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Comparative report

The regulatory quest for free and independent media

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Project profile

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

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Executive Summary

1. This report compares the media policies currently in place in the fourteen countries covered by the MEDIADEM project,[1] with a view to identifying common patterns, best practices and emerging problems, as well as developing a new conceptual framework for future policy actions. It adopts an integrated notion of media including digital media. The report covers different levels of regulation (national and European regulatory processes, including both the European Union and the Council of Europe); and various forms of regulation, including both public and private regulation, hybrids thereof, and multiple institutional and governance arrangements.

2. In more detail, this comparative report compares the MEDIADEM countries by analysing the following issues:

- *The role of freedom of expression as a framing principle for regulation* in the media sector, as guidance for selecting regulatory strategies and as a pillar of the more complex architecture of fundamental rights affected by media activity.
- *Structural media regulation*, ranging from ownership regulation to the role of competition policy in the promotion and protection of pluralism in the media sector.
- *Content regulation*, across media from the press, to broadcast media, to digital media and copyright protection of content and news.
- *The regulation of media professionals*, including journalists' freedom of expression and various self-regulatory bodies that regulate journalists' activity.
- *Regulatory instruments and institutions in the media sector*, covering national public bodies such as independent authorities and government bodies, European coordination and regulatory institutions, national courts and private regulatory bodies.

3. Section A below summarises the main findings for each of the above-mentioned matters. Section B then illustrates some implications that can be derived from the findings of the comparative analysis for a new architecture of European media regulation.

A. Main findings

Freedom of expression

4. In most European countries, as well as at the EU level, freedom of expression is 'the cornerstone of the democratic order', as democratic debate presupposes an effective confrontation of ideas. It is defined in art. 10 ECHR as encompassing the freedom to seek, impart and receive information. This definition is in conformity with

[1] Countries covered are: Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the UK.

art. 11 of the Charter of Fundamental Rights of the European Union and the nations' common constitutional traditions.

5. Constitutional principles contribute to defining the media regulatory space and to allocating the regulatory functions between different instruments, e.g. competition and regulation, and between actors, e.g. courts and regulators, and public and private regulators. Their influence is more restrictive at the national level even if informed by different constitutional approaches and interpretations and by the Council of Europe. The role of constitutional principles as drivers of regulation has received less attention so far at the EU level where media regulation has been primarily seen as an internal market issue, mostly connected with the concept of media pluralism. The comparative analysis shows that constitutional principles can provide a more homogeneous legal framework within each type of medium regulation and across media, leading towards a more integrated approach despite the different interpretations given by national legal systems.

6. Freedom of expression, defined on the basis of art. 10 ECHR, art. 11 of the Charter of Fundamental Rights of the European Union and the constitutional traditions, has both an active and a passive dimension. The active "right to inform", usually derived by the interpretation of the constitutional Courts, is a typical but not exclusive activity of 'professional' journalists, and may lead to exempting them from liability for slander or defamation, whilst at the same time granting them the right of access to sources. It has also been interpreted as a shield from political and financial interference. The passive perspective of freedom of expression, "the right to be informed" has served as the basis for deriving obligations recognised by courts, for those who exercise the activity and for those who own the means of information (from journalists associations to media enterprises). The right/freedom to information, in connection with the right to be informed, performs a recognised social function, which extends also to media other than the press: with the consequence for example that broadcasting is considered, commonly, as a general public service.

7. Although it may be framed in different ways, freedom of expression is legally protected in all the MEDIADEM countries and is the most important pillar of media policy at national and EU level. Except for the UK where the reference point is to be found directly in art. 10 ECHR, in all other cases, national constitutions include this freedom as part of the general ones associated with citizens' rights. This model does not provide for a distinction between freedom of expression and freedom of the press, leaving only a few countries (Belgium, Bulgaria, Greece, Slovakia) adopting a clear distinction between the two within their constitutions. However, distinctions do emerge through those cases where additional legislation supports the constitutional principle addressing freedom of the press or freedom of the media (e.g. Croatia and Finland) or refers to freedom of the media within the context of specific sectoral legislation (e.g. Estonia). Distinctions may also arise from case law in which it is mainly for courts to interpret the substantive and procedural feature of the constitutional principle (e.g. Italy and Germany). The principle of freedom of expression has been extended primarily via case law to digital media with both regulatory and jurisdictional consequences.

8. National constitutions of countries within the MEDIADEM project establish some limits to freedom of expression similarly to art. 10 ECHR, the EU Charter of Fundamental Rights and the decisions of the Strasbourg Court. These recognise the need to balance this principle with potentially conflicting rights. In most cases, countries have an *ad hoc* limitation clause following the model of the ECHR, introducing specific exemptions that identify the cases in which freedom of expression can be limited by media regulation. Whereas some others include a general limitation clause applicable to all fundamental rights, following the model of the EU Charter of Fