Broadcasting Act of 1990 precipitated a wave of consolidation within ITV reducing the original fifteen franchises to five. The Broadcasting Acts of 1996 and 1997 led to even further deregulation, and provided the groundwork for Digital Terrestrial Television (DTT), which was launched as a subscription service by ITV but failed. The final analogue television channel, Five, was launched in 1997 as a for-profit channel – but still nominally a public service channel. At this point all public service channels (BBC 1 and 2, ITV, Channels 4 and 5) were receiving public support, such as free or cheap access to the limited analogue spectrum, free access to digital capacity, in return for undertaking certain programming commitments, and, in the BBC's case access to the licence fee.

In 2002 a BBC-led consortium took over DTT and launched “freeview” digital television, a free-to-air broadcasting service. The 2003 Communications Act continued the previous trend of deregulation, resulting in further consolidation within ITV and relaxed content obligations on PSBs. Five separate sectoral regulators were combined to become the Office of Communications (Ofcom) in anticipation of further consolidation of communications technologies. Consolidation of media ownership also continued. In 2008 the switchover from analogue to digital television began, which will end in 2012. Catch-up television is increasingly available for all channels, as well as live streaming of television over the internet.

With the application of digital technology and growing communications convergence, the distinctions between the activities of broadcasting and print companies are beginning to erode, posing difficulties for regulation based on media type.

2. The media landscape in the UK

The media landscape in the UK has developed into a large and diverse market, open to international participants. The following discussion provides a brief overview of

²⁵ R. Wise and J. Steemers, *Multimedia: A critical introduction* (2000), at p. 97.

²⁶ *Ibid.*, p. 101.

²⁷ *Ibid.*, pp. 101-102.

the current media environment, discusses journalist's background and education and considers media literacy and public perceptions of the media in the UK.

2.1 The media market

The print media

In the UK there are currently roughly 14 national newspapers,²⁸ 1200 local/regional newspapers and 600 niche or highly local newspapers²⁹. The national press is predominantly based in London. Most of the national daily newspapers in the UK have special Sunday versions which are highly popular. Free weekly (local) newspapers are relatively common in the UK, which are heavily supported by advertising with little emphasis on editorial content. In Metropolitan areas free daily newspapers have come to the market, offering editorial content that approaches the quality of some of the paid-for daily newspapers, with *Metro* currently being the most successful.

In June 2010 none of the UK-wide national newspapers were showing a year-on-year rise in circulation³⁰ and the regional press is not faring much better.³¹ Most national newspapers show serious decline in circulation, though part of this is explained by their decision to all but stop free giveaway copies.³²

Of the print media the regional press receives the largest portion of total media advertising expenditure at 11.6%. The national press is the next largest at 10.5%, though all print media advertising expenditure is currently declining. Consolidation has become a recent trend with local media, with newspaper groups disposing of and acquiring titles. This trend has led to the five major regional newspaper groups accounting for over 70% of newspaper circulation.³³

Radio

As of July 2010, there are 288 individual analogue stations and 191 digital stations in the UK. This results in 334 unique radio stations in the UK, as some stations broadcast both analogue and digitally.³⁴ There are an additional 75 stations broadcasting on digital satellite, 24 stations available on freeview and 35 on cable; most of these are either analogously or digitally simulcast.³⁵ Of the total radio stations, 267 are local commercial stations, 10 are UK wide commercial stations and 57 are public, BBC run, stations.³⁶

In 2008 90% of the UK population could receive a signal from at least one digital radio multiplex, most being able to receive three or more.³⁷ The number of radio stations that are available in an area vary between 23 (Northern Ireland) to 59

²⁸ Audit Bureau of Circulations (ABC), available at www.abc.org.uk (last visited on 04/10/2010).

²⁹ See: The Newspaper Society, available at <http://www.newspapersoc.org.uk/> (last visited on 04/10/2010).

³⁰ "National press ABC's: Quality sales tumble", Press Gazette, 16/07/2010.

³¹ "Regional ABCs: regional sales continue to slide", Press Gazette, 25/02/2010.

³² "ABCs analysis: how bulk has disappeared since 2009", Press Gazette, 16/07/2010.

³³ Ofcom, "Media ownership rules review", 31/07/2009, at p. 34.

³⁴ Ofcom, "The communications market report", at p. 208.

³⁵ *Ibid.*, p. 208.

³⁶ *Ibid.*, p. 208.

³⁷ Ofcom, "The communications market report 2009", at p. 176.

(London).³⁸ Community radio, which is mainly financed by grants, is on the increase, with 17% of the UK population now able to receive community radio stations.³⁹

While the average time spent listening to the radio is declining,⁴⁰ 90.6% of the adults in the UK listen to the radio on a weekly basis, which is up from the previous year by 0.3% (nearly half a million listeners).⁴¹ The BBC's share of all radio listening hours is 54.6% and is currently holding stable year-on-year. National commercial radio accounts for 11% of all radio listening hours and local commercial radio accounts for 32.2%.⁴² The average time spent listening to the radio increases with age, with children spending the least time listening to the radio.⁴³

The total radio revenue for 2009 is estimated to be around £1.1 billion. The BBC accounts for £660 million and commercial radio for £432 million. Less than half of the latter (£202 million) is made up of national advertising sales, with commercial sales (31%) and sponsorship (22%) supplementing this amount.⁴⁴ Expenditure on radio advertising has been declining since 2007. Radio is currently receiving a 2.8% share of all advertising expenditure.⁴⁵

The radio industry is experiencing ongoing consolidation, with the two largest commercial radio groups, Global (British) and Bauer (German) now owning 37.1% of all commercial radio licenses.⁴⁶ In terms of audience share, Global and Bauer account for 16.6% and 10.7% respectively of all radio listening hours, while the BBC accounts for 46.2%.⁴⁷

Television

In 2009 there were 490 television channels broadcasting in the UK.⁴⁸ Television can be received through different platforms in the UK with different geographical coverage. Analogue terrestrial television can be received by 99% of the population, 98% can receive digital satellite television and 81% can receive digital terrestrial television (DTT).⁴⁹ The availability of DTT is rising rapidly with the digital switchover from analogue to digital in the UK. By 2012 DTT coverage will match analogue coverage.⁵⁰ Further platforms to deliver television are cable and Internet Protocol Television (IPTV).

In the first quarter of 2010 the take up of multi-channel television had risen to 92.1% of UK households.⁵¹ The five main PSBs in the UK attract 57.8% of all viewing hours in UK homes, with BBC1 being the most popular channel, followed by

³⁸ Ibid., p. 178.

³⁹ Ibid., pp. 208-209.

⁴⁰ Ofcom, "The communications market report 2010", at p. 189.

⁴¹ Data for the second quarter of 2010, Ibid., p. 214.

⁴² 2.2% of the audience share is classified as 'other', Ibid., pp. 214-215.

⁴³ Ibid., p. 215.

⁴⁴ Ibid., p. 198.

⁴⁵ Ibid., pp. 198-199.

⁴⁶ Ibid., p. 203.

⁴⁷ Ibid., p. 204.

⁴⁸ Ibid., p. 99.

⁴⁹ Ibid., p. 157.

⁵⁰ Ofcom, "The communications market report 2009", at p. 119.

⁵¹ Ofcom, "The communications market report 2010", at p. 158.

ITV1.⁵² There is little movement in the top 10 most watched channels, though there is some movement in the top 20.⁵³

Television industry revenue stood £11.1 billion in 2009,⁵⁴ of which 24% is generated by public funds, 28% by advertising and 41% by subscriptions.⁵⁵ 92% of UK households have taken up digital TV,⁵⁶ of which 53.1% subscribes to pay-tv. TV attracts 27.5% of the total advertising spending in the UK.⁵⁷ Of the total hours of television programming, 11% were first-run originations.⁵⁸ PSBs have to comply with original production quotas which pertain to programming made in the UK and commissioned from independent producers, or a broadcaster's own in-house production facilities. The quotas vary per broadcaster and apply separately for peak viewing times.⁵⁹ These quotas are generally between 50-90%⁶⁰ and are generally met and exceeded by all broadcasters.⁶¹ There is a further 25% independent production quota for all PSBs to ensure that production companies that are not attached to any broadcaster have access to mainstream channels. This quota has been exceeded by all broadcasters during the last 5 years.⁶²

Online media and social media online

All national newspapers have an online version with the website of the Mail online having been the most visited national newspaper for the last 6 months.⁶³ Most major broadcasters operate websites which offer the option of watching programs that have recently been broadcast on demand for free.

In the UK Facebook is by far the most used social networking site, with a unique audience of 24.2 million.⁶⁴ Twitter is the next most popular social network with 3.7 million users.⁶⁵ UK users spend an average of 6 hours and 9 minutes on Facebook every month.⁶⁶ Currently 9% of the adult UK population maintains a website or a blog,⁶⁷ with those in higher socioeconomic groups being slightly more likely to maintain one.⁶⁸

News agencies

The UK has a wide range of news agencies, a number of which, such as Reuters, have attained an international reputation. These agencies can be distinguished according to

⁵² Ibid., p. 175.

⁵³ Ibid., p. 174.

⁵⁴ Ibid., p. 123.

⁵⁵ 6.4% is classified as "other". Ibid., p. 126.

⁵⁶ Data for first quarter of 2010, see: Ofcom, "The communications market report 2010", at p. 97.

⁵⁷ Ofcom, "The communications market report 2010", at p. 97.

⁵⁸ Ibid., p. 133.

⁵⁹ Ibid., p. 133.

⁶⁰ For a full overview of the quotas and compliance, see: Ofcom, "The communications market report 2010", at p. 142.

⁶¹ Ofcom, "The communications market report 2009", at p. 103.

⁶² Ofcom, "communications market report 2010", at p. 143.

⁶³ "Mail online stays top as it hits new traffic record in June", Press Gazette, 29/07/2010.

⁶⁴ "The ups and downs of social networks" BBC News, 22/07/2010.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Defined as those over the age of 16.

⁶⁸ Ofcom, "UK adults' media literacy" (2010), at p. 50.

their geographical coverage, subject focus and media orientation. The largest agencies, such as Reuters, the Press Association, News Team International and National News and Pictures have broad coverage and employ their own journalists. Reuters started life covering the financial sector but moved into general news reporting in the mid-nineteenth century and now operates 200 bureaus worldwide and is the world's largest international news agency.⁶⁹ In 2008 it became a subsidiary of the Canadian company, renamed Thomson Reuters. The company is of particular interest for the Mediadem project in that it is subject to the Reuters Trust designed to guarantee the independence of its reports.⁷⁰

There are also news agencies operating at the devolved national and regional levels. In Scotland, for example, both Scottish News and Sport and Hard Edge Media provide varied coverage of Scottish news and events, while a similar role is performed in Wales by the Wales News and Picture Service. The Press Association covers developments in Ireland as well as the UK. At the regional level there are numerous smaller agencies such as the South West News Service, North News and Pictures, Mercury Press Agency (Liverpool) and the Cavendish Press (Manchester based).

Not all news agencies employ journalists to carry out independent investigations. Some such as The Profile Group simply review existing reports and repackage them. Within the UK the news agencies are represented by the National Association of Press Agencies.

Increasing reliance on news agencies is a cause for concern in the UK, especially where international news is concerned.⁷¹ The BBC is generally recognised as one of the few news organisations capable of foreign news gathering.⁷²

2.2 Journalists' background and education

Age, gender and social background

The largest survey into journalism was conducted by the Journalism Training Forum in 2002.⁷³ This survey provides detailed information on journalists and is the most recent survey to provide specific data on journalists at work. It should be noted though that the survey on which the study was based achieved a low return rate (11.5%), which may have distorted some of the data,⁷⁴ though the sample was large enough to provide reliable information.⁷⁵

While the data varies per sector, journalists in the UK are on average relatively young, with 35% aged between 22-39 and another 32% aged between 30 and 39.⁷⁶ The gender balance is 49% women and 51% men, thus providing a nearly equal split

⁶⁹ See: Thomson Reuters, "Reuters news agency", available at: http://thomsonreuters.com/content/media/pdf/news_agency_overview.pdf (last visited on 04/10/2010).

⁷⁰ For more information on this, see: Thomson Reuters, "Founders share company limited", available at: http://thomsonreuters.com/content/corporate/PDF/about_us/reuters_founders_share.pdf (last visited on 04/10/2010).

⁷¹ House of Lords, "The Ownership of the news", at par. 53 and 80.

⁷² *Ibid.*, par. 299.

⁷³ Journalism Training Forum, "Journalists at work" (2002).

⁷⁴ S. Frith and P. Meech "Becoming a journalist: Journalism education and journalism culture", 8 *Journalism* (2007), 137, at 139.

⁷⁵ Journalism Training Forum, "Journalists at work", at p. 12.

⁷⁶ *Ibid.*, p. 21.

between the sexes.⁷⁷ However, women earned on average £5000 less than men, though this can be partially explained by the average age of female journalists being lower and the fact that a high proportion of female journalists work in low paying sectors.⁷⁸ A very large proportion of journalists are white, over 96%, and only very small groups from ethnic minorities participate in the profession.⁷⁹

In the last few decades there has been a noticeable increase in the social exclusivity of journalism. The typical journalist, born in 1970 comes from a family with an income of 42.4% above the average family income, where this was only 5.5% for those born in 1958.⁸⁰ The result is that the typical journalist will come from a family that is better of than 3 out of 4 families in the UK.⁸¹ Top journalists are more likely to be independently schooled than not. Though only 7% of the UK population is independently schooled, nearly 55% of the top journalists are.⁸²

Education and professional training

The 2002 survey of the journalism profession showed that 98% of all entrants to the journalism profession have a degree, of which 43% has a postgraduate degree.⁸³ While these figures are likely to be distorted by the low return rate of the survey,⁸⁴ it does show a definite trend towards journalism becoming a graduate profession in the UK. There are still no formal academic entry requirements to journalism, though as the above data shows, the reality may be different. The National Union for Journalists (NUJ) estimates that currently 80% of all entrants to the profession have a degree.⁸⁵ It is further generally necessary to have some relevant work experience to access the profession,⁸⁶ which can form a barrier for entry due to the majority of work experience placements being unpaid.

At the time of the survey, 58% of those working in journalism hold a journalism qualification and a further 3% was working towards a qualification.⁸⁷ Most of these qualifications were accredited by the National Council for Journalists.⁸⁸ Newspaper journalists are most likely to hold a qualification, while those working in the magazine industry are least likely to.⁸⁹

⁷⁷ Ibid., p. 21.

⁷⁸ Journalism Training Forum, "Journalists at work", at p. 10 and 22.

⁷⁹ Ibid., p. 21.

⁸⁰ The Panel on Fair access to the Profession, "Unleashing aspiration: the final report on fair access to the profession", July 2009, at p. 20.

⁸¹ Ibid., p. 21.

⁸² Journalists working mid-2000s, Ibid., p. 19.

⁸³ Journalism Training Forum, "Journalists at work", at p. 24 and 26.

⁸⁴ Frith and Meech "Becoming a journalist", at 139.

⁸⁵ See: National Union of Journalists, "FAQs" available at: <http://www.nujtraining.org.uk/faqs.phtml#6> (last visited on 04/10/2010).

⁸⁶ The Panel on Fair access to the Profession, "Unleashing aspiration: the final report on fair access to the profession", at p. 101 and 103.

⁸⁷ Journalism Training Forum, "Journalists at work", at p. 34.

⁸⁸ Ibid., p. 35.

⁸⁹ Ibid., p. 35.

Salary

A trainee broadcast journalist can expect to earn between £15,000 and £18,000 a year. An experienced broadcast journalist will generally earn between £25,000 and £40,000 a year, though top salaries can be £100,000 or more.⁹⁰ Newspaper journalist can expect to earn around £15,000 during training and may expect to earn between £15,000 and £40,000 a year. As in broadcast journalism, top salaries may rise above £100,000.⁹¹ The median level of income in 2002 was £22,500.⁹² Generally speaking salaries in broadcast journalism are higher than in print journalism, especially for those journalists who appear on screen.⁹³

2.3 Media literacy

Media consumption

Since 2007 there has been a strong increase in the number of households that use digital television and internet. A 2009 survey shows that 89% of the households in the UK has digital television, 71% has internet access and 91% use mobile phones.⁹⁴ Currently 90% of the households with Internet have a broadband internet connection.⁹⁵ The households without internet cite “a lack of interest” and “cost” as the most common reason for not having internet access.⁹⁶ Those in the lowest socio-economic group and those aged 65 and above, have the lowest uptake of internet and digital television.⁹⁷ The main reasons for the use of television and radio, is for relaxation and to keep up to date with the news, whereas the main reason cited for using the Internet are “to find out and learn things” and to keep in touch with other people.⁹⁸ Three out of ten UK adults who use the internet either at home or elsewhere watch television and films over the internet.

Access to different types of media

The Communications Act 2003 provides Ofcom with the duty to ensure the availability of a large range of electronic communication service, television and radio services.⁹⁹ 98.5% of the households in the UK are capable of receiving digital public service television.¹⁰⁰ The UK is currently switching from analogue to digital TV which should be completed by the end of 2012, though the switchover will not

⁹⁰ Figures are a rough estimate, available at: <https://nextstep.direct.gov.uk/PlanningYourCareer/JobProfiles/JobProfile1351/Pages/Income.aspx> (last visited on 04/10/2010).

⁹¹ Figures are a rough estimate, available at: <https://nextstep.direct.gov.uk/PlanningYourCareer/JobProfiles/JobProfile1459/Pages/Income.aspx> (last visited on 04/10/2010).

⁹² Journalism Training Forum, “Journalists at work”, at p. 53.

⁹³ Frith and Meech, “Becoming a journalist”, at 139.

⁹⁴ Ofcom, “UK adults’ media literacy”, at p. 9.

⁹⁵ Office for National Statistics, Statistics Bulletin, “Internet access house holds and individuals” (2009), at p. 1, available at: <http://www.statistics.gov.uk/pdffdir/iahi0809.pdf> (last visited on 04/10/2010).

⁹⁶ Ofcom, “UK adults’ media literacy”, pp 19-20.

⁹⁷ *Ibid.*, p. 9.

⁹⁸ *Ibid.*, pp. 26-28.

⁹⁹ S. 3(2) Communications Act 2003.

¹⁰⁰ Ofcom, “Access and inclusion statement”, 15/10/2009, at p. 25.

significantly affect the number of households capable of receiving a television signal. It is estimated that after the switchover 98.6% of UK households will be capable of receiving public service digital television and 90% will be capable of receiving both public service digital television and all commercial multiplex channels, which is a significant increase from the 73% of households which could receive all analogue commercial channels before the switchover. Most households in the UK have access to broadband at basic speeds of up to 512Kbits/s. British Telecommunications (hereafter, BT) estimates this figure to be around 99.6% of all UK households.¹⁰¹ Furthermore, 90% of all UK households currently have access to a 2MBit/s connection and the government has set itself the target of ensuring 2MBit/s connections for virtually all UK households by 2012.¹⁰² Broadband access for rural communities such as the highlands and islands remains a concern and the government has recently created Broadband Delivery UK (BDUK) within the department of Business, Innovation and skills in order to achieve their Universal Service Commitment. 99% of the UK population is covered by 2G mobile network: the figure is somewhat lower for 3G coverage, at 92%, with rural and remote areas having the least coverage.¹⁰³

Role and power of the media

Although the extent and nature of media influence is hotly contested, the UK has introduced a number of measures designed to restrict the ability of any one individual or point of view to dominate the media.¹⁰⁴ These measures primarily relate to the audiovisual sector, which is considered particularly influential because of the combination of pictures and sound, and include the prohibition on political advertising, impartiality requirements, restrictions on election broadcasts and media ownership controls. Although political parties and many politicians now have their own websites, they do not directly control the main media sources in the UK. Political bodies are not allowed to own broadcasting licences and although press barons such as Beaverbrook and Rothermere, who dominated the print media in the early part of the twentieth century, sought to exert political influence, they did so independently of political power in parliament.¹⁰⁵ There remains, however, scope for indirect political influence, particularly in the audiovisual sector, through the government's power to appoint key personnel at the BBC and Ofcom, and during negotiations regarding the renewal of the BBC's Charter. It has also been suggested that the Hutton Inquiry, set up by the Labour government to investigate BBC journalist Andrew Gilligan's report on Iraqi weapons of mass destruction, led to subsequent BBC caution in the coverage of a number of controversial events.¹⁰⁶

In terms of media influence on the public, television is by far the main source of news for the UK population. Figures from 2006 indicated that 65% of the population relied primarily on television, with only 14% looking to newspapers and

¹⁰¹ Ibid., p. 38.

¹⁰² Ibid.

¹⁰³ These are coarse figures with a large error margin, for full details see: Ofcom, "Mostly mobile: Ofcom's mobile sector assessment, second consultation" (2009), at p. 112.

¹⁰⁴ For discussion of media effects see: G.G. Sparks, *Media effects research: A basic approach* (2009), especially chapter 9.

¹⁰⁵ Curran and Seaton, *Power without responsibility*, at pp. 45-48.

¹⁰⁶ H. Tumber and J. Palmer, *Media at war* (2004), at p.156.

11% to radio.¹⁰⁷ Five national television channels dominate the field, together attracting 97.5% of viewers: the BBC, Sky, Channels 3, 4 and 5.¹⁰⁸ The picture is in fact even more concentrated in that only three companies, the BBC, ITN and BSkyB, produce the news for these channels.

In general national broadcasters have been slow to adapt to social and political changes, which is sometimes blamed on the impartiality doctrine.¹⁰⁹ In 2010, however, the leader of the right wing British National Party (BNP) was controversially invited to take part in one of the BBC's flagship discussion programmes "Question Time", following the election of 2 BNP members to the European Parliament in 2009.¹¹⁰ In addition, in the run up to the 2010 general election UK television broadcasters followed the US lead and organised for the first time three televised debates among the leaders of the Conservative, Labour and Liberal Democratic parties. The performance of the Liberal Democratic leader, Nick Clegg, at the first of these debates precipitated a sudden and unprecedented spike in support for the Liberal Democratic Party, suggesting that the broadcast media have considerable power to frame public perceptions of the political landscape and the viability of specific democratic options.¹¹¹ This spike was not ultimately reflected, however, in an increase in the number of elected Liberal Democrat Members of Parliament.

The printed press is not required to be impartial and British newspapers adopt a more or less explicit political bias. They can also take political advertising. Interestingly, a paper's bias is not necessarily in line with that of its subscribers: the Sun newspaper, for example, which supported the Conservative leader Margaret Thatcher during the 1980's, nevertheless retained a significant proportion of Labour readers throughout this period. Though this might be thought to confirm the weakness of the "hypodermic needle" theory of media impact, the Sun itself has claimed that it has had a tangible political influence, particularly in relation to the defeat of Labour in the 1992 election.¹¹² More recently, it has been argued that the selective use of opinion polls by the print media during the 2010 general election and negative reporting cut back the advantage that Nick Clegg obtained from the first televised debate.¹¹³ Whether or not the print media are able to effect a major change in political allegiance, the growing sensitivity of politicians and their spin doctors to adverse

¹⁰⁷ Ofcom, "Report for the Secretary of State Pursuant to Section 44A of the Enterprise Act 2002 of BSkyB plc's Acquisition of 17.9% Shareholding in ITV plc", 27/10/2007, figure 3.1.

¹⁰⁸ Ibid., figure 4.1.

¹⁰⁹ For a discussion, see D. Tambini and J. Cowling, (eds) *New news: impartial broadcasting in the digital age* (2002) and the work of the Glasgow Media Group, in particular J. Eldrige (ed.) *Glasgow media group reader volume 1: News content, language and visuals* (1995) and G. Philo (ed.) *Glasgow media group reader volume 2: Industry, economy, war and politics* (1995). For a recent reappraisal of the doctrine by the BBC see BBC, "From seesaw to wagon wheel: safeguarding impartiality in the 21st Century" (2007), available at: http://www.bbc.co.uk/bbctrust/our_work/other/century21.shtml (last visited on 04/10/2010) noting that 'impartiality is often about...bringing extra perspectives to bear, rather than limiting horizons or censoring opinion' (p. 6).

¹¹⁰ J. Robinson and S. Brook, "Coup or crisis? Can the panel discuss...", *The Guardian*, 26/10/2009.

¹¹¹ C. Hope, "Nick Clegg's TV debate performance 'changed election dynamic' says Ashdown", *The Telegraph*, 16/04/2010.

¹¹² P. Chippindale and C. Horrie, *Stick it up your punter, The uncut story of the Sun newspaper* (2005).

¹¹³ A. Grice, "Sun' censored poll that showed support for Lib Dems", *The Independent*, 23/04/2010.

media coverage ensures that the views and interests of media owners such as Rupert Murdoch are, at the very least, taken seriously by political leaders.¹¹⁴

New media services are also beginning to show their capacity to supplement the established media, influencing the development and impact of news stories. For example, in 2009 Twitter was used to get around an injunction preventing the mainstream media from revealing the name of a chemical company involved in legal proceedings, while the Guardian newspaper experimented with “crowd sourcing” to help review the many documents detailing the, in some instances fraudulent, expense claims lodged by Members of Parliament.¹¹⁵

Citizen involvement in online content production

Content creation by internet users is on the rise in the UK. The most common form of content creation is uploading photos onto a website, which is done by 49% of all adult internet users. Other popular activities in the UK are: making and uploading short videos (11%), maintaining a blog (12%) and setting up a website (15%).¹¹⁶ In 2009, 44% of adult internet users had a social networking profile, which is nearly double the number of 2007, while commenting on blogs is also on the rise.¹¹⁷ Setting up a social networking profile is mainly popular under those aged 34 and under, and females are more likely than males to have one. In the UK Facebook is the most popular social networking site.¹¹⁸

With regard to political participation online, 22% of all adult internet users have signed an online petition and 7% has contacted an MP or local councillor online.

Trust in the media

Only 18% of the British population trusts the printed press, which is the lowest figure in the EU.¹¹⁹ This is possibly attributable to the fact that it is well known in Britain that the written press is free to be partisan.

UK adults place the most trust in information found on TV and radio, as respectively 52% and 50% of the adult population find this type of information to be reliable and accurate. Information found on the internet and newspapers is considered less reliable.¹²⁰ A majority of users say that they tend to trust the news output from TV (54%), radio (66%) and news websites (58%).¹²¹

¹¹⁴ P. Toynbee, “Murdoch’s malign influence demeans British politics”, *The Guardian*, 11/07/2009. For discussion of Rupert Murdoch’s influence on the editorial slant of his newspapers see Curran and Seaton, *Power without responsibility*, chapter 7.

¹¹⁵ R. Booth, “Trafigura: A few tweets and freedom of speech is restored”, *The Guardian*, 13/10/2009 and “Investigate your MP’s expenses”, *The Guardian*, available at: <http://mps-expenses.guardian.co.uk> (last visited on 04/10/2010).

¹¹⁶ Ofcom, “UK adults’ media literacy”, at p. 51.

¹¹⁷ *Ibid.*, p. 51.

¹¹⁸ *Ibid.*, p. 53.

¹¹⁹ European Commission, Directorate General Communication, Eurobarometer, autumn 2009, “national report UK”, at p. 12.

¹²⁰ Ofcom, “UK adults’ media literacy”, pp. 72-73.

¹²¹ *Ibid.*, p. 73.

3. Media policy in the UK

In the following section we consider the legal status of freedom of expression and information in the UK, before turning to examine structural and content regulation in the communications sector. The regulatory framework for the media in the UK has developed into a complex system including elements of state, co and self regulation, with different types of media subject to different regulatory techniques.

3.1 Freedom of expression and information

Fundamental legal norms on freedom of expression

The UK follows the common law legal tradition and does not have a written constitution as such. Many rules relating to government take the form of unwritten conventions, though certain measures that can be considered to have constitutional status are enshrined in legislation, such as the Human Rights Act 1998. At the centre of the British constitution lies the doctrine of the sovereignty of parliament, of which a more controversial aspect, particularly in the light of the UK's EU membership, is the principle that parliament cannot bind its successors.

Within the UK there has been a strong presumption that individuals remain free to do anything that the law does not proscribe. The emphasis on liberties rather than rights has meant that until recently human rights were not codified in the UK, and, though UK courts have recognised the importance of human rights under the common law, they could be overridden by legislation as indeed they can be by express legislation even today – the Human Rights Act having retained this aspect of Parliamentary sovereignty.

Britain was one of the first states to sign the European Convention on Human Rights (hereafter, ECHR) in 1951 and has since adhered to it on an international level. However, as the UK has a dualist approach to international law, the provisions of the Convention, though having some influence on the development of the common law, were not legally binding internally in the UK and could therefore not be directly enforced in the UK courts. In 1966 the UK accepted the right of their citizens to have recourse to the European Court of Human Rights (hereafter, ECtHR) in cases where they have exhausted domestic remedies.

The position of human rights in the UK changed radically with the adoption of the Human Rights Act 1998 (hereafter, HRA), which gave effect to key articles of the ECHR in the UK. The act requires courts to take into account any previous decision of the ECtHR, though it does not formally require them to follow these judgements.¹²² Should there be a conflict between a ruling of the House of Lords and a ruling of the ECtHR, the English courts are required to follow the ruling of the House of Lords.¹²³ Of particular importance is section 3, which states that the UK courts have to interpret legislation, whenever possible, in accordance with human rights, though primary UK legislation cannot be invalidated on human rights grounds. Courts may only issue a declaration of incompatibility which does not affect the continuing validity of the statute in question.¹²⁴

¹²² S. 2 HRA 1998.

¹²³ *Price v Leeds City Council* [2005] EWCA Civ 289, Confirmed by the House of Lords in *Leeds City Council v Price* [2006] UKHL 10.

¹²⁴ S. 4 HRA 1998.

Section 6 of the HRA states that it is unlawful for a public authority to act incompatibly with convention rights. All bodies that have functions of a public nature are covered by this provision, which can lead to the HRA imposing obligations on private bodies as well as the state, for example with regards to privacy. Especially relevant for the media is section 12, which requires courts to have particular regard to the importance of freedom of expression when deciding whether to grant any relief, and in particular when granting an injunction prior to publication. It requires courts to take into consideration the public interest in the availability of the contested information.

The HRA has both vertical and horizontal effect. Although the HRA itself only covers public bodies, it is applicable to the courts, which have consequently given effect to rights under the ECHR in private law actions between individuals and private companies. It should be noted though that a violation of rights which stems from private law, will not give rise to a cause of action under the HRA. However, where there is cause of action in private law the court must interpret this action in line with the HRA. Certain sections of the media have been extremely critical about the operation of the HRA, especially its influence on the development of the law of privacy. The Conservative Party, now in coalition government, has indicated that it would like to abolish the HRA and instate a new bill of rights for the UK.

Freedom of information and the media

The right to freedom of information contained in art 10 of the ECHR is protected in the UK through the HRA, but there is also specific legislation aimed at insuring freedom of information. The Freedom of Information Act 2000 (hereafter, FOI Act) contains a general right of access to information held by public authorities in England, Wales, and Northern Ireland. The Freedom of Information (Scotland) Act 2002, which came into force at the same time as the FOI Act, contains similar public-disclosure obligations as those contained in the FOI Act. The predecessor of the FOI Act, the Code of Practice on Access to Government Information, which had a much wider margin of discretion when responding to access requests,¹²⁵ was replaced by the FOI Act when it came into force on 1 January, 2005. The Act contains 23 exemptions to the general right of access,¹²⁶ divided into two types: “absolute” and “qualified” exemptions. Where an absolute exemption is applicable, no public authority may disclose the requested information, not even where disclosure would be in the public interest. Where there is a qualified exemption, information may only be disclosed if the public interest in disclosure outweighs the public interest in maintaining the exception.

The UK Information Commissioner is charged with the responsibility of ensuring public authorities’ compliance with the statute. Where a public authority refuses to disclose information, the internal complaint procedure of the authority must be followed and where this does not lead to a satisfactory result, independent review may be sought from the Commissioner. An appeal lies from the Commissioner’s

¹²⁵ D. Cooper “UK Freedom of Information Act 2000: Boon or bane?” 26 *Company Lawyer* (2005) 217, at p. 217.

¹²⁶ Ss. 21 to 44 FOI Act.

decision to the First-tier Tribunal (Information Rights)¹²⁷ and then, as a last resort, to the High Court.

Ranking of media freedom in the country under study

The UK has ranked between 20 and 28 in the Press Freedom Index of the Reporters Without Borders, since the start of the publication of the index. The UK is currently ranked at the highest rank it has achieved so far: 20th place. The media in the UK is deemed free to report on all aspects of British life.¹²⁸

Due to its constitutional framework there is no entrenched guarantee of press freedom, though the HRA, as noted previously, emphasises the importance of the Convention right to freedom of expression. Nevertheless, freedom of the press has historically been an important part of Britain's unwritten constitution and legal tradition.¹²⁹ Licensing of the (written) press was abolished in 1684 and ever since there has been a general right to publish written material without prior state authorisation, though sedition laws and stamp duties were used to curb the radical press well into the nineteenth century.¹³⁰ The broadcast sector was, from its inception in the early twentieth century, subject to government regulation and even today there remain laws that limit the freedom of both the print and audiovisual media. *Freedomhouse* currently ranks the UK 27th in their 2009 world ranking of freedom of the press. The factors they cite as limiting media freedom in the UK are libel laws favourable to the plaintiff, the Prevention of Terrorism Act, and the intimidation of journalist in Northern Ireland.¹³¹

Relevant international treaties signed by the UK

The UK is a signatory state to the International Covenant on Civil and Political Rights and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005. It is also a signatory to the Council of Europe European Convention on Human Rights and the Convention on Cybercrime, though has yet to ratify the latter convention.

3.2 Structural regulation

Licensing rules

In the UK the media regulator "Ofcom" is responsible for licensing all commercial radio and television channels transmitted by satellite or terrestrial networks and by cable. Under the Broadcasting Act 1990, as amended by the Broadcasting Act 1996 and the Communications Act 2003, there are several groups of people who are disqualified from holding a licence. The main groups of people that are disqualified

¹²⁷ Previously called the Information Tribunal, originally the Data Protection Tribunal specifically set up to hear appeals under the Data Protection Act and later the FOI Act 2000, the Privacy and Electronic Communications Regulations 2003 and the Environmental Information Regulation 2004.

¹²⁸ See: CPU Media Trust, "United Kingdom", available at: <http://www.cpu.org.uk/page-view.php?pagename=UnitedKingdom> (last visited on 04/10/2010).

¹²⁹ Humphreys, *Mass media and media Policy*, at p. 199.

¹³⁰ Curran and Seaton, *Power without responsibility*, at pp. 40 chapters 2 & 3.

¹³¹ See: Freedom House, Freedom of the press 2009, Press freedom rankings by region, available at: <http://www.freedomhouse.org/template.cfm?page=251&year=2009> (last visited on 04/10/2010).

from holding a broadcasting licence¹³² are: political organisations, advertising agencies, local authorities and those people who, in the opinion of Ofcom, are subject to undue influence by a disqualified person such as to act against the public interest.¹³³ Religious bodies may only hold licences with Ofcom's prior approval and there are restrictions on the type of licence they can hold.¹³⁴ Publicly funded bodies cannot hold radio service licences.¹³⁵ Prior rules restricting foreign ownership of broadcasting licences were removed by the Communications Act 2003. It is a criminal offence to provide broadcasting services without a licence.¹³⁶

The EU Authorisation directive has been implemented in the UK by the Communications Act 2003, thus moving the previous regime of telecommunications licensing on an individual base with conditions based on market power, to a general authorisation regime. New online media will, however, generally fall into the category of "content service" for the purpose of the Communications Act 2003 and will therefore not fall under the general regulation applicable to "electronic communication services" as regulated by the EU Authorisation and Framework directive.¹³⁷ New online media in the UK are currently not subject to licence conditions, though under the amendments of the Communication Act 2003 to implement the Audiovisual Media Service (hereafter, AVMS) Directive, anyone who wishes to provide an on demand programme service must notify the relevant regulatory authority, Ofcom, in advance if its intention.¹³⁸

The print media in the UK are less regulated than the broadcast media and are not subject to a licensing system. Anyone with the funds to start a newspaper is free to do so. There are, however, rules on cross-ownership and competition regulations that pertain to newspapers, discussed further below.

Ownership rules

In the last decade there has been significant deregulation of media ownership rules in the UK, with increasing emphasis on the role of competition law to check undue concentrations. Ownership was previously heavily regulated in order to promote plurality of content, thereby enabling access to different viewpoints and facilitating citizens' democratic participation. With increasing diversity and choice of content, the result of new digital services transmitted over the Internet or satellite and terrestrial networks, this underlying rationale for ownership regulation has decreased in importance.

¹³² A licence granted under the 1990/1996 Broadcasting act for independent television services, independent radio service, digital terrestrial television broadcasting and digital terrestrial sound broadcasting.

¹³³ For a full list see: Schedule 2 of the Broadcasting Act 1990, Schedule 2 of the Broadcasting Act 1996 and ss. 348-350 & Schedule 14 of the Communications act 2003.

¹³⁴ They cannot hold a channel 3 or 5 licence, a national sound broadcasting licence, a public teletext licence, an additional television service licence and a television or radio multiplex licence.

¹³⁵ Schedule 2, part 2, s. 3 Broadcasting Act 1990.

¹³⁶ S. 13 & 97 Broadcasting Act 1990.

¹³⁷ S. 32(2) Communications Act 2003.

¹³⁸ S. 368BA Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2010.

Ownership rules are primarily of two types. The first, discussed in the previous section, prevents certain bodies from owning licences. The second restricts the number of licences any one individual or group can own and are set out below.

In relation to television, all accumulation rules at both national and local levels were removed by the Communications Act 2003. Consolidation among the various Channel 3 (ITV) licencees was thus made possible, subject to competition law oversight. Cross-media restrictions have, however, been retained in relation to certain combinations of print and broadcast interests. Companies with a 20% share of the national newspaper market are prohibited from holding, or acquiring, 20% or more of the shares in the holder of a Channel 3 television licence. In addition, a company in which a major newspaper proprietor has more than a 20% stake cannot own more than a 20% stake in a company with a Channel 3 licence.¹³⁹ Local television ownership is also affected by cross media ownership rules with limits on ownership of certain combinations of local radio stations, local newspapers and a regional channel 3 licence where market shares are high and coverage overlaps.¹⁴⁰ The rules considering local licences are currently under review.¹⁴¹

In relation to radio, current restrictions on ownership of multiple licences are fairly complicated. The main rules are that no single person may hold a licence for more than one national multiplex service for radio, nor can someone hold two local multiplex licences with overlapping territory. There are no restrictions on the number of national analogue radio licences a person can hold. The number of local licences a single person can hold can generally not exceed two in the same locality and calculations take place on a complicated point system based on coverage and potential audience shares.¹⁴²

There are currently no media ownership rules pertaining to newspaper ownership, other than those concerned with mergers of large newspapers, discussed in the next section, and rules concerning cross media ownership, as discussed above. There are further specific rules preventing cross media ownership at the local level, concerning local analogue licences, local newspapers and regional channel 3 licences where audience and market shares overlap and cross a certain threshold. There are however strong indications that the rules concerning cross media ownership of local media will be relaxed in the near future, in part to ease the position of local newspapers, which have been affected by Internet and free media services.¹⁴³

Competition rules

Aside from specific media ownership regulations, competition rules also apply to the media. The position is complex in that not only have the general competition rules been modified to take into account media pluralism concerns, but Ofcom also has concurrent competition powers in relation to those media services it regulates.

Media mergers are subject to the general merger rules contained in sections 22 and 23 of the Enterprise Act 2002, which enable the Office of Fair Trading to make a

¹³⁹ Part 1, Schedule 14 Communications Act 2003.

¹⁴⁰ For full regulations see Communications Act 2003, schedule 14.

¹⁴¹ House of Commons, Culture, Media and Sports Committee: 4th report, "Future of local and regional media", 24 March 2010, HC Paper 43-I, chapter 4.

¹⁴² S. 9, Schedule 2, part III, Broadcasting Act 1990.

¹⁴³ See: House of Commons, "Future of local and regional media" and Ofcom reports.

reference to the Competition Commission where a merger is likely to result in a significant lessening of competition in the relevant market. Where a merger is thought to raise specific media plurality concerns the Secretary of State is empowered, though not required, to trigger an investigation and can block a merger on media pluralism grounds.¹⁴⁴ The public interest factors that can be taken into consideration in this way are: the accurate presentation of news and freedom of expression in newspapers; the plurality of views in the newspaper market; the plurality of the media in general and the need for a wide range of high quality broadcasting appealing to different tastes and interests; and, finally, the need for a genuine commitment on the part of the media owners concerned to the objectives of section 319 of the Communications Act, which include due impartiality, taste and decency.¹⁴⁵ Where the Secretary of State has given a merger intervention notice that mentions a media public interest consideration, Ofcom will provide an advisory report to the Secretary of State concerning the likely effect of the merger on the specified media pluralism concern.¹⁴⁶

Under sections 316-318 of the Communications Act 2003, Ofcom also enjoys broad powers to regulate competition in relation to licensed broadcasters. Ofcom can include in the terms of its licences such conditions as it sees fit to ensure fair and effective competition.¹⁴⁷ Where Ofcom considers that action by a licensee threatens competition it can give directions to the broadcaster concerned and if no action is taken the broadcaster can ultimately be fined or even lose its licence. Ofcom has recently exercised this power by fixing the wholesale prices at which the satellite broadcaster BSkyB sells on its premium sports channels to competing media providers.¹⁴⁸

3.3 Content regulation

General structure of content regulation in UK

In the UK the written press is largely self-regulated by the Press Complaints Commission (hereafter, PCC) Editors' Code of Practice (hereafter, PCC code of conduct) which is applicable to both printed and online versions of printed publications, though not all publications subscribe to the code.¹⁴⁹ The editors are responsible for the conduct of the journalist working for their publication and are therefore responsible for ensuring the code is followed. It has become common practice for compliance with the PCC code of conduct to be written into editors' contracts.¹⁵⁰ The PCC cannot impose fines to enforce compliance with the code, but it can force an editor to print an adjudication against their newspaper or magazine. The lack of power of the PCC to impose financial penalties has led to wide criticism that the PCC is an ineffectual body, incapable of keeping the press in check, though this is contested by the PCC itself. It should be noted that section 12 of the HRA requires courts to take into account "any privacy code" when considering whether to grant an

¹⁴⁴ Ss. 42, 59 and 67 Enterprise Act 2002.

¹⁴⁵ Ss. 58(2A-2C) Enterprise Act 2002.

¹⁴⁶ S. 377 Communications Act 2003.

¹⁴⁷ S. 316 Communications Act 2003.

¹⁴⁸ For more details, see Ofcom, "News", available at: www.ofcom.org.uk/media/news/2010/03/nr-20100331 (last visited on 04/10/2010).

¹⁴⁹ House of Commons, Culture, Media and Sport Committee, "Press standards, privacy and libel: second report", 9 February 2010, HC paper HC362-I, at para. 553.

¹⁵⁰ Press Complaints Commission, "code of conduct", Introduction.

injunction preventing publication and this has led to some consideration of the privacy provisions of the code in the courts.

The broadcast media, both public and commercial, are subject to content regulation by Ofcom under the Communications Act 2003. This requires Ofcom to establish certain standards for the content of programmes transmitted as part of television or radio services.¹⁵¹ These standards are set out in Ofcom's broadcasting code, which is accompanied by guidance notes. The notes are non-binding but give an indication of how the code will be applied in certain situations. It should be noted that Ofcom has a certain "bias against intervention"¹⁵² and in practice a form of co-regulation takes place, with industry regulation backed-up by statutory enforcement by Ofcom.¹⁵³

The broadcasting code is enforced by Ofcom's Sanctions Committee, which has a variety of duties, the most relevant here being the consideration of content-based cases.¹⁵⁴ Where a service provider breaches the content provisions, the Committee may direct the service provider to issue a correction, they may impose a fine and in the most severe cases, they can revoke the broadcasting licence.¹⁵⁵ It should be noted that the code covers all licensed services and to some extent also the BBC, though as noted below the BBC alone oversees compliance with impartiality and accuracy standards.

The BBC is largely self-regulated with its own code, the BBC's editorial guidelines, which, in many aspects, parallels the Ofcom Broadcasting Code. The BBC's editorial guidelines are broader than the Ofcom Broadcasting Code as they apply to all BBC content, whether this be for radio, television, online content, mobile devices, interactive services or the printed word.¹⁵⁶ Compliance with the guidelines is monitored by the Executive Board, who is responsible for ensuring compliance with the code and guidelines.¹⁵⁷ The Executive Board is overseen by the BBC Trust, the BBC's specific regulatory body. The BBC Trust has the power to investigate areas of concern and hear appeals on complaints made to the executive board on editorial matters. They can apply internal controls such as reprimands, or even dismissal to enforce the editorial guidelines. In particular, the Trust is ultimately, and solely, responsible for compliance with impartiality and accuracy standards.¹⁵⁸

Video on Demand (hereafter VoD) content is partly regulated by the Association for Television on Demand (hereafter, ATVOD), with Ofcom as a co-regulator, through a regulatory framework that implements several provisions of the AVMS Directive. It sets minimum content standards for those VoD services that are under its editorial control, namely those services that offer content comparable in

¹⁵¹ S. 319 Communications Act 2003.

¹⁵² S. Carter, "The Communications Act: myths and realities" (2003), Speech delivered to Media and legal Practitioners, available at: <http://media.ofcom.org.uk/2003/10/09/the-communications-act-myths-and-realities-thursday-9-october-2003/> (last visited on 04/10/2010).

¹⁵³ L. Hitchens, *Broadcasting pluralism and diversity: a comparative study of policy and regulation* (2006) at p. 14.

¹⁵⁴ The full terms of reference for the Ofcom Content Sanctions Committee are available at: http://www.ofcom.org.uk/about/csg/ocsc_index/ocsc_tor2/ (last visited on 04/10/2010).

¹⁵⁵ Ss. 344 and 345 Communications Act 2003.

¹⁵⁶ S. 2 BBC Editorial Guidelines

¹⁵⁷ S. 3.2 BBC Trust, "BBC protocol on editorial standards", available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/protocols/d4_editorial_standards.pdf (last visited on 04/10/2010).

¹⁵⁸ *Ibid.*, s. 2.2 and s. 44(5)b BBC Agreement.

form and content to television programmes. In case of non-compliance fines can be imposed and in extreme cases the service may be suspended.¹⁵⁹

The British Board for Film Classification (BBFC) is an independent non-governmental body that regulates the film and video industry in the UK. The BBFC was originally set up by the film industry itself to achieve national uniformity in film classifications. It was granted further powers under the Video Recordings Act 1984,¹⁶⁰ which provided that all video recordings offered for sale or hire commercially in the UK should be classified. It should be noted that though BBFC classifications will generally be followed, statutory powers on film remain with the local councils, which can overrule any of the Board's decisions in their jurisdictions.

General content requirements designed to satisfy citizen's information needs

One of the principal duties of Ofcom is "to further the interests of citizens in relation to communications matters" and to "further the interests of consumers in relevant markets, where appropriate by promoting competition".¹⁶¹ Ofcom is responsible for ensuring that the news provided by (regional) Channel 3 services, is capable of competing with other television news services.¹⁶² Ofcom's Broadcasting Code further sets several standards for content that are directly aimed at satisfying citizens' information needs. According to section 319 of the Communications Act 2003, Ofcom is obliged to set standards that will secure the objective of due impartiality and due accuracy. There are further provisions that limit political advertising, ban misleading advertising and prohibit use of techniques which exploit the possibility of conveying a message to, or influencing the mind of, viewers or listeners, without their being aware of it taking place. The rules discussed above concerning media competition and media pluralism are also relevant here, as they are aimed at allowing citizens access to different view points. The BBC editorial guidelines largely mirror the Ofcom Broadcasting Code and contain their own standards for impartiality and accuracy. However, as the BBC's editorial guidelines apply to all BBC content, whether this be for radio, television, online content, mobile devices, interactive services or the printed word,¹⁶³ they are of wider applicability than the Ofcom broadcasting Code, which applies mainly to broadcast radio and television services.

There are complicated rules governing Party Political Broadcasts (hereafter, PPB) and referendum campaign broadcasts. Ofcom is required under section 333 of the Communications Act to set standards for these types of broadcasts, which are further developed by the Broadcasters' Liaison Group. All the main parties and those parties standing in at least one sixth of seats in each nation are allocated a specific number of PPB's.¹⁶⁴ The BBC has its own rules concerning PPB's, but these provisions largely mirror those of the Communications Act 2003.

Self-regulation of the printed press through the PCC code of conduct is less extensive than that under the Ofcom Broadcasting Code. There is no requirement for

¹⁵⁹ Ss. 368i-368n Audiovisual Media Services Regulations 2009.

¹⁶⁰ The act was repealed and brought back into force by the Video Recordings Act 2010, after it was discovered the 1984 act was invalid due to a procedural mistake.

¹⁶¹ S. 3 Communications Act 2003.

¹⁶² S. 280 Communications Act 2003.

¹⁶³ S. 2 BBC Editorial guidelines.

¹⁶⁴ The numbers differentiate between nations but the main parties are generally allocated around 4 broadcasts each, with one broadcast for each 'smaller' qualifying party.

impartiality as most papers have a certain political bias of which readers are well aware. The code does, however, have a requirement of accuracy, which states that the press must take care not to publish inaccurate, misleading or distorted information, including pictures.

Recently there have been calls from James Murdoch to relax the impartiality requirements to make it easier for foreign companies like Fox to obtain a broadcast licence in the UK.¹⁶⁵ While content requirements are applicable to foreign broadcasts that are relayed by broadcasters within the jurisdiction, the application of these rules is somewhat less stringent as the terms *due* impartiality and *due* accuracy have been interpreted by Ofcom to allow the fact that the service is aimed at a different audience to be taken into account.¹⁶⁶

Codes of conduct, ethic codes and codes on editorial freedom

As mentioned above, the Press is regulated by the PCC Code of Conduct which is enforced through holding editors responsible for the adherence to the code by the journalists working under them. Recently it has been suggested by the advertising agency that the self-regulation code for non-broadcast media should be extended to social network sites.

Quota rules and obligations to invest in content production

The vast majority of content that originates from the UK is commissioned and produced by the Public Service Broadcasters (hereafter, PSB's).¹⁶⁷ Ofcom sets UK production quotas for these broadcasters. Due to financial pressure on the commercial PSB's, the investment in UK based content is currently decreasing. The current content requirements for PSB's are laid down in section 273 of the Communications Act 2003, however the only types of content Ofcom can mandate are news and current affairs programmes.

Television broadcasters in the UK are subject to the provisions of the AVMS Directive, which requires that where practicable, more than half of all programming of television channels should consist of EU produced content. The PBS channels easily meet this obligation in the UK, and carry a high proportion of UK original productions.¹⁶⁸ All television channels licensed by Ofcom have to report annually on the proportion of EU content they carry and, where they fail to meet the 50% mark, they must explain why they have failed to do so. It has recently been suggested that Ofcom should work more closely with UK cable and satellite channels to ensure the provisions on EU content of the AVMS Directive are adhered to.¹⁶⁹

¹⁶⁵ J. Murdoch, "The absence of trust", lecture given at the Edinburgh International Television Festival 2009, 28/08/2009.

¹⁶⁶ Broadcast, "Fox news cleared of war bias", 19/06/2003, available at: <http://www.broadcastnow.co.uk/news/multi-platform/news/fox-news-cleared-of-war-bias-by-its/1121070.article> (last visited on 04/10/2010).

¹⁶⁷ House of Lords, "British film and television industries report 2010", para. 172.

¹⁶⁸ *Ibid.*, para. 251 and 169.

¹⁶⁹ *Ibid.*, para 253.

Advertising rules

Advertising is self-regulated for all media by the Advertising Standards Agency (hereafter, ASA). The ASA enforces codes that are designed for consumer protection and the levelling of the playing field between advertisers. These codes are created by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) and ensure that all non-broadcast marketing communications covered by the codes are “decent, honest and truthful and prepared with a due sense of social and professional responsibility” and “that all broadcast advertisements conform to the enduring principles shared by the self-regulatory and statutory systems, namely that advertisements should not mislead, harm or offend”.¹⁷⁰ The codes are regularly updated, with the latest version coming into force 1 September 2010. Aside from the advertising requirements contained in these codes, broadcast advertising has to comply with the requirements of the AVMS Directive, which are contained in the Communications Act 2003 and monitored by Ofcom. Ofcom has set quotas on the amount of advertising that is permitted per hour, currently between 7-9 minutes for “spot” advertising and between 9 and 15 minutes for the total advertising time per hour.¹⁷¹

The UK has an outright ban on political advertising in the broadcast media, intended to prevent wealthy groups gaining undue influence through the media.¹⁷² It is still to be determined whether the ban is compatible with art 10 ECHR in that although the UK government has argued that it is, recent rulings by the ECtHR render this questionable.¹⁷³ The possibility of the ban being overruled in future cannot, therefore, be excluded.¹⁷⁴

Rules regarding media publishing

In the UK, defamation law differs under English and Scottish law. The main differences are that under English law a distinction is made between libel (written) and slander (spoken), which is relevant as in the case of libel, damages can be claimed without having suffered a financial loss as a result of the statement, whereas slander requires actual damage. The distinction between libel and slander is inconsequential under Scottish law as the requirement for a defamation action is that some harm has been caused, not necessarily financially. It should be noted that local authorities and central government bodies cannot sue for defamation, nor can political parties.

The UK is notorious for having a defamation law that is considered favourable to claimants. This, combined with potentially large sums that can be awarded by way of damages, has resulted in a relatively high number of claims, further helped along

¹⁷⁰Committee of Advertising Practice, “CAP regulatory statement 2010”, available at: <http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/CAP-Code-Review-consultation.aspx> and “BCAP regulatory statement 2010”, available at: <http://bcap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation.aspx> (last visited on 04/10/2010).

¹⁷¹ See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/rules.pdf>.

¹⁷² S. 321(2) Communications Act 2003.

¹⁷³ *TGV* and *Rogaland Pensioners Party* cases. In the UK the issue was addressed in *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [UKHL] 15; [2008] 2 W.L.R. 781.

¹⁷⁴ See: T. Lewis and P. Cumper “Balancing freedom of political expression against equality of political opportunity: the courts and the UK broadcasting ban on political advertising” Public Law (2009) 89.

by the rise in “no win no fee” actions and the ease of finding a jurisdictional base through the Internet. The UK is increasingly a venue for “libel tourism”, which has led the US to take action in order to protect the position of the First Amendment protection of free speech.

Once a reputation has been defamed, the defendant has to establish the truth of the statement by way of defence, though, as an alternative, the common law recognises certain defences, in particular, “fair comment”, “neutral reportage”, and an absolute privilege for “reporting parliament” and “proceedings in UK and certain international courts”. The courts in the *Reynolds* case also developed a further qualified privilege for “responsible journalism”, which applies to comments made without malice that can reasonably be believed to be true. The person publishing must have a legitimate interest in publishing, or be under a duty to do so (i.e. publishing is in the public interest) and the person receiving must be under a duty to, or have a legitimate interest in, receiving the information.¹⁷⁵ Anyone can invoke this privilege, though it has most often been applied in a journalistic context and while journalists have to act in “good faith” and on an “accurate factual basis”, they are not required to guarantee accuracy of the facts.¹⁷⁶

Despite the development of defences such as those contained in the *Reynolds* case, there remain concerns about this area of law and the House of Lords Select Committee on the Media has recently reviewed the existing rules on defamation. Their report considered the possibility of introducing statutory defences and noted that under certain circumstances limitations on the ability of companies to obtain damages may be warranted. The review further noted that at the moment there seems to be no temporal limit on bringing defamation actions in relation to on-line publications, a matter that may also require reform.

The influence of the HRA has led courts in the UK to develop a right to privacy on the back of earlier tort law and breach of confidence actions, which are both based in the common law. The courts consider whether “there is a reasonable expectation of privacy”, balancing the individual rights under arts 8 and art 10 of the European Convention without giving initial priority to either article. The courts appear to afford significant protection to sensitive medical details and to children where they may be exposed to publicity, but appear reluctant to go as far as the ECtHR in the *Hannover*¹⁷⁷ case and afford blanket protection to celebrities when in public places. The courts have also allowed sensitive personal information relating to sports and media celebrities to be published, where the person has previously represented themselves to be a role-model.

Copyright

All works produced by the British Government are subject to Crown copyright, though there are eleven general waivers which, amongst others, include primary and secondary legislation and government press notices.¹⁷⁸ Copyright generally does not

¹⁷⁵ *Reynolds v Times Newspapers* [2001] 1 AC 127.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Von Hannover v Germany* [2004] ECHR 294.

¹⁷⁸ For a full list of waivers see: The National Archives, “Use of information previously covered by the Crown copyright waiver, available at: <http://www.opsi.gov.uk/advice/crown-copyright/copyright-guidance/waiver-of-crown-copyright> (last visited on 04/10/2010).

hinder news reporting as fair dealing for the purpose of reporting current events does not infringe copyright in a work, though sufficient acknowledgement of the work should be given where possible.¹⁷⁹ Copyright can exist in headlines under UK law, which has the potential of hampering news reporting, though copyright protection here is not very strong.¹⁸⁰

Social media

In the UK there are few rules governing social media publishing. In principle online publications are treated as print publications under the law. There has been some debate as to the extent to which the protection offered to journalists applies to bloggers. The general law regarding media publishing will apply to any publication and will therefore cover social media participants. Most social media sites have their own (additional) rules through contractual terms for the use of a site, but these are by no means standardised and self-regulation in this area does not take place yet. Bloggers can sign up to the PCC code of conduct, though this is by no means common practice, partly due to high costs. It is more common for “serious” bloggers to state that they adhere to the principles of the PCC code or to the NUJ code of conduct.

Interestingly, there has been some discussion whether online defamation is slander or libel. As this generally concerns written content there is a strong argument for considering it libel, though following a recent case under English law it may be classified as slander where comments are made “in the heat of the moment”.¹⁸¹ This distinction is relevant as slander is not necessarily actionable.¹⁸² Bloggers seem to be liable for defamatory comments on their sites made by third parties, if they fail to remove them after becoming aware of them.¹⁸³

A similar approach applies to Internet Service Providers (hereafter ISP) if they fail to act after having been made aware of defamatory comments on their server.

Rules regarding information gathering processes

In the UK, journalistic sources are protected under section 10 of the Contempt of Court Act 1981, which recognises that in a free and democratic society journalistic sources should be protected and a presumption is made in favour of journalists wishing to protect their sources. There are however exceptions where national security or the prevention of disorder and/or crime are at issue, in which case disclosure of the source will be warranted in almost all cases. There is also an exception where disclosure is in the interest of justice, though courts are rather more reluctant to order disclosure on this ground unless vital public or individual interests are at stake. Concerns have, nevertheless, been voiced that UK courts have been unduly protective of commercial and property interests. In this context, Article 10

¹⁷⁹ Art. 30, Copyright, Designs and Patents Act 1988.

¹⁸⁰ *The Shetland Times v Wills* [1997] FSR 604.

¹⁸¹ *Smith v ADVFN Plc* [2008] EWHC 1797.

¹⁸² J. Tumbridge, “Defamation: the dilemma for bloggers and their commenters” 31 *European Intellectual Property Review* (2009) 505, at 505.

¹⁸³ *Carrie v Tolkien* [2009] EWHC 29.

ECHR may be beginning to have an influence, in that the ECtHR has overturned several UK cases where source disclosure was ordered.¹⁸⁴

As mentioned above, the UK has a general right of access to information held by public authorities in England, Wales, and Northern Ireland through the FOI Act.¹⁸⁵ Journalists have generally remarked that the FOI Act has not had a major impact on their reporting, though the added avenue of information-gathering can assist them in certain cases.¹⁸⁶ One of the main issues remains that the process of an FOI request is slow and therefore does not provide an adequate source of information for (one-day) news stories. However, investigative reporters have remarked that the FOI Act has made a “noticeable” difference to their reporting.¹⁸⁷

In the UK the Data Protection Act 1998 (hereafter, DPA 1998) establishes a range of rights and duties to safeguard personal data. Section 32 of the Act exempts “processing (...) undertaken with a view to the publication by any person of any journalistic, literary or artistic material”, where this is done in the public interest. This is a broad exemption as publication is simply defined as to “make available to the public or any section of the public” and “any person” avoids debates about when a person can be considered a journalist. The exemption, however, is not applicable to the entire act, though it is applicable to all eight data protection principles, minus the 7th principle, which provides that “[a]ppropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data”.

Pictures are generally considered to be private data under the DPA 1998 in the UK and breach of confidence claims will often invoke the DPA 1998. Children are well protected from having their pictures published in the press,¹⁸⁸ though no case has been brought to the courts as of yet, relying on the new (far reaching) ruling of the *Reklos and Davourlis v Greece*¹⁸⁹ of the ECtHR. It remains to be seen how this ruling will be interpreted by the UK courts.

The PCC Code of conduct provides that the press “must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening device” and where there is “a reasonable expectation of privacy”, this should be honoured. Under-16s are afforded special protection and should not be interviewed or photographed without parental consent. However, the code notes that there may be exceptions to these provisions where they can be demonstrated to be in the public interest.

Rules regarding search engines

The UK currently has no specific rule governing search engines and access to information. A recent court ruling in the UK concluded, however, that search engines, in this case Google, were not “publishers” at common law and therefore could not be

¹⁸⁴ Most recently in *Financial Times (Ltd) v United Kingdom* [2010] 50 EHRR 46.

¹⁸⁵ And a similar right to access to information held by public authorities in Scotland under the Information Scotland Act 2002.

¹⁸⁶ S. Holsen et al, “Journalists’ use of the UK FOIA” 3 Open Government: a journal on Freedom of Information (2007), at p.13.

¹⁸⁷ *Ibid.*, p. 9 and 13.

¹⁸⁸ See for example: *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.

¹⁸⁹ *Reklos and Davourlis v Greece* [2009] ECHR 200.

held liable for defamatory content that appears in natural search results, both before and after they have been notified of the defamatory nature of the content.¹⁹⁰ A search engine was ruled to be a “facilitator” rather than a “publisher”. Where search results are generated automatically without human input, there is no control over the search terms chosen by users and the websites indexed in search results. Where this is the case, a search engine is no more than a facilitator. It should be noted though that Google does have a “notice and takedown” system in place which blocks the URLs of the offending material after they have been notified, but this does not stop parts of the text of the blocked URL of showing up in the search results and it is these fragments of text, which can be defamatory, for which Google is not liable as they are deemed a mere “facilitator” here.

3.4 Supervision

Under section 6 of the HRA it is unlawful for a public authority to act incompatibly with a convention right. This section applies to “any person certain of whose functions are functions of a public nature” and where a body performs both public and private functions, section 6 only applies to those actions that are public in nature. As most media regulatory bodies can be considered to be a “public authority” or to be performing functions of a public nature their actions can ultimately be reviewed under the HRA. Thus, Ofcom, the PCC, ASA, ATVOD and the BBFC are all covered by section 6 in whole or in part. Newspapers, however, are not covered,¹⁹¹ and broadcasters only in the few instances where they perform regulatory functions, such as where they are responsible for ensuring that election broadcasts comply with the Ofcom Codes.¹⁹²

¹⁹⁰ *Metropolitan International Schools Ltd (t/a Skillstrain and t/a/ Train2Game) v Designtecnica Corp (t/a Digital Trends)* [2009] EWHC 1765 (QB).

¹⁹¹ *Venables and Thompson v News Group Newspapers Ltd* [2001] Fam 430, para D1

¹⁹² A. Nicol, et al., *Media Law and Human rights* (2009), at par. 3.40.

Table 1

	Ofcom	BBC Trust	PCC
<i>Regulatory Document</i>	Communications Act 2003 & Broadcast Code	BBC editorial guidelines	PCC Editor's code of practice
<i>Type of regulation</i>	Statutory, contractual undertaking with licensees	Self-regulation	Voluntary self-regulation
<i>Competence</i>	TV and radio sectors, fixed line telecoms and mobiles and the airwaves over which wireless devices operate	All BBC content regardless of creator, method and manner of creation	Newspaper and periodical industry
<i>Composition</i>	Non-Executive Chairman, Executive Directors (incl. Chief Executive), and Non-Executive Directors	Chairman, Vice-Chairman and ten Trustees, declare personal/business interests and interests of immediate family	Independent Chairman appointed by industry, lay members and industry members
<i>Ultimate power of appointment</i>	Nominations Committee appoints board; Chairman of Ofcom is chairman committee. Chairman is appointed jointly by the Secretary of State for Culture, Media and Sport and the Secretary of State for Trade and Industry, under the provisions of the Office of Communications Act 2002	The Queen, on advice of Ministers after an open selection process	Independent appointment commission
<i>Sanctions</i>	Rectification, Fine revocation of licence	Internal discipline and rectification	Rectification
<i>Mode of Financing</i>	Grant-in-aid from the department for BIS, licence fee, and administrative charges for electronic networks and services, the provision of broadcasting and associated facilities	Licence fee	Levy on the newspaper and periodical industries

Table 2

	ASA	ATVOD	BBFC
<i>Regulatory Document</i>	Advertising Code	UK AVMS Regulations 2009/2010 (specific code to follow)	Video Recordings Act 2010
<i>Type of regulation</i>	Self-regulation and co-regulatory with Ofcom in relation to broadcasting	Co-regulation with Ofcom	Self-regulation for cinema and statutory regulation for video works
<i>Competence</i>	Marketing communication in all UK media	Video on Demand services	Cinema and video works offered for sale or hire commercially
<i>Composition</i>	ASA council administers code, 2/3 of members are independent of industry.	Independent chair, five independent and four industry members	One president, two vice-presidents and a management team
<i>Ultimate power of appointment</i>	Appointment following public advertisement by the ASA Chairman	Open recruitment on Nolan principles	Council of management with no actual or perceived interest in classification decisions & policy.
<i>Sanctions</i>	Wide range: fines, pre-vetting, ban, withdrawal of trading privileges etc.	Financial penalties, restrictions or suspension of service	-
<i>Mode of Financing</i>	Levy on advertising spend	Regulatory fees, consultation ongoing	Independently financed by fees charged for classification of submitted works

4. Media policy and democratic government

The status of the media in the UK

Though the media in the UK have not generally been afforded any special legal status, both the political establishment and the courts regard the media to play a central role in the democratic process. In 1995, for example, the then Conservative government in its 1995 White Paper on media ownership observed: “[a] free and diverse media are an indispensable part of the democratic process. They provide the multiplicity of voices and opinions that informs the public, influences opinion, and engenders political debate. They promote the culture of dissent which any healthy democracy

must have".¹⁹³ Similar views were expressed by the subsequent Labour administration.¹⁹⁴ With the coming into force of the Human Rights Act 1998, UK courts are required to "take into account" the jurisprudence of the European Court of Human Rights relating to Convention rights, although prior to this, freedom of expression was already considered by some judges to have a special constitutional status.¹⁹⁵ In *McCartan Turkington Breen v Times Newspapers Ltd*, Lord Bingham stated: "[t]he proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognized the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction."¹⁹⁶

Multiple democratic functions

Although political parties, politicians, and UK government and devolved bodies increasingly have their own websites, the traditional print and broadcast media continue to be the primary means through which they convey their policies to the general public. And for members of the public, the mass media constitute their main source of information on domestic and foreign events.¹⁹⁷ As Niklas Luhmann has observed "[w]hatever we know about our society, or indeed about the world in which we live, we know through the mass media".¹⁹⁸

But to perform this democratic function the media need to do more than simply act as a conduit for the views of politicians: they can enhance citizens' abilities to make informed choices through explaining the wider context to political decisions and examining alternative policy options; they can go beyond merely reporting on political developments and take a more activist role, seeking to set the political agenda, raise awareness of problems, or campaign for change; they can provide a location for public (rather than merely professional) debate through, for example, the publication of readers letters, "phone-ins", or internet fora; and they can perform a vital investigative or "watchdog" role, checking for abuses within government, public and also powerful private bodies – what Leonard Downie refers to as "accountability journalism".¹⁹⁹ A central question for those framing media policy in the UK today is consequently whether the media are able to perform, and are actually performing, these various roles – mediator; expositor/educator; agenda setter/campaigner; public forum and investigator/watchdog – given the current economic climate and technological developments. In both the print and audiovisual sectors there is increasing concern that this, unfortunately, is not the case.

¹⁹³ S. Barnett, "Journalism, democracy and the public Interest: Rethinking media pluralism for the digital age", Reuters Institute for the Study of Journalism working paper, (September 2009) at p. 3.

¹⁹⁴ *Ibid.*

¹⁹⁵ HRA 1998, section 2 and see discussion of relevant case law and academic commentary by Lord Steyn in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277 at 296-298.

¹⁹⁶ [2001] 2 AC 277, at 290-291.

¹⁹⁷ See section on the Role and Power the Media at section 2.3.

¹⁹⁸ N. Luhmann, *The reality of the mass media* (2000), p. 1.

¹⁹⁹ L. Downie, "The new news", James Cameron Memorial Lecture, 22/09/2010, City University London.

Media regulation: the bifurcated approach in the UK

As discussed above, the UK has adopted a bifurcated approach to media regulation, with the printed press and broadcast media subject to distinct regimes. The print sector has fought hard for the maintenance of a “light touch” self-regulatory system, which it considers necessary to insulate it from government influence. To date this has been accepted by both Labour and Conservative administrations, the previous government expressing its “strong belief” that “*a free press is vital to the health of our democracy. There should be no laws that specifically seek to restrict that freedom and Government should not seek to intervene in any way in what a newspaper or magazine chooses to publish*”.²⁰⁰ The main constraints on the printed press stem from general laws relating to obscenity, national security, privacy, contempt of court and defamation, though print mergers can be reviewed on media pluralism grounds where the Secretary of State decides to intervene under the Enterprise Act 2002.²⁰¹ Unlike in some European countries, the print sector does not benefit from state subsidies, which could threaten its independence, though newspapers and magazines are zero rated for VAT purposes.²⁰²

By contrast, the broadcast media are subject to a variety of restrictions intended to ensure coverage of the main strands of political thought and to insulate broadcasters from undue political and commercial influence. These measures include ownership restrictions; impartiality requirements, restrictions on editorialising; specific rules relating to party political and party election broadcasts; prohibitions on political advertising and the sponsorship of news programmes; restrictions on the amount of advertising that can be included within news programmes and a right of reply.²⁰³ In addition, commercial public service broadcasters who receive operating licences from Ofcom are required to transmit a certain proportion of public interest programming, including national and regional news.²⁰⁴ The BBC is required by its Agreement with the Government to meet a range of public service obligations, including the provision of news and current affairs, requirements that are fleshed out further by the BBC Trust.²⁰⁵ Apart from its regular radio and television news broadcasts and its online news services, the BBC provides dedicated coverage of the Welsh and Northern Ireland Assemblies, Scottish and Westminster Parliaments and key parliamentary committees.

Although the combination of two very different regulatory models operating side by side in one system is not the result of a carefully thought out master plan for the media sector, it can be rationalised on the basis that it may in fact enhance content diversity, firstly, by offering citizens both partisan (newspapers and magazines) and non-partisan (radio and television) sources, and, secondly, by providing a range of services more or less insulated from direct governmental (printed press) and commercial (licence fee funded broadcasters) pressures. It has also been justified on

²⁰⁰ Department of Culture, Media and Sport, “Privacy and Media Intrusion”, 2003, Cm 5985, at p.1. The reference to ‘intervention’ here is rather ambiguous: the Labour Government did not use the law to repress the media but they certainly sought to manipulate news coverage through the activities of communications officers such as Alastair Campbell and carefully cultivated links, see, for example, N. Davies, *Flat earth news* (2008), 198-202.

²⁰¹ Enterprise Act 2002, s. 58(2A-2B).

²⁰² HMRC Reference: Notice 701/10 (August 2003).

²⁰³ See more detailed coverage in chapter 3.

²⁰⁴ Communications Act 2003, ss. 264-271 and 279.

²⁰⁵ Department for Culture, Media and Sport, “Agreement between HM Sec. State for Culture, Media and Sport and the BBC”, July 2006, Cm 6872.

the basis of the perceived greater emotional impact of the audiovisual media and the limited spectrum available for broadcast services, necessitating regulation in the public interest. Yet, the coherence and legitimacy of singling out a specific media sector to meet costly public interest requirements is debatable and the spectrum scarcity rationale has been undermined by signal compression techniques and digitisation.²⁰⁶ With growing convergence among what were previously discrete media sectors – newspapers, for example, now operate across a number of platforms offering online versions with video inserts, links to related stories, and sites for reader interaction – the bi-polar regulatory model that characterised much of the last century is now under considerable strain.

The written press

As indicated above, the press has not generally been afforded any special legal status over and above that afforded ordinary citizens. It is, however, the main beneficiary of the protection from defamation actions afforded fair and accurate reports of parliamentary and judicial proceedings, certain public meetings and reports, including reports prepared by companies and civil society organisations.²⁰⁷ The press is also, on occasion, allowed to attend certain judicial hearings that are closed to the public.²⁰⁸ At present the main concerns regarding the UK printed press are the implications for independent journalism of dwindling revenues; the failure of certain newspapers to maintain ethical standards; the perceived weakness of the existing self-regulatory regime; and media consolidation. In relation to the former, all of the quality daily newspapers have encountered a steady loss of readers, with *The Times*' circulation falling to less than half a million for the first time since 1994.²⁰⁹ Regional papers have been badly affected, with sixty UK newspaper titles and 25 offices closing over a period of just six months in 2009, though the pace of decline appears now to be slowing.²¹⁰ The Scottish press, in particular, has been exposed to damaging competition from modified versions of London based daily papers, such as *The Times*.²¹¹ All papers have been affected by the growth of free online news sites provided, for example, by the BBC. Although online versions of the established daily papers are attracting increasing numbers of readers and thus advertising revenue, they have not compensated for the loss of advertising, in particular of classified advertising, experienced by the printed press. Newspapers are thus looking to establish new business models and the News International papers, *The Times*, *Sunday*

²⁰⁶ See discussion by E. Barendt, *Broadcasting law: A comparative study* (1995), pp. 5-9.

²⁰⁷ Defamation Act 1996, sections 14 and 15, schedule.

²⁰⁸ Primarily those involving children and family matters, see G. Robertson and A. Nicol, *Media law* (2007), pp. 19-20.

²⁰⁹ S. Busfield, "ABC's: Times Slips below 500,000 for the First Time in 16 Years", *The Guardian*, 10/09/2010, available at: <http://www.guardian.co.uk/media/2010/sep/10/abcs-national-newspapers> (last visited on 04/10/2010).

²¹⁰ D. Ponsford, "Regional ABCs: improving picture for UK dailies", *Press Gazette*, 25/08/2010 and C. Rowe, "How are freelance journalists coping in the current economic downturn?", [journalism.co.uk](http://www.journalism.co.uk), 02/04/2009, available at: <http://www.journalism.co.uk/5/articles/533978.php> (last visited on 04/10/2010). For a recent overview of the state of the local press see House of Commons, Culture, Media and Sport Select Committee Report, "Future for local and regional Media", HC 43-1, 6 April 2010, 11-17.

²¹¹ R. Greenslade, "Can the scottish press be saved? The declining sales figures suggest not", 18/05/2010, *The Guardian*, available at: <http://www.guardian.co.uk/media/greenslade/2010/may/18/newspapers-scotland> (last visited on 04/10/2010).

Times and News of the World, all recently moved to charge for access to their online sites, joining the Financial Times.²¹²

The financial crisis in the print media has resulted in many journalists losing their jobs and those who remain in employment, often lower paid young journalists with less experience, are now expected to provide material for both online and print services.²¹³ As a result, journalists have less time to engage in serious investigative journalism and careful fact checking, leading to greater reliance on press releases and recycled agency material. The run-up to the Iraq War illustrated once again how dependent the press are on government information and selective briefings in times of conflict, as well as the reluctance of certain papers to go against the official line even when in receipt of contrary reports.²¹⁴ A few papers and journals have, however, been established with, or have subsequently developed, structures designed to insulate them from corporate, proprietorial or political pressures.²¹⁵ The Guardian newspaper, for example, is backed by the Scott Trust, while the constitution of the Economist prevents any individual or corporation gaining a majority shareholding and the magazine's independent board of trustees has power to appoint and dismiss the editor.²¹⁶ The House of Lords Communications Committee in their report, *The Ownership of the News*, concluded that they did not believe "an internal company structure can be an adequate substitute for competition law and statutory regulation in ensuring that no single voice becomes too powerful. We are clear that regulation to ensure a plurality of media ownership is still relevant and necessary".²¹⁷

In relation to press governance, self-regulation through the Press Complaints Commission ('PCC') has been subject to repeated criticism.²¹⁸ In particular, the PCC is thought to have focused unduly on addressing individual complaints regarding breaches of the PCC Code of Conduct, rather than raising press standards more generally. It has no power to fine newspapers and does not adjudicate on matters where legal proceedings have been initiated. There is also the perception that the PCC is unduly accommodating to press interests: although the proportion of independent members of the Commission has gradually increased, seven of its seventeen members are serving editors or editorial directors. The Code Committee, which updates and reviews the PCC Code, has no lay members. With such limited powers it is not, perhaps, surprising that the tabloid press has at times cynically resorted to unethical, if not illegal, practices, such as phone tapping, and celebrity harassment in order to obtain copy.²¹⁹ The House of Commons Culture Media and Sports Committee recently proposed that the PCC should take a more proactive role in monitoring press

²¹² P. Robins, "Paywalls: Why papers' websites could be the next iTunes or amazon", 18/05/2010, The Guardian, available at: <http://www.guardian.co.uk/media/organgrinder/2010/may/18/newspaper-paywalls-reader-offers> (last visited on 04/10/2010).

²¹³ The consequences for democratic government are well set out by Davies, *Flat earth news*. See also House of Commons, Culture, Media and Sport Select Committee Report, "Press standards, privacy and libel", 24/02/2010, HC 362-1, at pp.77-80.

²¹⁴ Davies, *Flat earth news*, chapter 9, 'The Blinded Observer'.

²¹⁵ Such systems may also be introduced to ease competition authority concerns. When Rupert Murdoch purchased The Times and Sunday Times in 1981 he strengthened the role of the Independent National Directors, a majority of whom must agree to the appointment or dismissal of the papers' editors., House of Lords "The ownership of the news", paras. 215-217.

²¹⁶ See Barnett, "Journalism, democracy and the public interest", at p.10.

²¹⁷ House of Lords, *The Ownership of the News*, para. 220.

²¹⁸ The numerous official reports on the functioning of the PCC are detailed at House of Commons, Culture, Media and Sports Committee report, "Press Standards, Privacy and Libel", at chapter 6.

²¹⁹ *Ibid.*, chapter 5.

conduct, have greater lay participation, and enhanced enforcement powers.²²⁰ Reform during the present Coalition Government appears likely so that a move to tighten regulation rather than deregulate may take place in the print context. It is also possible that press conduct will increasingly be subject to review in the courts, given the gradual evolution of a right to privacy following passage of the Human Rights Act in 1998.

Ongoing concentration of ownership in the media

Concentration of ownership in the press sector, particularly at the local level, has been significant, and four large groups now account for around 72% of the regional press.²²¹ In relation to the national press, eight companies dominate, with News International, a subsidiary of News Corporation, owning The Times, Sunday Times, News of the World and the Sun.²²² Although consolidation has been supported by the major press groups on the basis that it leads to cost savings and synergies, enabling titles to survive that would otherwise fold, consolidation can also lead to a reduction in the number of distinct voices, centralisation, and an undue focus on profitability.²²³ Section 58 of the Enterprise Act 2002 incorporates a series of media pluralism considerations that the Secretary of State can address where mergers involve print and broadcasting companies. In relation to the press, this requires consideration of the need for “accurate presentation of news”, “free expression of opinion” and whether there is “a sufficient plurality of views in each market for newspapers in the United Kingdom or a part of the United Kingdom”.²²⁴ The House of Lords Communications Committee has suggested that this should be extended to cover an examination of whether the merger would “impact adversely on newsgathering” and Steven Barnett has noted that this could be taken further to “demand safeguards for professional training, for investment, and for different kinds of investment output”.²²⁵ To date there has been no government support even for a more limited amendment.

The audiovisual sector has also been subject to significant consolidation in light of the deregulation initiated by the Communications Act 2003. This has been particularly marked in the radio sector, with two conglomerates, Global and Bauer, owning the majority of commercial stations.²²⁶ Tony Stoller observes that much of the output is common across these stations, with a concomitant loss of genuinely local programming.²²⁷ Mergers have also taken place in the television sector, with Granada and Carlton merging in 2004 to become ITV plc. The remaining independent Channel 3 companies continue to have specific geographical links: Scottish Television Group, which serves central and northern Scotland; Ulster Television, Northern Ireland; and the Channel Islands Group.

²²⁰ Ibid., Conclusions and Recommendations.

²²¹ See House of Lords Select Committee on Communications, “The ownership of the news”, vol.1 HL Paper 122-I, 2008, at para.162 and Barnett, ‘Journalism, democracy and the public interest’, at p. 4.

²²² House of Lords, “The ownership of the news”, at para. 161.

²²³ For examples of these diverse views see the evidence given to the House of Lords, “The ownership of the news”, at paras. 170-201 and discussion by Barnett, “Journalism, democracy and the public interest”, at pp. 2-4.

²²⁴ Enterprise Act 2002. s. 58(2A-2B).

²²⁵ House of Lords “The ownership of the news”, at para. 243; Barnett, ‘Journalism, democracy and the public interest’, at p.14.

²²⁶ House of Lords, “The ownership of the news”, at para. 282.

²²⁷ T. Stoller, *Sounds of your life* (2010).

The Communications Act 2003 also facilitated further cross-media consolidation, a recent example being the purchase by Richard Desmond, owner of the Daily Express and Daily Star, of the Five Group which runs the fifth television channel in July 2010. News Corporation, owner of News International, which currently owns 39% of the pay television broadcaster BSkyB, has also indicated its intention to retake complete ownership of the company. Earlier this year, the Government requested Ofcom to further investigate the impact of removing the remaining local cross media ownership rules, which restrict ownership of print, television and radio services in the same local area. Ofcom concluded, contrary to its earlier findings, that complete removal of the rules would not be unduly prejudicial to media pluralism and the Government now appears likely to press ahead with deregulation in this area.²²⁸ Further liberalisation is primarily justified on the basis that this will support struggling local newspapers, though the synergies to be gained from cross, as opposed to mono, media consolidation are disputed.²²⁹ With these final restrictions removed, the main constraint on media mergers will be the operation of competition law, incorporating the media plurality test.

The financial struggle in the audiovisual media sector

In economic terms, the pay television sector does not appear to have been particularly affected by the downturn, subscriber numbers remaining buoyant with BSkyB moving close to 10 million subscribers, 3 million for its high definition services.²³⁰ By contrast the advertiser funded commercial broadcasters have seen a significant downturn in revenues and have had to face increasing audience fragmentation, with competition from pay television and online services.²³¹ In 2004 Ofcom identified certain programme genres that it considered the commercial broadcasters would be unlikely to continue to fund in the current climate, in particular, regional news and documentaries.²³² Ofcom research also revealed that expenditure on network news and current affairs programmes by the five main PSB channels fell by £39m or 14%, from £289m in 2004 to £250m in 2008, with a reduction in news and current affairs output particularly marked in Scotland and Wales.²³³ Recent figures relating to the production of news and current affairs content to 2009 are, however, somewhat more encouraging, indicating that the position has at least now stabilised on the public service channels and in some cases marginally improved.²³⁴ In particular, the decline in news viewing appears to have halted, with the majority of viewers still watching

²²⁸ Ofcom, "Response to the Secretary of State (DCMS): Local Media – cross media ownership rules", (9 August 2010).

²²⁹ G. Doyle, "The economics of monomedia and cross-media expansion: A study of the case favouring deregulation of TV and newspaper ownership in the U.K", 24 *Journal of Cultural Economics* (2000) pp.1-26.

²³⁰ Ofcom, "The communications market report 2010", at p. 98. J. Plunkett, "BSkyB Signs up 3 millionth subscriber to high-definition service", (2/09/2010), *The Guardian*, available at: <http://www.guardian.co.uk/media/2010/sep/02/bskyb-high-definition-subscribers> (last visited on 04/10/2010).

²³¹ Ofcom, "The communications market report 2010", at p. 121.

²³² Ofcom, "Review of public service broadcasting phase 2 - meeting the digital challenge", 28/09/2004.

²³³ Ofcom, "Public service broadcasting annual report", 21/07/2009, at p. 4.

²³⁴ Ofcom, "The communications market report 2010", pp. 134-135.

the flagship news programmes on linear channels rather than dedicated news services.²³⁵

There remains, however, real concern over whether the commercially funded public service broadcasters will be able, or will wish, to continue to meet the same level of public service commitments in the future. ITV, whose licence comes up for renewal in 2014 previously indicated that it no longer wished to continue to provide regional news coverage and, as indicated above, Ofcom has made a number of proposals for alternative means of funding such programming in the future.²³⁶ Although the present Coalition Government will not be implementing the previous government's plans for local news consortia, Culture Secretary Jeremy Hunt has initiated a review into how local news services can be provided, possibly involving a combination of networked and local news. The viability of such services without significant public subsidy has, however, been questioned.²³⁷ At the ultra-local level Steven Barnett has noted the valuable role that Community radio services can play in providing information and campaigning on local issues, though he notes that they do not have the resources or staff to carry out sustained investigative journalism.²³⁸ These services are licenced by Ofcom and are required to be not-for-profit, to engage where possible members of the community, and to fulfil certain social objectives, namely, facilitating discussion, providing education and enhancing awareness of, and strengthening, the particular community.²³⁹ Licensed community radios are funded through a range of public grants, including seed money provided directly by Ofcom.

Concerns over television news coverage are not restricted to regional and local news, in that just three companies – BBC, BSkyB and ITN - provide the news services for the main commercial broadcasters Sky, BBC, ITV, Channels 4 and 5.²⁴⁰ Although new web services would appear to be offering additional independent sources of news, research carried out by Chris Paterson suggests that the situation, at least in relation to international news, is little different on the web: “[w]e are left with a picture of an online news world (in the English language) where only four organisations do extensive international reporting (Reuters, AP, AFP, BBC) a few others do some international reporting (CNN, MSN, New York Times, Guardian and a few other large newspapers and broadcasters), and most do no original reporting”, relying on pre-existing agency copy.²⁴¹ As Paterson notes, many online sites, such as Google News, operate merely as aggregators, and although a wide array of news and current affairs sites run by freelance journalists, civil society and not-for-profit organisations have sprung up, the economic challenges facing independent online

²³⁵ S. Purvis, “Halt in decline of flagship news programmes”, Ofcom news release, 03/06/2010.

²³⁶ Ofcom, “Review of public service television broadcasting phase 3 – competition for quality”, 08/02/2005.

²³⁷ R. Andrews, “Why Hunt’s local TV news idea is a non-starter”, 26/07/2010, paidContent:UK, available at: <http://paidcontent.co.uk/article/419-why-hunts-local-tv-news-idea-is-a-non-starter/> (last visited on 04/10/2010).

²³⁸ Barnett, “Journalism, democracy and the public interest”, p. 12.

²³⁹ Community Radio Order 2004, Statutory Instrument No. 1944, Stationery Office, 2004, s.2.2.

²⁴⁰ See Ofcom, “Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of BSkyB’s acquisition of 17.5% shareholding in ITV plc”, 27/10/2007 and R. Craufurd Smith, “Media ownership and the public interest: The case of Virgin media, British Sky Broadcasting and its ITV shares”, 1 *Journal of Media Law* (2009), pp. 21-36.

²⁴¹ C. Paterson, “International news on the internet: Why more is less” (2007) 4 *Ethical Space: The International Journal of Communication Ethics* (2007) 57, at p. 63. See also: ‘News agency dominance in international news on the internet’, Centre for International Communications Research Papers in International and Global Communication No.1/06 (May 2006) 5.

news sites makes it difficult for them to engage in systematic independent news gathering and investigation.²⁴² Nor can the same level of philanthropic support be counted on as in the USA, where private funding has facilitated the introduction of ventures such as the non-profit news service “ProPublica”.²⁴³

The future of the BBC

It is not solely the commercial public service broadcasters who are being affected by changes to the broadcasting market and the current economic difficulties; the BBC has been subject to increasing criticism from commercial operators for its expansion into areas that they see as potential fields for development. In particular, its highly successful online, free, news site, which attracts more UK readers than any other, poses an undoubted challenge to alternative advertiser funded and subscription online services. In his 2009 MacTaggart Lecture at the Edinburgh International Film Festival, James Murdoch controversially stated that “dumping free, state-sponsored news on the market makes it incredibly difficult for journalism to flourish on the internet...We seem to have decided as a society to let independence and plurality wither. To let the BBC throttle the news market and then get bigger to compensate.”²⁴⁴ Particular criticism has been levelled at the purchase by the BBC’s commercial arm, BBC Worldwide, of the Lonely Planet Guide, considered to bear little relation to the BBC’s primary broadcasting activities. In part to pre-empt the inevitable, the BBC has already started to cut back on certain services, overheads and salaries, and in September 2010 announced that it would not increase its licence fee, as previously planned, in 2011. Its Charter and Agreement come up for renewal in 2012, during the course of the present Coalition Government, and the present Culture Secretary has indicated that the BBC both needs to adapt to the changing economic environment and that cuts to the licence fee settlement are likely.²⁴⁵ Given the financial pressures on the commercial public service sector, the role of the BBC as a core provider of quality news and current affairs programming would appear to be even more important than ever - indeed its existence was relied on by Ofcom as a basis for accepting further relaxation to the local cross-media ownership rules.²⁴⁶ As Mark Thompson, Director-General of the BBC argued in the subsequent MacTaggart Lecture in 2010, the BBC is crucially important because it is founded on the idea of creating a public space.²⁴⁷ If funding is removed from the BBC, it will not only remove funding from the UK creative economy as a whole, it could also bring into question the continuing viability of that unique public space.

The BBC also sought to respond to criticisms of the scale of its activities by the introduction of “public value” test, an approach outlined in its 2006 Agreement with the Government.²⁴⁸ A similar test has been endorsed by the European

²⁴² For discussion see the papers in N. Fenton (ed.), *New media, old media, journalism and democracy in the digital age* (2010).

²⁴³ For discussion of this and other non-profit US news ventures see Downie, “The new news”.

²⁴⁴ J. Murdoch, “The absence of trust”, lecture given at the Edinburgh International Television Festival 2009, 28/08/2009.

²⁴⁵ M. Brown and J. Robinson, “BBC licence freeze could prove costly”, *The Guardian*, 20/09/2010.

²⁴⁶ See Ofcom, “Response to the Secretary of State (DCMS) local media – cross media ownership rules” (2010).

²⁴⁷ M. Thompson, “The battle for quality”, MacTaggart Lecture given at the Edinburgh International Television Festival 2010, 27 August 2010.

²⁴⁸ BBC Agreement 2006, Cm 6872, paras. 23-33.

Commission in a number of its state aid broadcasting cases.²⁴⁹ When the BBC proposes new services, their potential impact on the commercial sector is reviewed by Ofcom and their potential advantage to the public examined by the BBC Trust, which then decides, balancing the various benefits and disadvantages, whether the service should be allowed to proceed.²⁵⁰ It is apparent that this process has led the BBC to be more cautious in launching new services and in 2009 the BBC Trust decided against the provision of an online local news video service, in part because the market impact assessment indicated that the launch would have a significant negative effect on commercial providers, particularly newspaper publishers.²⁵¹ Supporters of the proposal had, however, argued that this was an important opportunity for the BBC to improve its local provision, to combat centralisation, and connect further with local communities as part of its public service mission.²⁵²

In terms of the quality of its coverage, the BBC has in the past been criticised for limited coverage, and inclusion, of programmes from the devolved nations, and for over-simplified coverage of European affairs.²⁵³ Indeed, centralisation of production has been seen as a wider problem within the public service sector, with the Culture Secretary recently observing that “*three out of five PSB programmes are made in London. Our news is horribly centralised and I do believe that we should be giving more space to local policies.*”²⁵⁴ In 2007 the Scottish Government sought to raise the profile of these concerns by appointing a Broadcasting Commission, chaired by Blair Jenkins, to consider, inter alia, whether broadcasting policy should be devolved to Scotland.²⁵⁵ Although the Commission stopped short of calling for the devolution of media powers to Scotland, it did propose that Scottish Ministers should have greater responsibility, within the UK framework, for operational matters relating specifically to Scotland and that there should be enhanced Scottish representation on the Ofcom Board. The Commission also proposed the establishment of a new Scottish digital television network and called on public service broadcasters to comply with existing commitments to include Scottish programming and in certain cases to extend these commitments further.²⁵⁶

UK media and EU law

One notable aspect of UK media policy has been the growing influence of European Union law, both competition law – particularly important in relation to state aid and

²⁴⁹ European Commission, “Communication from the Commission on the application of State aid rules to public service broadcasting”, 02/07/2009, OJ C257/1, paras. 88-89.

²⁵⁰ For further discussion see BBC Trust website, available at: http://www.bbc.co.uk/bbctrust/our_work/pvt/index.shtml (last visited on 04/10/2010).

²⁵¹ BBC Trust, “Local video, public value test, final conclusions” (2009).

²⁵² *Ibid.*, para 4.3.1-4.3.8.

²⁵³ In relation to European affairs, the BBC commissioned an independent report, “BBC news coverage of the European Union”, January 2005, available at: <http://www.bbcgovernorsarchive.co.uk/docs/reviews/independentpanelreport.pdf> (last visited on 04/10/2010). The corporation has subsequently sought to address the issues raised in the report.

²⁵⁴ Reported in allmediascotland.com, “*Hunt reiterates support for local TV*”, 28/08/2010, available at: www.allmediascotland.com/press_news/26846/hunt-reiterates-support-for-local-tv (last visited on 04/10/2010).

²⁵⁵ Scottish Broadcasting Commission, “Platform for Success”, 8/09/2008, available at: <http://www.scottishbroadcastingcommission.gov.uk/about/Final-Report.html> (last visited on 04/10/2010).

²⁵⁶ *Ibid.*

the sale of premium television programme rights - and media specific regulations. The adoption by the EU of the Audiovisual Media Services Directive (AVMS) in 2007 led to the introduction of a co-regulatory system for on demand television services, the UK previously having taken the view that the internet, very much like the press, should be an area subject to self-regulation.²⁵⁷ On-demand programmes are to be overseen by the Association of Television on Demand, ATVOD, and commercial content by the Advertising Standards Authority but with back-up power of oversight retained by Ofcom.²⁵⁸

Judicial development of the law relating to the media and the impact of the Human Rights Act 1998

In any overview of the development of media policy and democratic politics it is necessary to mention briefly the continuing role and influence of courts in the UK. Although section 12 (4) of the Human Rights Act 2008 calls on courts to have “particular regard to the importance of the Convention right to freedom of expression”, this has not afforded freedom of expression any special priority over other competing rights.²⁵⁹ Indeed, the Human Rights Act is not regarded as an unqualified good by certain sections of the press, particularly given its role in the development of the law of privacy.²⁶⁰ In other areas, such as the protection of journalists’ sources, the courts have continued to show limited understanding of press interests, as evidenced by the ruling of the European Court of Human Rights in the *Financial Times* case.²⁶¹ There is also concern at the willingness of the English courts to grant what are known as “super-injunctions”, which both prohibit media reporting on a particular issue and coverage of the fact that the injunction has been sought and granted.²⁶²

More positively, English courts had, even prior to the coming into force of the Human Rights Act 1998, developed a “responsible journalism” defence to defamation claims in *Reynolds v Times Newspapers*, discussed further above.²⁶³ The defence requires the court to assess a wide range of factors, including the steps taken to verify published information, the urgency of the matter, and the “tone” of the article, and although these factors have been held not to be cumulative they nevertheless impose on journalists a high standard of investigation and careful record keeping.²⁶⁴ The law of defamation is currently under wide ranging review, given concerns that it unduly favours claimants with deep pockets and is increasingly being used to deter legitimate

²⁵⁷ Directive 2007/65/EC, amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities 18/12/2007, OJ L 332/27–45.

²⁵⁸ See: <http://atvod.co.uk/>.

²⁵⁹ For an early but extensive appraisal of the impact of the Human Rights Act on press freedom see H. Fenwick and G. Phillipson, *Media freedom under the Human Rights Act* (2006).

²⁶⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; [2004] 2 AC 457, in particular Lord Hope at para. 113.

²⁶¹ See ECtHR, *Financial Times and Others v United Kingdom*, [2010] E.M.L.R. 21.

²⁶² Most controversially in relation to the ‘Trafigura case’, on which see A. Rusbridger, “Trafigura: anatomy of a super injunction”, guardian.co.uk, 20/10/2009.

²⁶³ [1998] 3 All E R 961.

²⁶⁴ See, for example, discussion in T. Welsh, W. Greenwood and D. Banks, *Essential Law for Journalists* (2007), pp. 275-281.

debate on matters of public interest, for example, in the scientific field.²⁶⁵ There is also a perceived need to respond to the introduction in the USA of “anti-libel tourism laws”, designed specifically to prevent the enforcement of UK defamation rulings in the US.²⁶⁶

5. Conclusion

The media in the UK are in the process of adapting to a difficult economic climate and political change. With a receptive Conservative Party dominating the present Coalition Government there will undoubtedly be pressure for further deregulation in the commercial broadcasting sector. The remaining cross-media ownership restrictions are to be abolished, Ofcom’s policy making powers are likely to be curtailed, and it is possible that existing content requirements, such those relating to impartiality, imposed on commercial television broadcasters such as BSkyB could be removed. On the other hand, some strengthening of the self-regulatory press regime can be anticipated and a new co-regulatory system for television on demand is now in force, so there are also counter pressures at work in certain sections of the system.

UK governments are able to exert an indirect influence over key regulatory bodies, such as Ofcom and the BBC Trust, through their power of appointment and new appointments under the existing government could thus influence the strategic approach of these bodies. The position of the BBC is also likely to be weakened when the next Charter is agreed with the Government, with an anticipated reduction in the licence fee, a move that should assist commercial competitors, particularly those keen to develop online services.

Although the UK media are widely seen as being largely free from governmental influence, pressure points and indirect forms of influence consequently remain. In particular, the Government has considerable power to influence the overall balance and structure of the domestic media landscape and a reluctance to alienate powerful media voices, notably the Murdoch owned press, may lead it to exercise this power in specific ways. The links between the political and media spheres frequently lack transparency and are, by their very nature, difficult to detect and evaluate.

On a more positive note, the UK has an extremely diverse media marketplace, incorporating different regulatory approaches. Within this system it is possible to identify a number of innovative models, designed to provide at least a degree of insulation from both political and commercial influences. Freedom of information legislation has given the media access to new sources, facilitating its watchdog role, and UK courts are now required to take into account the importance of freedom of expression alongside other human rights. Finally, the internet offers additional opportunities for conveying information, enhancing dialogue, influencing the media agenda and, as illustrated by wikileaks, evading domestic legal constraints.

²⁶⁵ As in the case involving Dr. Singh, who, though successful on appeal, spent two years defending an action brought against him by the British Chiropractic Association: *British Chiropractic Association v Singh* [2010] EWCA 350. On defamation, see the current Defamation Bill [HL] 2010-11 and, for general discussion, M. Sweeney, “UK government plans major review of libel law: Ministry of Justice announces draft defamation bill to be put out for consultation and pre-legislative scrutiny in the new year”, *The Guardian*, 9/07/2010.

²⁶⁶ The securing the protection of our enduring and established constitutional heritage Act or ‘Speech Act’, H.R. 2765 (2010), prohibits US courts from enforcing foreign defamation judgements where these fail to comply with US First Amendment or similar state constitutional protections.

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The case of the European Union and the Council of Europe

Federica Casarosa *

1. Introduction

The history of media policy in Europe began at the national level with governments involved to different degrees in the regulation of the press, and then the radio and broadcasting sectors.¹ While the press enjoyed greater autonomy, paving the way for the creation of self-regulation, broadcasting attracted more attention from national governments which resulted in mostly successful attempts to monopolise and control the sector.²

From the outset, state intervention in the field of the media was triggered by the capability of the mass media in particular, to influence readers, listeners or viewers in their choices, regardless of whether these were of a commercial, social or political nature. This capability can evidently have positive and negative effects, as the media can have a function of integration in promoting social cohesion and solidarity, but they can also prove harmful by contributing to the breakdown of shared values, social norms and patterns of behaviour.³ From a democratic politics perspective, it can be acknowledged that the media can provide programmes which support particular social, civil and political values, through the provision of a wide range of programming, including news, current affairs, documentaries, educational programmes, etc., and at the same time offer opportunities for citizens' engagement in public discourse. Thus, the regulation of media sectors has also been driven by the need to create an informed citizenry. Although media regulation has for decades implied that readers, listeners and viewers are passive receivers of the information provided, technological developments have substantially challenged this premise. In recent years, media users appear to have more choice in accessing and selecting and even producing and disseminating information and materials, due to technological innovation.⁴ Nonetheless, such technological changes do not occur in a regulatory vacuum. Pre-existing rules and regulation are still applicable. The challenge is therefore to define whether and how the existing rules should be reviewed and perhaps updated.⁵

* Thanks to Fabrizio Cafaggi and Evangelia Psychogiopoulou for useful suggestions on some of the questions addressed in the paper. The content of Paragraph 2 profited from the relevant work of Fabrizio Barzanti and from the useful and rich conversations had in preparation of this part. Responsibility is my own.

¹ See M. Bailey, *Narrating media history* (2009).

² See for instance Article 11 of the 1789 *Déclaration des droits de l'Homme et du Citoyen* [Declaration of the Rights of Man and of the Citizens] in France, where it provided that “*The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law*”.

³ For a detailed analysis of the functionalistic approach to the media and its critics, see J. Harrison and L. Woods, *European broadcasting law and policy* (2007), at p. 21 ff.

⁴ See the definition of the so-called ‘non-linear’ services provided by Directive 2007/65/EC, below par. 2. For a wider analysis of the convergence issue see D. Tambini, D. Leonardi and C. Marsden, *Codifying cyberspace: communications self-regulation in the age of convergence* (2008).

⁵ Note the process that involved the broadcasting sector in the EU, where directive 1989/552/EC, otherwise known as the Television without Frontiers directive, has been involved in three reviewing processes, finally resulting in the current Audiovisual Media Services directive in 2007. See below par. 2.

So far, the focus has been on the regulation of the content available through the media, either by ensuring that certain types of programmes are made accessible to the public or that access to media outlets is offered to the various segments of society. However, the same results can be pursued through a different type of rules which concern structural regulation of media sectors. In this sense, who owns the media, the *rectius* who also controls or influences the media directly or indirectly, is the focal point. Indeed, the concentration of the power to influence citizens in the hands of few, whether in economic or political terms, seems likely to constrain the possibility for citizens to impart and receive information and ideas. Governments have thus adopted a range of different tools to facilitate the variety (i.e. plurality) of providers of information, such as media ownership rules, licensing and authorisation regimes and competition law.

Given the framework outlined above, it is clear that the two most relevant supra-national institutions at European level could not but be involved in these issues, though on the basis of different perspectives. Such involvement could be justified under two dimensions: practical and political. For the former, the advent of new technologies obliges not to interpret media services only on a national dimension, rather on a cross-national one, (which has already triggered the development of trans-border markets). For the latter, a more comprehensive approach, for instance at EU level, could prevent national political compromises shaped only according to the lobbying activity of powerful media outlets at national level.

As will be developed below, the European Union competence over media sectors has been progressively achieved through the joint (but not always coordinated) activity of the European Court of Justice (ECJ) and the European Parliament and Commission. The expansion of EU competences in the field of media is mainly to be ascribed to the ECJ in confirming its jurisdiction over areas that might not have been thought to be included in the original economic scope of the European Economic Community (EEC) Treaty. In particular, although the cultural dimension of broadcasting could have been perceived as hampering the possibility of bringing it within the scope of the EU competences, the ECJ was able to draw a distinction between its cultural and economic dimension, defining broadcasting as a tradable service, thus, subject to the rules on free movement between the Member States. This economics based approach was the underlying rationale that was then used by the European Commission to push for regulatory intervention in the media sector. Yet it was only through the inclusion of a specific article on culture in the Treaty of Maastricht that the path was opened for more comprehensive interventions,⁶ despite the limited competence enjoyed by the EU in the cultural field. The current policy framework recognises both cultural and the economic dimension, and at the same time fosters the protection of public interest values, such as media pluralism and the protection of human dignity in the media sectors.

The history of the Council of Europe's (CoE) involvement in media policy has a different basis, as it dates back to 1950 when the CoE acknowledged the importance

⁶ See the recent Commission Communication on Creative Content Online, in the Single Market, COM (2007) 836 final, where the Commission considers that policy makers should still consider the need to promote the dual objectives of competitiveness and cultural diversity in order to manage the systemic changes currently taking place. See I. Maghiros, "Information, telecommunication technologies and media convergence challenges – perspectives on the creative content industries" in C. Pawels, H. Kalimo, K. Donders, and B. Van Rompuy (eds), *Rethinking European media and communication policy*, (2009), at p. 41.

of freedom of expression and information by declaring it a fundamental right in Article 10 of the European Convention on Human Rights (ECHR). The ECHR gave the CoE the legal means to defend that freedom in practice: although it has been rarely invoked before the 1960s and 1970s, Article 10 of ECHR has since become increasingly important and has been used to make the point in many cases of the European Court of Human Rights that the right to freedom of information takes precedence over the political, legal, and economic imperatives which are sometimes given as reasons for restricting it. In a parallel process, the CoE also devised tools and structures to guarantee and strengthen freedom of expression across the continent. From the 1958 European Agreement concerning Programme Exchanges⁷ to the recent Convention on Cybercrime, the CoE's work has encapsulated and regulated an increasingly complex world of information addressing the most relevant issues, such as journalistic freedom⁸ and the protection of pluralism. It should be emphasised that, since 1981, media issues gained such a importance to require a separate expert committee, the Steering Committee on the Mass Media, which was created within the Human Rights Directorate of the CoE. The role of this committee was to develop alone or in collaboration with other Council bodies recommendations and resolutions covering general or specific media issues.⁹

The following analysis will take into account these two different frameworks in order to inquire into the interventions that have developed progressively to address the issue of a free and democratic media system by the EU (in par. 2) and by the CoE (in par. 3). This will provide the basis for a comparative evaluation of the effectiveness of these supranational organisations in supporting media freedom and independence, taking into account the institutions or bodies involved in the process and the type of regulatory instruments used in each context (par. 4). Conclusions will follow.

2. EU media policy

The role of the European Union in the field of media policy has become especially pronounced over the last decades. However, EU media policy is closely intertwined with the wider perspective of the regulatory framework for communications. The traditional distinction between regulation of infrastructure (communication) and regulation of content (media), although technological innovations have blurred the boundaries between the traditional telecommunications and media sectors, still resists. Thus, the current analysis will focus on regulation of content, however, where needed, will take into account also the current framework of infrastructure regulation.

From a different perspective, it is acknowledged by academic literature that EU media policy is rooted into industrial policy,¹⁰ and this can be interpreted as one of the reasons why this policy has been mostly focused on regulating capital

⁷ See that this Agreement and the following European Agreement on the protection of Television broadcast, in 1960, provided the basis for the programme exchanges within the European Broadcasting Union, allowing television companies to authorise or prohibit cable retransmission or broadcasting in the signatory states. See K. Karaca, *Guarding the watchdog: The Council of Europe and the media* (2003), at p. 13.

⁸ See the Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, available at: <https://wcd.coe.int/ViewDoc.jsp?id=342907&Site=CM> (last visited on 26/10/2010)

⁹ See Karaca, *Guarding the watchdog*, p. 15.

¹⁰ A. Hartcourt, *The European Union and the regulation of media market* (2004) at p. 9.

investments and provision of services within the internal market as primary objectives.¹¹

Since the first interventions, not all media sectors have been addressed by the EU institutions.¹² The focus of the enacted regulations has been on broadcasting,¹³ with the landmark Directive on Television Without Frontiers (hereinafter TWF) in 1989.¹⁴ This directive clarified the approach of the EU to the broadcasting sector, as it was predominantly directed at providing the basis for the free circulation of television programmes in the Community and establishing a minimum harmonisation of rules on advertising. Economic consideration was the structure of this regulatory intervention, but it was coordinated with non-economic elements, such as the protection of minors and of human dignity, the introduction of the right of reply throughout Europe,¹⁵ and the protection of cultural diversity.¹⁶ Given the membership of all the EU member states to the European Convention of Human Rights, the European legislator was able to leave the remaining aspects of television programming content to the application of Article 10 of the ECHR.¹⁷

Only in the 1990s was a legitimate means to develop a more comprehensive policy in the media field defined, through what is now Article 167 of the Treaty on the Functioning of the European Union on culture included in the 1992 Treaty of Maastricht,¹⁸ and the 1997 *Protocol on the System of Public Broadcasting* in the Treaty of Amsterdam.¹⁹ The action of the EU was also enriched with a more interventionist approach of the EU institutions setting the agenda for the development of the information society, which was outlined firstly in the 1993 *White Paper on*

¹¹ At the same time the EU could not ignore the fact that media systems are embedded within the national states, due 19th century historical development of such systems. Thus, the European intervention over media system was required to balance also such national elements. See E. Dommering, "General introduction", in O. Castendyk, E. Dommering, A. Scheuer, *European media law* (2008) at p. 11.

¹² See D. Hutchinson, "The EU and the press: policy or non-policy?", in K. Sarikakis, *Media and cultural policy in the European Union*, 24 *European Media studies* (2007) 183.

¹³ The possibility for the EU to develop its media policy in this sector is to be found in the two main decisions of Sacchi and Debaue, and in particular the former which declared that broadcasting as a trade-able service. See Case C-155/73, *Giuseppe Sacchi, Reference for a preliminary ruling: Tribunale civile e penale di Biella*, ECR (1974) 00409 and Case C-52/79, *Procureur du Roi v Marc J.V.C. Debaue and others*, ECR (1980) 00833.

¹⁴ Note that the *Green Paper on the establishment of a common market for broadcasting, especially satellite and cable - Television without frontiers*, COM (84) 300 final, dates back to 1984 and it took five years of negotiations to get the subsequent directive approved.

¹⁵ Note that in some Member States such a right was already enforced, for instance in the case of Italy.

¹⁶ See, for instance, Article 4 TWF Directive on the promotion of distribution of European media products and the production of Television programmes.

¹⁷ See below par. 3.

¹⁸ In particular, Article 167 provides that:

"1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

— improvement of the knowledge and dissemination of the culture and history of the European peoples,

— conservation and safeguarding of cultural heritage of European significance,

— non-commercial cultural exchanges,

— artistic and literary creation, including in the audiovisual sector".

¹⁹ See OJ [1997] C340/109. On the content of the Protocol see also, R. Mastroianni, "Il Protocollo sul sistema di radiodiffusione pubblica", *Il diritto dell'Unione Europea* (1990) 538 and ff.

*Growth, Competitiveness, and Jobs*²⁰ and in the 1994 Bangemann Report,²¹ and then more clearly defined within the media and communication system in the *Green Paper on the Convergence of Telecommunication, Media and Information Technology Sectors, and implications for Regulation* of 1997.²² The latter document envisaged, in the drafting, the abandonment the public service broadcasting model in favour of a horizontal regulation of the media;²³ however, in the final version the old sector-specific approach was retained, and only in more recent interventions, such as the Audiovisual Media Service Directive (hereinafter AVMS), this shift can be seen in practice.²⁴

It is clear from the history of the development of EU media policy that the primary rationale for this policy is to be found in the economic sphere, developing three axes of regulation: regulation of networks (including the fixed telecommunications/IP networks, mobile networks, cable networks, broadcasting networks as well as satellite networks); regulation of service provision (where broadcasting was the most prolific area of regulation); and regulation of content.²⁵ These three components have mostly envisaged trade liberalisation and market integration in the media sectors; however, this has not excluded indirect interventions to improve the level of freedom and democracy of the media systems at European level. The main rationale that has provided this (in)direct effect has been the introduction in the European debate of the concept of media pluralism,²⁶ used since 1992.²⁷ However, this notion has never been defined in clear terms by the European institutions, rather it has been understood from different perspectives, namely cultural and political, and emphasis has been placed on its relationship with competition law.²⁸

In order to analyse the direction taken by the EU in this respect, it is useful to clarify briefly the different meanings attributed to media pluralism by the EU

²⁰ European Commission, *Growth, competitiveness, employment: The challenges and ways forward into the 21st Century - White Paper*. Parts A and B. COM (93) 700 final/A and B.

²¹ Commission Report on Europe and the global information society: recommendations of the high-level Group on the information society to the Corfu European Council [follow-up to the White Paper]. Bulletin of the European Union, Supplement No. 2/94.

²² *Green Paper on the Convergence of the telecommunications, media and information technology sectors, and the implications for Regulation - Towards an information society approach*, COM(97) 623 final.

²³ In particular, the document proposed a public library model in which the information required was bought in from third-party producers and made available to the public in form of a virtual library.

²⁴ However, the coordination between this and previous directives, such as the 2000 e-Commerce directive, is not perfectly clear, as it is possible that linear and non-linear services provided by a single platform could be regulated, either simultaneously or successively, by the aforementioned directives, ending in an ambiguous regulatory framework for the service provider. See more on this point in M. Holoubeck and D. Dramajanovic, *European content regulation – A survey of the legal framework* (2007) at p. 122 and ff.

²⁵ See H. Kalimo and C. Pawels, “The converging media and communications environment”, in C. Pawels, et al., *Rethinking European media and communications policy* (2009) 3, at p. 4 and ff.

²⁶ The notion of ‘media pluralism’ is frequently nuanced and often assimilated with related concepts such as ‘media diversity’, ‘plurality of the media’, ‘media variety’ and ‘information pluralism’. See D. Westphal, “Media pluralism and European regulation”, 13 *European Business Law Review* 5 (2002) 459.

²⁷ See the Commission Green Paper, *Pluralism and media concentration in the internal market – An assessment of the need for community action*, COM (92) 1980. For a criticism of the ‘catch-all’ concept of media pluralism with a limited interest in a more clear definition see V. Zeno-Zencovich, *La libertà di espressione – Media, mercato, potere nella società dell'informazione* [*Freedom of expression – Media, market, power in the information society*] (2004), at p. 33.

²⁸ See Dommering, “General introduction”, pp. 22-23.

institutions: first, cultural pluralism can be understood as way of promoting content variety in the different media as a part of a more general cultural policy. In this sense, the rationale is partly economic, i.e. a solution for market failure where the market does not produce enough cultural goods owing to high production costs and low demand, and partly non-economic, i.e. for educational purposes. Political pluralism, instead, is part of the governmental media policy focus on increasing the possibilities for all political and social movements to have access to the media. Finally, pluralism can be defined also as a competition law concept, in the sense of facilitating a multiplicity of providers to access the media market. This approach takes into account the need to monitor dominant providers in order to prevent abuses and merger controls, which could potentially result in dominant positions being exploited to monopolise adjacent upstream and/or downstream markets, which should be prevented.

Media pluralism has been interpreted by the EU institutions as a precondition for the existence and the exercise of the fundamental right of freedom of expression,²⁹ and its derived freedoms to hold opinions, to receive and impart information and ideas, since it ensures the representation and reproduction of the different viewpoints that are present within a democratic society.³⁰ However, academic literature has underlined that this diversity should not to be evaluated only under a quantitative dimension, rather under its actual qualitative variety and diversity, either for the political or the cultural facet.³¹

The enhancement of pluralism has resulted as an indirect effect of the competition rules, in particular general competition tools to tackle over-dominant positions of providers,³² while positive obligations fostering the production of European audiovisual products in order to promote variety of content can only be found in cultural based interventions. It should be noted that the two approaches were mostly related to two different institutions involved in media policy, namely the European Parliament and the Commission. The latter was more involved in the media ownership and media concentration dimension as this appeared more closely connected with the internal market perspective, without taking pluralism as an EC objective;³³ whereas the former, through various resolutions has shown the cultural dimension greater attention.³⁴

²⁹ This link is to be found both in the legal text, such as in the case of Article 11 of the European Charter of Fundamental Rights, and in the jurisprudence of the ECJ, in relation to Article 10 of the ECHR. See more below for further detail.

³⁰ See F. Barzanti, "Governing the audiovisual space – What modes of governance can facilitate a European Approach to media pluralism", unpublished, provided by the Author (2008).

³¹ D. Westphal, "Media pluralism and European regulation".

³² See the application of Articles 81 and 82 TEC, *inter alia*, in case Commission, Decision 2004/311/EC of 2 April 2003, *Newscorp/Telepiù* (Case COMP/M.2876), OJ L110/73, 16/04/2004.

³³ Note that the Commission Green Paper *on pluralism and media concentration in the internal market*, clearly expressed the position of the Commission on the fact that preserving pluralism is not in itself an EC objective.

³⁴ See the several interventions of the European Parliament published mainly in the 1990s: Resolution on media takeovers and mergers, OJ C 68, 19/03/1990, p. 137; Resolution on media concentration and diversity of opinions, OJ C 284, 2/11/1992, p. 44; Resolution on the commission Green Paper "Pluralism and media concentration in the internal market", OJ C 44, 14/02/1994, p. 177; Resolution on concentration of the media and pluralism, OJ C 323, 21/11/1994, p. 157; Resolution on pluralism and media concentration, OJ C 166, 3/07/1995, p. 133. See K. Sarikakis, *Powers in media policy: The challenge of the European Parliament* (2004).

Only more recently, through the reference in Article 6.1 of the Treaty of Lisbon,³⁵ the intertwining connection between fundamental rights and media pluralism has gained more legal substance, as the Charter of Fundamental Rights of the European Union explicitly recognises freedom of expression and information as fundamental rights that belong to everyone, in Article 11. This provision, corresponding to the wording of Article 10 of the European Convention of Human Rights in its first indent,³⁶ clearly states in paragraph 2 that “*freedom and pluralism of the media shall be respected*”. As it appears from the *travaux préparatoires* of the Charter, the second indent was inserted at a later stage in the long drafting process of Article 11. It was indeed included into an amendment originally providing explicitly for cultural and political pluralism to be “guaranteed”.³⁷ However, after further modifications, the final agreed and adopted version eventually included the significant change of the verb “guaranteed” into “respected”. Thus, on the one hand, the inclusion in the Charter of the principle of pluralism in the media – though not defined nor articulated – can surely be taken as an indicator of its acknowledged relevance as a principle that results from the constitutional traditions common to the EU member states, and hence the necessity to observe it as a general principle of Community law, as it stems directly from the freedom of expression.³⁸ However, Article 11.2 shows and reinforces the prevailing attitude of the Community towards media pluralism as a predominantly negative stance, rather than in terms of a proactive approach to guarantee it directly and in practice, and promote it at European level.

The aforementioned reference in the Charter of Fundamental Rights is not the only source of primary EU law where media pluralism is addressed. Indeed, the Protocol on the system of public broadcasting in the Member States, introduced as an annex to the Treaty of Amsterdam and which entered in force in 1999, explicitly refers to media pluralism in the context of public service broadcasting (PSB). In focusing on PSB, the protocol mainly purported to offer an interpretative aid for the application of EU competition and state aid law to the funding of public service broadcasters, which are set up and organised by each Member State. The Protocol highlights the need to strike a balance between the realisation of the public service remit entrusted upon PSBs and the achievement of the common supranational interest in the efficient and undistorted functioning of the EU's internal (broadcasting) market;

³⁵ Note the vague wording of Art. 6 (1) which provides that the Charter has the “*same legal value of the Treaties*”, nonetheless interpreted as conferring on the Charter the same legally binding nature of the EU treaties.

³⁶ See below par. 3, Article 10 (1) of the ECHR provides that “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*”, while Article 11 (1) of the Charter of Fundamental Rights replicates the same text of the first two sentences, but it excludes any reference to the last indent. This does not imply that the EU legislator wanted to limit the possibility for Member States to impose licensing rules on broadcasting, television and media enterprises; rather this gap is filled by the application of Art. 52 of the Charter, that clarifies in (3), “*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*”.

³⁷ B. Klimkiewicz, “Media pluralism: European regulatory policies and the case of Central Europe” EUI Working Paper RSCAS (2005), at p. 4.

³⁸ Barzanti, “Governing the audiovisual space”, p. 19.

and hence to reconcile the latter with the former.³⁹ In dealing with such a public service task that has a strong political dimension, the Protocol indicates that the reason for paying this special account to PBS rests upon the consideration that “*the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism*”. Also in this case, then the negative integration route, founded on the application of the free movement and competition rules and the removal of national barriers to trade prevailed over a positive harmonisation route, based on the adoption of regulatory measures to approximate justified obstacles to trade integration.

Before examining the few positive interventions within the media policy field, the important role of the ECJ in regulating media markets in the EU should be acknowledged, as it “*has represented the only EU institution with the legal resources to assess national media laws and Court decisions, and mandate direct changes to the composition of the media market*”.⁴⁰ The ECJ's role in media regulation has been crucial. It was indeed the ECJ that established the legal competence of the EU to engage in media policy-making through its judgments in the *Sacchi* and *Debauve* cases.⁴¹ Indeed, the legal definition of broadcasting as a service of economic interest, paved the way not only for the Court to develop its body of media case law; it also placed broadcasting in the realm of economic policy to be decided at the European level, pointing to also the legal basis that could be used for the adoption of the already mentioned TWF directive.

Within the following case law, two main points can be raised highlighting the different perspectives that the ECJ has had on media regulation, in particular taking as a point of reference the media pluralism notion.

First, the safeguard of media pluralism at Member State level has been justified given its connection to freedom of expression, which is mainly protected by Article 10 ECHR.⁴² The ECJ has stated that “*fundamental right form an integral part of the general principles of law, the observance of which it ensures*”.⁴³ Accordingly, in ensuring the exercise of fundamental market freedoms, the ECJ has also guaranteed respect for the fundamental right to freedom of expression and the maintenance of media pluralism which connected to it.⁴⁴ Thus, in balancing different fundamental

³⁹ On the role and importance of PBS, see also I. Katsirea, *Public broadcasting and European law: a comparative examination of public service obligations in six member states* (2008) at p. 167 ff.

⁴⁰ Harcourt, *The European Union and the regulation of media markets*, p. 36.

⁴¹ See Case C-155/73, *Giuseppe Sacchi*, and Case C-52/79, *Procureur du Roi v Marc J.V.C. Debauve and others*.

⁴² A separate body of judgments based on Article 11 of the Charter of European Fundamental Rights is yet to be developed, as no reference to this provision has been made by the ECJ in its most recent case-law. It is possible that the incorporation of the Charter in the Treaty of Lisbon would pave the way for a coordinated reference to the ECHR's and Charter's provisions.

⁴³ See Case C-260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, ECR 1991 I-2925, par. 41.

⁴⁴ Note that in many cases the lack of consistency between the interpretation of Art. 10 by the ECtHR and the concurrent interpretation by the ECJ has been emphasised by academics, not only in terms of formality (for instance given the different *locus standi* provided in the two jurisdictions), but also in terms of substantial results, for instance where the ECJ did not refer to the most relevant case law of the ECtHR or to no case law at all. For a detailed analysis of the relevant case law of the ECJ on freedom of expression see L. Woods, 'Freedom of expression in the European Union', 12 *European Public Law* (2006) 371 and ff.

rights and principles, the ECJ has demonstrated that there is no absolute trade integration taking place at the expense of protected human rights. In other words, trade law should respect in its application wider values such as freedom of expression, and more specifically media pluralism. An example of this approach can be seen in the *Familiapress* case, where an Austrian ban on marketing magazines containing prize crosswords was analysed by the ECJ, and a balance was struck between the free movement of goods, and freedom of expression (on the part of the publisher of the German magazine) and media pluralism (of the Austrian press), on the other.⁴⁵

From a different perspective, the ECJ has elaborated a consistent set of judgements regarding the application of the freedom of movement rules where the presence of national regulations that could result in impediments to trade can be justified, and thus upheld, because they aim to safeguard media pluralism.⁴⁶ This approach stems from the reasoning that media pluralism forms part of cultural policy which may constitute an overriding requirement relating to the general interest thus justifying a restriction on the freedom to provide services.⁴⁷ However, this possibility was not interpreted in an expansive fashion, as the ECJ conducted assessments of the cases in light of a strict proportionality and necessity test, which resulted in several negative appraisals of the possibility of upholding national regulations.⁴⁸ In this line of cases, the ECJ has certainly interfered with Member States' regulation, despite clearly recognising that media pluralism is part of a policy domain reserved to Member States.⁴⁹ This was also recently supported by the *Centro Europa 7* judgement,⁵⁰ where the Court indirectly, yet manifestly, interfered with Italian policy towards media pluralism, by challenging the compatibility with EU law of governing the process of granting broadcasting licences, for lack of objective, transparent, non-discriminatory and proportional criteria contained within them.

Turning to the legislation in force at European level concerning media services, the existing pieces of legislation harmonise national rules, mainly in television broadcasting, and introduce in several provisions rules that improve the level of freedom and democracy in Member States' media systems.

However, it must again be noted that the trigger for intervention by the EU legislator is found in the objective of favouring the completion and the effective functioning of the internal market for broadcasting services.⁵¹

The first point of reference is the TWF Directive that paved the way for the EU audiovisual regulation and policy. The text was elaborated in parallel with the text

⁴⁵ See Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag*, ECR 1997 I-03689.

⁴⁶ See Case 352/85, *Bond van Adverteerders and others v The Netherlands State*, ECR 1988 2085; and Case C-211/91, *Commission of the European Communities v Kingdom of Belgium*, ECR 1992 I-6757.

⁴⁷ Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media ("Mediawet I")*, ECR 1991 I-04007; Case C-353/89, *Commission of the European Communities v Kingdom of the Netherlands*, ECR 1991 I-4069; Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media*, ECR 1993 I-00487; Case C-250/06, *United Pan-Europe Communications Belgium SA and Others v Belgian State*, ECR I-11135.

⁴⁸ See case *Stichting Collectieve Antennevoorziening Gouda*.

⁴⁹ See R. Craufurd Smith, *Broadcasting Law and fundamental rights* (1997), at p. 186.

⁵⁰ See ECJ 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*, ECR 2008 I-00349.

⁵¹ See B. De Witte, "Non-market values in internal market regulation", in N. Nic Shuibhne (ed.), *Regulating the Internal Market* (2006) 61.

of the European Convention on Transfrontier Television,⁵² and took into account not only the market dimension of the audiovisual services but also their cultural value. This was also clarified by the fact that the Directive introduced some specific and content-oriented measures aimed at promoting wider values, such as the protection of minors, respect for human dignity and protection of the consumer. Moreover, against the background of the cross-sectional clause of Article 167 (4) TFEU, the TWF Directive embodied provisions such as the “European-quota rules” intended to promote the distribution of European television programmes and independent productions.⁵³ Additionally, the Directive imposed measures to ensure that events which are regarded by Member States as being of major importance for society, could not be broadcast in such a way that a substantial part of the population of that country would be prevented from accessing them.⁵⁴

The successor to the TWF Directive, the recently adopted AVMS Directive,⁵⁵ also is oriented in this direction. This is the result of a second and more radical amendment to the TWF Directive, which was necessary to adapt it in accordance with the technological developments taking place in the media sector, and to structure and consolidate at the EU level one of the two poles of the future, and currently under development, “law of convergence”.⁵⁶ One of the relevant changes is the graduated extension of the scope of the application of the Directive to “all audiovisual media services”, moving away from the traditional identification with television broadcasting, to a wider notion that encompass new platforms for delivery, such as satellite and cable television, and new media, such as personal computers and mobile phones. Article 1 (a) of the AVMS Directive distinguishes in particular between linear (television broadcasting) and non-linear (video-on-demand) services, including in the latter definition any service “*provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request*”.⁵⁷ Thus, this wide definition also permits the inclusion of services provided through the Internet and delivered to any digital device within the Article's application.

Although the language of the provisions seems more exhortative than binding, the Directive also extended the reach of the European-quota rules and added a measure providing for a right to short reporting so as to ensure freedom and plurality of information. In this sense, the Directive, without mentioning directly freedom of expression or media pluralism, promotes them. It is precisely freedom of expression and media pluralism that the measures mentioned above aim at achieving.

In the interim between the two Directives on the broadcasting/audiovisual sector, another attempt were made by the EU institutions to deal with another perspective related to the promotion of free and independent media. The case refers to the proposal to adopt a Directive on “Concentration and Pluralism in the Internal Market”, which was mainly aimed at harmonising the disparities between national

⁵² See below par. 3.

⁵³ See Article 4 and 5 TWF directive.

⁵⁴ See Article 3, lett a. TWF directive.

⁵⁵ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332, 18.12.2007, P. 27–45.

⁵⁶ G. Morbidelli and F. Donati (eds) *Comunicazioni: verso il diritto della convergenza* [Communications: towards a law of convergence] (2003).

⁵⁷ See Article 1 (g) AVMSD.

regulations on media concentrations and at setting common standards for measuring and evaluating them at EU level. This proposal on the one hand advanced the internal market functioning rationale to legitimise the intervention, but on the other hand it referred to the need to promote media pluralism at the European level. However, the proposal did not materialise in a legislative intervention, not even in its less ambitious formulation which was free from direct references to media pluralism.⁵⁸ The reason for the failure was primarily related to the lack of a legal basis upon which the Directive could be based.⁵⁹ At the same time, national governments and national regulatory agencies resisted the attempts to move the policy arena to the European level. This demonstrated the huge difficulties the EU faces when seeking to include public interest goals in its policy-making, given its reliance on economic instruments for regulating media markets.

If the printed press is examined, EU competences there are substantially limited.⁶⁰ The printed press is one of the prime examples of national or even regional competence, and its situation often reflects the varying media traditions in the different Member States, and the common for the Member States resort to self-regulation in the field. Thus, there is no EU legislation specifically on the printed press, nor can there be such legislation under the present state of the Treaty. Nevertheless, the EU institutions, and in particular the European Commission, have always looked favourably on the development of the written press throughout the EU.⁶¹

The previous discussion of the interventions of the EU shows that, despite the tendency to indirectly promote freedom of the media, through the prism of media pluralism, weak solutions are provided and evident regulatory gaps emerge at the EU level. This is possibly all due to the lack of an explicit competence in this area on the part of the EU. However, the EU institutions have presented differing alternative solutions that attempted to achieve the same goal through soft law and independent studies. Particular mention should be made of the three step process on media pluralism elaborated in 2005 and put into practice in 2007.⁶² The process was based on a broadened concept of media pluralism, covering not only media ownership issues but also access to a variety of information (so citizens can form opinions without being influenced by one dominant source) and transparent mechanisms that guarantee that the media are genuinely independent.

⁵⁸ For a wider account of such an initiative see Harcourt, *The European Union and the regulation of media market*, p. 62-89.

⁵⁹ See R. Craufurd Smith, "Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship", 29 *European Union Law* (2004) 652.

⁶⁰ Hutchinson, "The EU and the press: policy or non-policy?", p. 191 and ff. See that the latest intervention by the Commission on this issue dates back to 2005 with the Commission staff working paper, strengthening the competitiveness of the EU publishing sector - The role of media policy, SEC(2005) 1287, 7/10/2005.

⁶¹ In June 2009, a European Charter on Freedom of the Press has been presented, drafted by journalists across Europe. The Charter on Freedom of the Press initiated by the European journalist community is an important reaffirmation of the basic values, including freedom of expression and information that underpin Europe's democratic traditions and are enshrined in fundamental legal texts such as the EU Charter of Fundamental Rights. The Charter is therefore an important step towards reinforcing these basic values and rights allowing journalists to invoke them against governments or public authorities whenever they feel the freedom of their work is unjustifiably threatened.

⁶² See the Press Release of the overall process, European Commission, "Media pluralism: Commission stresses need for transparency, freedom and diversity in Europe's media landscape", <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/52> (last visited on 25/10/2010).

The process includes the Commission Staff Working Paper on Media Pluralism⁶³ that provided an account of the essential work undertaken by the Council of Europe on the issue, and offered a concise first survey of Member States' audiovisual and print media markets. This was followed by a study on media pluralism⁶⁴ that provided the concrete and objective criteria for measuring media pluralism. The process was then supposed to end with a Commission Communication on indicators for media pluralism in EU member States, to be followed by a broad public consultation, but that is yet to be completed. Although the study, published in early 2009, raised conflicting reactions from academics and policy-makers, the positive aspect of this debate is the attention it attracted at the European level. Far from suggesting regulation, a task for the Member States, the EU Commission was given a monitoring role of media pluralism in the EU Member States.

There is an additional point to the specific situation of new media, and in particular Internet providers that can alternatively or contextually provide access, content and/or services. This group of operators includes not only audiovisual service providers which are web-based (such as a on-line TV channel), but also operators who provide user-generated audiovisual content (e.g. Youtube), and intermediaries in the distribution of content (such as search engines). As mentioned above, the AVMS Directive does not include in its definition of non-linear audiovisual services the second category, in order not to impose the burdens of registration and administrative costs on actors that operate only as platforms which do not undertake any editorial tasks and activities. However, some authors have criticized this legislative choice, arguing that it results in a regulatory gap because the AVMS Directive does not deal with liability for illegal or harmful content (or provide an exemption from which) in the case of content distributors, nor does it contain any clarification of their obligations with regard to audiovisual content that is not edited by them but to which they provide access. Thus, user-generated content portals can only be regulated by the E-commerce Directive (Directive 2000/31/EC) as “information society service providers”, and consequently, be subject to the different liability regimes in force in the various Members States.⁶⁵

On a different note, it should be noted that the current distinction between transmission⁶⁶ and content regulation with respect to audio-visual services also has difficulties in grasping the third category mentioned above, as search engines and Internet portals that provide access to content edited by third parties do not fall either in the transmission regulation or in the content services provision regulation. Hence, although they can be framed as “gatekeepers” of information and knowledge, they can only be regulated under the e-commerce directive's liability regimes.⁶⁷

⁶³ European Commission, Commission staff working document on media pluralism in the Member States of the European Union, SEC(2007) 32, 16/01/2007.

⁶⁴ See the K.U.Leuven et al., Independent study on indicators for media pluralism in the Member States - Towards a risk-based approach (2009) available at: http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf (last visited on 25/10/2010).

⁶⁵ See P. Valcke, D. Stevens, E. Lievens and E. Werkers, “Audiovisual media services in the EU next generation approach or old wine in new barrels?”, 71 *Communications & strategies* (2008) 103, at p. 113 ff.

⁶⁶ Network operators providing technical transmission services, including conditional access services, are regulated by the Electronic Communications Directives of 2002. See below par. 4, part. fn 108.

⁶⁷ See the recent case involving a search engine decided by the ECJ, joined Cases C-236/08 to C-238/08, *Google France, Google, Inc. v Louis Vuitton Malletier* (C-236/08), *Viaticum SA, Luteciel*

Given the importance of new media in the lives of citizens, and in particular the participatory models of Internet-based services,⁶⁸ the current regulatory framework seems to still lag behind, as it is not yet able to address the legal issues at the core of the new technological environment. The EU should then to start a careful and profound analysis of the possibilities through which such new media could be regulated, so as to implement freedom of expression.

3. The media policy of the Council of Europe

The Council of Europe has a long history of interventions in the field of free and independent media, interpreted as a fundamental basis for the development of a democratic and participatory legal framework for citizens.

The main reference point has been the practical and effective application of the principle of freedom of expression as embedded primarily in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), in Article 10. As a matter of fact freedom of expression has been described by the European Court of Human Rights (ECtHR) as “*one of the basic conditions for the progress of democratic societies and for the development of each individual*”.⁶⁹ However, it is not only the jurisprudence of the ECtHR where freedom of expression has been affirmed has been affirmed; many other texts of the CoE refer to it, clarifying in each case the limits that it should be subject to. In this sense, the CoE clearly endorses the interpretation of freedom of expression as a “relative” right rather than an absolute one, which should always be balanced in the broader system of human rights in any case of conflict or overlap.⁷⁰

The main documents regarding freedom of expression are: the aforementioned ECHR and related jurisprudence; the European Convention on Transfrontier Television (ECTT); the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML). Although all of them contribute to the definition of the boundaries of freedom of expression, for the purpose of this study only the first two will be analysed in depth. Additionally, this study will take into account the recommendations and resolutions taken by different bodies of the CoE, such as the Committee of Ministers, the Venice Commission, the Steering Committee on Media and New Communication Services and the European Ministerial Conferences on Mass Media policy, that also contributed to the debate on the multiple facets of freedom of expression.

The first provision to be analysed is Article 10 of the ECHR that provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not

SARL (C-237/08), Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), 23 March 2010, nyr.

⁶⁸ See more generally Y. Benkler, *The wealth of networks* (2008).

⁶⁹ *Handyside v the United Kingdom*, n. 5493/72, judgment of 7 December 1976, Series A, n. 24 § 49.

⁷⁰ See for instance the common case of conflict between the right to freedom of expression and the right to respect for private life, also included in the ECHR under Art. 8 which has been analysed more recently by *Von Hannover v Germany*, n. 59320/00, decision of September 24 2004, 40 EHRR 1. On this case see E. Barendt, “Balancing freedom of expression and privacy: The jurisprudence of the Strasbourg court”, 1 *Journal of Media Law* (2009) 49.

prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This provision distinguishes three main components of freedom of expression: the right to hold opinions, the right to receive information or ideas, and finally the right to impart information or ideas. It is possible to attach each of the aforementioned rights to the position of speakers and listeners. Although these three dimensions are all protected by the same comprehensive principles they can in practice conflict with each other, such as in the clear case of hate or racist speech.⁷¹ One further dimension that instead is not expressly mentioned in the letter of the Article is the right to seek information, which has become, through the case law of the ECtHR, the basis for the protection of the activity and role of journalists.

From the perspective of media regulation, the aforementioned article does not prevent states from defining licensing schemes. However, the second provision of the article sets limits to the core right, listing a number of grounds on the basis of which the right may legitimately be restricted, provided that the restrictions are prescribed by law⁷² and are necessary in a democratic society. Under the ECtHR case law the latter element implies “a pressing social need”, which is evaluated by each state with some discretion (the so-called “margin of appreciation”). The ECtHR justifies this approach by linking the permissibility of restrictions to freedom of expression with the existence of duties and responsibilities which govern its exercise.⁷³ Moreover, the latter must be used only when strictly necessary and should always be interpreted narrowly. In other words, the right to freedom of expression is always the norm and any restrictions of it the exception.

It should be noted that the right to freedom of expression may also be limited on the basis of Article 17, ECHR, which can be regarded as a safety mechanism, designed to prevent the ECHR from being misused or abused. In particular, the ECtHR applied it in order to limit the expansion of the protection offered by Article 10 to racist, xenophobic or anti-Semitic speech; statements denying, disputing, minimising or condoning the Holocaust, or (neo-)Nazi ideas.⁷⁴

Regarding the relationship between freedom of expression and the democracy enhancing role of the media, it should be emphasized that the ECtHR case-law has continually referred to the so-called “argument for democracy” as a basis for its

⁷¹ A speaker’s right to utter racially abusive remarks, for example, would be pitted against a listener’s right to be protected from racism. All this would have to be weighed up against third parties’ right or interest not to allow racist utterances in public.

⁷² According to the Court, the requirement is not only of a legislative provision that should be complied with, rather the law applicable could also be for instance a ministerial ordinance, however it must be sufficiently precise in order to enable the applicant to regulate its conduct. See the case *Gawęda v Poland*, n. 26229/95, judgment of March 14 2002, Reports 2002-II.

⁷³ See M. Janis, R. Kay, A. Bradley, *European human rights law: text and materials*, 3rd ed. (2008), at p. 292 and ff.

⁷⁴ *Norwood v the United Kingdom*, n. 23131/03, judgment of November 16 2004, Reports 2004-IX.

reasoning.⁷⁵ In particular, the Court has stressed on many occasions the role of the media as a source of information and as a venue for the presentation of different political positions, with the ability in both cases of enhancing and supporting citizens in defining their own opinions. These two roles are the ECtHR's main focus for these activities. Concerning the former, i.e. as a source of information, the main point of reference is that the radio and television “*are media of considerable power and influence. Their impact is more immediate than the other print media*”.⁷⁶ Concerning the latter, i.e. the provision of a forum for public debate, this was traditionally applicable to the press, but it is yet to be found in the new media technologies that contributed to an active participation of citizens.⁷⁷

From a different perspective, the ECtHR has attributed the function of “public watchdog” to the media, implying their monitoring role over governments and the importance of the publication of any wrongdoing.⁷⁸ In particular, the Court has repeatedly presented the press as an “agent of the people”,⁷⁹ with the ability to enhance the public's “right to know”.

Given the relevant importance of this role of public watchdog, journalists have been provided with a privileged protection by the ECtHR. The Court has given legal recognition and protection to specific journalistic practices and realities: the freedom to report and comment on matters of public interest; presentational and editorial freedom (including recourse to exaggeration); protection of sources of information; and intellectual property rights. However, this has not been thought of as a form of disparity of treatment between two classes of speaker, i.e. journalists and those who are not journalists.⁸⁰ The differentiation is instead based on a taxonomic approach to free speech,⁸¹ where speech value depends on the type of content it carries. Indeed, the Court has never distinguished the subject expressing her own opinions or ideas, but rather distinguishes three types of content that hierarchically are classified in the following way: political speech, artistic expression, and commercial speech.⁸²

⁷⁵ T. McGonagle, “Free expression and respect for others” in Y. Lange (ed.), *Living together: a handbook on Council of Europe standards on media's contribution to social cohesion, intercultural dialogue, understanding, tolerance and democratic participation*, (2009) 5, at p. 11.

⁷⁶ *Purcell and others v Ireland*, n. 15404/89, decision of April 16 1991, DR70, 262.

⁷⁷ See *Castells v Spain*, n. 11798/85, judgment of April 23 1992, Series A, n. 236, where the Court clarified that, “the preeminent role of the press in a State governed by the rule of law must not be forgotten [...] freedom of the press affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of their political leaders. In particular, it gives the politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society” (ib. § 43).

⁷⁸ *Goodwin v the United Kingdom*, n. 28957/95, judgment of March 27 1996, Reports 1997-II, where the ECtHR stated that the “*vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected*” if the press could not protect their confidential sources. See in a different framework, *Jersild v Denmark*, n. 15890/89, judgment of September 23 1994, Series A n. 298 and more recently *Tonsberg Blad as a Haukom v Norway*, n. 510/04, judgment of March 1 2007, 46 EHRR 30.

⁷⁹ See D. Carney, “Theoretical underpinnings of the protection of journalists' confidential sources: Why an absolute privilege cannot be justified”, 1 *Journal of Media Law* (2009) 117.

⁸⁰ See P. Wragg, “Free speech is not valued if only valued speech is free: Connolly, constituency and some article 10 concerns”, 15 *European Public Law* (2009) 111.

⁸¹ T. Martino, “In conversation with professor Eric Barendt: hatred, ridicule, contempt and plain bigotry”, 18 *Entertainment Law Review* (2007) 48, at p. 51, cited in Wragg, “Free speech is not valued if only valued speech is free”, p. 118.

⁸² For the supremacy of political speech, see *Lingens v Austria*, n. 9815/82, judgment of July 8 1986, Series A n. 103.

Although useful, rough categorisation has been criticised as difficult to apply in those cases where the boundaries between the different categories is blurred, in particular where the Court has faced the hybrid nature of many types of expression. The consequence of such a difficult inclusion of speech into the “right” category could then result in a different decision based on a higher or lower level of protection accorded.⁸³

As already mentioned, the ECtHR has affirmed that speech involving political issues and also political figures⁸⁴ serves a central role in the functioning of democratic societies. Therefore, arguments that a restriction of such discussion is necessary in such a society will be harder to maintain.⁸⁵ However, the Court did not distinguish the case of protection accorded to civil servants and politicians, in particular when they are under attack through insult and injury, underlining the fact that in both cases they “*must enjoy public confidence in conditions free of undue perturbation if they were to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty*”⁸⁶.

Regarding the media, and broadcasting in particular, the jurisprudence of the ECtHR is quite developed. As already mentioned, Article 10(2) provides the possibility for States to regulate broadcasting through licensing schemes; however, any regulatory framework would still have to satisfy the other requirement of the same proviso, namely that the restrictions should be prescribed by law and be necessary in a democratic society.⁸⁷

The main precedent on this issue concerned Austrian legislation on the national public monopoly on broadcasting.⁸⁸ The Court held that such monopoly was not necessary to guarantee impartiality, balance and diversity in broadcasting, and also compared the Austrian approach to the regulatory choices made by other European countries on the same issue. In particular, the Court emphasised that other countries achieved the aforementioned objectives by enhancing competition in the broadcasting licensing market, instead of restricting it. It is important to note that in this case the Court combined the analysis of the technical conditions for broadcasting with concentration problems, interpreting both elements in the light of pluralism. The Court acknowledged the common problem of scarcity of frequencies and channels available in the national broadcasting markets, a condition that is shared by all countries in Europe, however, ruled that such technical condition cannot only be solved through a restrictive solution that limits the access of any competitor to the market. At the same time, “*fears that the Austrian market was too small to sustain a*

⁸³ See *Thorgeir Thorgeirsson v Iceland*, n. 13778/88, judgment of June 25 1992, Series A n. 239.

⁸⁴ See *Feldek v Slovakia*, n. 29032/95, judgment of July 12 2001, Reports 2001-VIII.

⁸⁵ See *Bowman v the United Kingdom*, n. 24839/94, judgment of February 19 1998, Reports 1998-I; more recently *Brasilier v France*, n. 71343/01, judgment of April 11 2006.

⁸⁶ See *Janowski v Poland*, n. 25716/94, judgment of January 21 1999, Reports 1999-I, § 33.

⁸⁷ See Janis, Kay, and Bradley, *European Human Rights Law: text and materials*, p. 303. Note that the ECtHR followed the ECJ's position concerning public monopoly in broadcasting, showing reluctance to declare that they were incompatible with Article 10 ECHR in the 1960s and 1970s, with the change in decisions following technological developments and the changed attitude regarding network industries also at the national level, such as in the cases of France, Germany, Spain and Italy. Only in 1995 did the ECtHR find that the creation of public monopolies was infringing Article 10 ECHR. See P. Ibanez Colomo, *European Communication Law and Technological Convergence – Deregulation, Re-regulation and Regulatory Convergence in Television and Telecommunications*, PhD Thesis (2010) at p. 47.

⁸⁸ *Informationsverein Lentia and others v Austria*, Judgment of November 24 1993, Series A n. 276.

sufficient number of private stations for concentration and 'private monopolies' to be avoided were groundless, being contradicted by the experience of several European countries, comparable to size to Austria”.⁸⁹

Although the letter of the Article 10 ECHR does only refer to licensing schemes, the ECtHR did not limit its scope and addressed the issue of content regulation for broadcasting channels. The case concerned the refusal of national authorities to grant a licence to a television channel,⁹⁰ justifying the decision on the fact that the channel was exclusively devoted to automobiles matters. The Court accepted the reasoning of the Swiss government that required, in order to grant the broadcasting license, the broadcaster to contribute to the development of a pluralistic culture, showing that the restrictions on freedom of expression on the grounds of pluralism could also be justified by the application of Article 10. This is in line with the previous case law that views the state as the “ultimate guarantor” of pluralism in the media sector.⁹¹

The principle of media pluralism is also acknowledged in other texts adopted within the framework of the CoE activity, also dating back to the 1982 Declaration on the freedom of expression and information. More recently, mention should be made of the ECTT, where pluralism is expressly cited in Article 10 bis showing the relevance of this issue, though the wording of the provision still remains vague. Another important text that became a milestone on this issue is *Recommendation R (99) 1 on measures to promote media pluralism*,⁹² which was recently amended and enlarged in its approach by *Recommendation (2007) 2 on media pluralism and diversity of media content* and the *Declaration on protecting the role of the media in democracy in the context of media concentration*. Recommendation (2007) 2 takes into account the development of technology and its effects on structural pluralism and content diversity. In particular it stresses the fact that pluralism of information and diversity of media will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, states should ensure that “*a sufficient variety of media outlets provided by a range of different owners, both private and public, is available to the public*”. This should be provided through specific regulation that takes also into account the current trends of media integration and ownership concentration, increased by digitalisation and convergence. Thus, in terms of structural regulation, the CoE encourages the state to limit “*the influence which a single person, company or group*” has on the media, “*introducing thresholds based on objective and realistic criteria*” in order to make space for “*other media*” as well, “*for example community, local, minority or social media*”. While, in terms of content regulation, the Recommendation goes on, suggesting that states should “*adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media*”.⁹³

The focus on structural regulation and in particular on media concentration is not a new item in the agenda of the CoE. The patchwork regulatory framework at European level concerning ownership rules, and the difficulties in reaching political

⁸⁹ Ibid., §42.

⁹⁰ *Demuth v Switzerland*, n. 38743/97, judgment of November 5 2002, Reports 2002/IX.

⁹¹ McGonagle, “Free expression and respect for others”, p. 15.

⁹² Note that this text provided for the first time the definition of “media pluralism”.

⁹³ See the Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content at point II.1, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1089699> (last visited on 25/10/2010).

agreement on binding measures on this issue⁹⁴ opened the floor for a leading role for the CoE in proposing non-binding standards with the objective of enhancing media pluralism. For instance, the Declaration of the Committee of Ministers on protecting the role of the media in democracy in the context of media concentration⁹⁵ lists a set of conditions aimed at avoiding the risk of misuse of the media's power in a situation of strong concentration of the media and new communication services. Although these indications are very general and theoretical, they touch upon the main ways of improving the democratic process and transparency in the media sector, mentioning in particular the need for “*separation between the exercise of control of media and decision making as regards media content and the exercise of political authority or influence*” and the usefulness of “*regulatory and/or co-regulatory mechanisms for monitoring media markets and media concentration which could permit competent authorities to identify suitable preventive or remedial action*”.⁹⁶

The CoE's activity is not only focused on media pluralism, since media pluralism has interpreted it as a component of the wider needs for media governance⁹⁷ that can provide the basic condition for a democratic society. Indeed, the CoE's interventions have also emphasised the need for the participation of citizens in political and social debate. In this regard, Recommendation (2007) 11 on promoting freedom of expression and information in the new information and communications environment views access to the Internet as instrumental for accessing information and therefore also as “*participation in public life and democratic processes*”. This Recommendation encourages states to increase the provision of online services to citizens in order to streamline and reduce the administrative burdens for participation, in the pursuit of e-democracy.⁹⁸ However, the Recommendation does not evade the fact that effective participation in democratic societies requires facing the problem of digital divide, overcoming the still-existing disparity of access to ICTs for a large part of society.⁹⁹

From a different perspective, the CoE considers the media as a forum through which citizens not only gather information but also participate directly in reaction to the information diffused. This is clearly embedded in the right of reply mechanism that can safeguard fairness, balance, impartiality, accuracy and reputational interests. It allows those affected by particular media coverage or statements to respond to claims made, to challenge biases or to correct inaccuracies. The Recommendation (2004) 16 on the right of reply in the new media environment in particular underlines the role of the right of reply in a broader perspective, adding to the corrective function

⁹⁴ See the failure of the directive on Concentration and Pluralism in the Internal Market, above par. 2.

⁹⁵ Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1089615&BackColorInternet=9999CC&BackColorIntranet=FFB55&BackColorLogged=FFAC75> (last visited on 25/10/2010).

⁹⁶ See also the activity of the Parliamentary Assembly of the Council of Europe, and of the so called Venice Commission that have supported the standard setting measures also through resolutions in respect of specific countries.

⁹⁷ M. Puppis, “Media governance: A new concept for the analysis of media policy and regulation”, 3 Communication, Culture & Critique (2010) 134.

⁹⁸ See in particular point IV of the Recommendation, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1188541> (last visited on 25/10/2010).

⁹⁹ See also the previous Recommendation No. (99) 14 on universal community service concerning new communication and information services; Recommendation Rec (2003) 9 on measures to promote the democratic and social contribution of digital broadcasting; Declaration on human rights and the rule of law in the information society (2005).

“the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information”. However, the first binding document that clearly refers to the right of reply is the ECTT, in Article 8, though it relates only to broadcasting.¹⁰⁰

The importance of political debate in a democratic society is also taken into account in the context of the right of reply. One of the principles set forth in Recommendation (2007) 15 on measures concerning media coverage of election campaigns states: “Given the short duration of an election campaign, any candidate or political party which is entitled to a right of reply or equivalent remedies under national law or systems should be able to exercise this right or equivalent remedies during the campaign period without undue delay”.

Increasingly, reactions to media output are enabled by online discussion – in which readers, viewers and users can comment – often hosted and moderated by the media themselves. The levels of moderation of such *fora* tend to vary in practice. Similarly, the growing online presence of the media in general has facilitated the practice of sending feedback to the media. The familiar convention of sending “letters to the editor” can now be achieved with the click of a button.

Moreover, it should be noted that the right of reply – and other mechanisms for the promotion of public participation in the media – do not depend exclusively on regulatory measures by state authorities. Relevant Council of Europe standards recognise the usefulness of, and consistently invite consideration of, the desirability of promoting self- or co-regulatory measures in order to achieve these goals.¹⁰¹ This amounts to an important acknowledgement of the value of sector-specific input into regulatory and policy processes and even their ability in some circumstances to preempt traditional, state-dominated regulation. Initiatives and practices nurtured from within the media sector are often those which enjoy the greatest chance of uptake and effective implementation. In such instances, standards can reflect valuable sector-specific expertise and a sense of (part) authorship can bring a feeling of ownership too, thus strengthening commitment to the standards and their application.

A final point should highlight the parallel interests of the CoE and the EU on the definition of the criteria through which press freedom and freedom of expression can be evaluated. As a matter of fact, the *Resolution 1636 (2008) on indicators for media in a democracy*,¹⁰² widens the scope of the similar action taken by the EU with regard to media pluralism indicators,¹⁰³ demanding a number of provisions that Member States should apply in order to allow journalists to work freely and to give all political parties access to the media. The text lists a set of basic principles stemming from the well-established activity of the CoE, in order to provide a template for the level of media freedom enjoyed at the national level.

¹⁰⁰ The recommendation applies to all “means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.”

¹⁰¹ See for instance Venice Commission, *Report on self-regulation within the media in the handling of complaints*, CDL(2008)039, available at: <http://www.venice.coe.int/docs/2008/CDL%282008%29039-e.asp> (last visited on 25/10/2010).

¹⁰² Available at: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta08/ERES1636.htm> (last visited on 25/10/2010).

¹⁰³ See above par. 2, part. fn 60.

4. European media policy-making and its effects on state media policies

When looking at the systems of media regulation of Member States, it is virtually impossible to distinguish clearly between what comes from the traditional national media regulation and what is the outcome of the legal and policy-making processes defined at EU level.¹⁰⁴ Until the 1980s, each Member State developed specific regulatory regimes which although substantively different, nonetheless shared similar basic elements, such as the dual system of public and private service providers in the broadcasting sector. The role of the public service broadcasting was recognised as crucial in each Member State (and still is), as it is the bearer and the guardian of public interest values, which include contribution to the quality of public discourse, the promotion of societal integration as well as national culture and an emphasis on news and education.¹⁰⁵ The functioning of this dual system, however, differs from country to country, as it can be regulated differently in terms of the role of political powers within the PBS, the rules governing the funding of the PBS, the ownership limits applicable to the commercial broadcasters, the level of caps on advertising and the rules on media content.¹⁰⁶ The press market, instead, is less heavily regulated, leaving more space to self-regulatory measures adopted directly by market actors and by journalist associations. The applicable statutory rules in this sector focus mainly on ownership structures with special attention to limitation of shares holding, multiple ownership and cross-media ownership.¹⁰⁷ Content laws for the press are less diffused, while state subsidisation of newspapers, and in particular party political ones, is still an existing practice.

Since the 1980s, a trend towards the convergence of Member State media policies can be acknowledged initially based on the implementation in national systems of the TWF Directive. This Directive represented a milestone in EU audiovisual policy, not only because it was the first legislative intervention in the field, but also because it prompted a significant revision of domestic media laws and regulations that were in conflict with the letter of the directive. The ECJ, on its part, ensured the liberalisation process prescribed by the Directive, imposing changes to national regulations, not only in relation to the formal wither transposition of the Directive's provisions, but also by eroding "*national media legislation by overriding even minimum provisions enacted in the TWF Directive to safeguard the public interest*".¹⁰⁸

¹⁰⁴ See M. Moran and T. Prosser, *Privatization and regulatory change in Europe* (1994), at p. 148.

¹⁰⁵ See Harcourt, *The European Union and the regulation of media market*, p. 158.

¹⁰⁶ There are several studies which have analyzed national media systems and their development over the decades, without the intention of being an exhaustive list, see P. Humphreys, *Mass media policy in Western Europe* (1996); I. Nitsche, *Broadcasting in the European Union: the role of public interest in competition analysis* (2001); D.C. Hallin and P. Mancini, *Comparing media systems: three models of media and politics* (2004); Y. Katz, *Media Policy for the 21st century in the United States and Western Europe* (2004); M. Kelly, G. Mazzoleni, D. McQuail (eds), *The media in Europe* (2004); W. Meier, J. Trappel (eds), *Power, performance and politics: media policy in Europe* (2007); J. Harrison, L. Woods, *European broadcasting law and policy* (2007); A. Charles, *Media in the enlarged Europe: politics, policy and industry* (2009); B. Klimkiewicz (ed.), *Media freedom and pluralism: media policy challenges in the enlarged Europe* (2010).

¹⁰⁷ See R. Van der Wurff and E. Lauf (eds), *Print and online newspapers in Europe – A comparison analysis in sixteen countries* (2005).

¹⁰⁸ Harcourt, *The European Union and the regulation of media market*, p. 200. For a more detailed analysis of the case-law, see Harcourt, *The European Union and the regulation of media market*, p. 22 and ff.

This “top-down” mechanism had also an indirect effect: the European Commission acted as a policy entrepreneur, by influencing national policy change through the recommendation of best practices, models and solutions through a “soft law” approach, which included the publication of Commission reports, green papers, etc. These suggestions were evidently formulated at the European level, but they affected policy formation at the national level. In this way, the Commission can be seen to have steered the course of debate over deregulation at the national level.¹⁰⁹

However, this should not be seen as a one-way process, since national governments also disseminated their own policy recommendations, using the EU as a platform for rule transfer. For instance, France and Italy lobbied for an EU content requirement to protect domestic production,¹¹⁰ while the UK lobbied for changes to the TWF Directive to encompass its non-domestic satellite policy, excluding the applicability of content rules to such broadcasters.

The objective of EU regulation was the deregulation of broadcasting and the creation of a single audiovisual market through the legalisation of cross-border broadcasting. However, the advent of digital technology and the intertwined effect of convergence between broadcasting and telecommunication invalidated the traditional argument regarding radio-spectrum scarcity which was used to justify regulatory interventions, including the pursuit of public interest goals, in particular media pluralism. Indeed digital compression of data, visual images and sound allows broadband cables to carry much more capacity than previously possible, thus increasing the possibility for new actors to provide broadcasting services through digital systems. This paved the way since the 1990s for the entry of new competitors on the market, to the creation of strategic alliances, and the undertaking of acquisitions and corporate media mergers. The liberalisation that started with the TWF Directive was then developed further addressing also areas such as internet, e-commerce and mobile phones.¹¹¹

However, the failure of the Commission to achieve sufficient political compromise to enact the directive on media concentration demonstrates the difficulties that the European institutions faced (and still face) in overriding the

¹⁰⁹ However, see P. Humphreys, “The EU audio-visual policy, cultural diversity and the future of public service broadcasting”, in J. Harrison, and B. Wessels, *Mediating Europe – new media, mass communications and the European public sphere* (2009) 183, at p. 186 where the Author argued that “EU ‘negative integration’ is easier to achieve because the Commission and the European Court of Justice can rule unilaterally on competition related matters, whereas the harmonization of market correcting rules - ‘positive integration’ - is rendered more difficult to achieve because of the need for agreement in the Council of Ministers and Parliament”.

¹¹⁰ Note that Article 4 and 5 of the TWFD should be read as a semi victory for the French lobby which insisted on including provisions capable of reducing the cultural and economic impact of US audiovisual imports. Through these measures, the French partially succeeded in transferring their own protectionist cultural policy model to the other Member States.

¹¹¹ See the Telecommunications Package of 2002 which included Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services; Directive 2002/20/EC on the authorisation of electronic communications networks and services; Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services; Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector.

resistance of influential Member States, based on the argument that competence for media policy rests with national governments.¹¹²

In the 2000s, the European policy framework changed to encompass goals relating to the social cohesion and European citizenship, and this renewed concern towards public interest values can be explained by four different reasons which are mainly related to the existing historical and existing economic conditions in Europe:

the emergence of a liberated media sector within Central and Eastern European states following the end of the Soviet era has generated a public debate about pluralism and media independence which was less evident in Western Europe;

new technologies enhanced convergence among previously differentiated market sectors triggering the consolidation of existing industry players through vertical integration, facilitated by the emergence of gate-keeping technologies. The opportunities created by these developments in purely economic terms, however, are counter-balanced by the risks of potential abuse of editorial power by media owners and controllers;

the liberalisation of the broadcasting sector allowed for the emergence of private media entities with the capability of rivalling public sector broadcasters, thus reviving concerns about the influential nature of the media;

globalisation reopened the debate about the impact of foreign ownership and the prevalence of foreign content on domestic regulation and culture.¹¹³

Turning to the Council of Europe's influence on national media policies in Europe, it is clear that its main legal tool is the ECtHR jurisprudence concerning Article 10 ECHR. In effect, Article 10 ECHR makes respect for the human right to freedom of opinion binding on all Member States of the Council of Europe. Since the entry into force of Protocol No. 11 to the Convention any citizen of a signatory State is entitled, after exhausting domestic remedies, to lodge a complaint alleging a violation of these human rights with the Court. This has enabled the ECtHR to develop a rich jurisprudence on allegations about breach of Article 10 ECHR. Within the European Union, the rights guaranteed by the Convention, and therefore also by Article 10, qualify as general principles of European law, as expressly acknowledged in Article 6.2 of the Treaty on the European Union.

The judgements of the ECtHR clearly shows that freedom of the media is not only interpreted as part of the individual right to freedom of expression enshrined in Article 10(1) ECHR, but also as a means of promoting freedom of information applied by the Strasbourg Court in connection to Article 10(2). This has permitted the Court to take into account the social/cultural and political/democratic facets of the media and to introduce these into its decisions. For instance, the Court has stressed in the judgement concerning the Austrian broadcasting monopoly that the preservation

¹¹² Humphreys, "The EU audio-visual policy, cultural diversity and the future of public service broadcasting", p. 197. The Author argued that this lack of intervention paved the way for a deregulatory process starting with the deregulation of anti-concentration rules in UK and Germany in 1996, where governments supported the argument that this process was a positive reaction to enhance international competitiveness of national media industries.

¹¹³ See I. Walden, "Who owns the media? Plurality, ownership, competition and access", in D. Goldberg, G. Sutter, and I. Walden, *Media law and practice* (2009) 19, at p. 22.

of a plural, culturally diverse broadcasting provision was an aim that could justify restrictions on broadcasters' freedoms. Nonetheless, such pluralism could be achieved by other means than a public service broadcasting monopoly, for example, through a dual broadcasting system, as shown by the regulatory choices of other European countries.¹¹⁴

At the same time the resolutions and recommendations addressing media issues have provided European States with a useful toolbox, which in particular includes benchmarking and best practice reports able to steer indirectly the political choices on national governments.¹¹⁵ In many cases, although these “soft law” instruments impose no legally binding obligation, the CoE has often evaluated the implementation of its recommendations for the purpose of evaluating its own influence and reminding the states to take the analysed issues into account.¹¹⁶

5. Conclusion

The analysis developed in this contribution shows, in the end, that both the EU and the CoE have influenced deeply the choices of national governments in their media policies. However, it should be noted that while the CoE provides a wider interpretation of the concept of media freedom, focusing on the full interpretation of the freedom of expression, which is enshrined in the ECHR. Instead, the work of the EU can be evaluated as more limited in scope and also much less effective: on the one hand it only addressed the issue of freedom of expression through the lens of media pluralism; on the other, not only the limited competences of the EU to act and the legal basis upon which grounding the legitimacy of legislation, but also the difficulties in achieving sufficient political compromise with most powerful member States, proved the failure of many attempts to develop a full-fledged media policy.

The comprehensive approach taken by the CoE, and in particular the important role performed by the Steering Committee on the Mass Media, provides a useful framework for the evaluation of the policy choices taken by single countries with regards to the enhancement of free and democratic media systems. The recent Recommendation on indicators of media freedom could then be interpreted as a summary of the historical and conceptual development of the principles underlying media freedom, capable of being used in practice to evaluate and eventually improve

¹¹⁴ See *Informationsverein Lentia and others v Austria*.

¹¹⁵ See for instance the Report “Public service media in the information society”, February 2006, H/Inf(2006) 3, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282006%29003_en.pdf (last visited on 25/10/2010); Report “Methodology for monitoring media concentration and media content diversity”, November 2008, H-Inf(2009)9, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%299_en.pdf (last visited on 25/10/2010); Report “Strategies of public service media as regards promoting a wider democratic participation of individuals”, November 2008, H/Inf(2009)6, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%296_en.pdf (last visited on 25/10/2010).

¹¹⁶ Among the most recent reports see the Report “Contribution of public service media in promoting social cohesion and integrating all communities and generations”, November 2008, H/Inf(2009)5, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%295_en.pdf (last visited on 25/10/2010); Report “How member states ensure the legal, financial, technical and other appropriate conditions required to enable public service media to discharge their remit”, November 2008, H/Inf(2009)7, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf%282009%297_en.pdf (last visited on 25/10/2010).

existing national media policies. However, until now the reactions of national governments have not been seen.

However, it should be emphasised that the CoE had the possibility of intervening directly in national policies only on a case-by-case basis, through the claims presented by individuals and organisations at the Strasbourg Court. On the contrary, the EU has a more effective role since, within the ambit of its competence the supremacy of European law is acknowledged by the Members States, through the means of either positive integration or negative integration.

The need to develop a comprehensive approach to media policy at the European level supportive of media freedom and independence comes from a twofold reasoning: on the one hand, the cross-national dimension of audio-visual media services and the consequent development of the related trans-border markets increasingly render national policies and regulatory strategies less apt to deliver meaningful results, and also, if left alone, less incisive and successful in securing highly sensitive and fundamental objectives, other than mere economic objectives. On the other hand, an European intervention could prevent national policies and regulatory solutions, especially if predominantly in the hands of national governments and politics alone, be dangerously influenced by political pressures and then shaped according to contingent and distorted interests.

The methods through which this objective could be achieved could benefit from the comparative analysis of national policies in terms of enhancement of free and democratic media, in order to define the best regulatory strategies which could, not only fit in the existing national regulatory framework, but also improve its potential weaknesses.

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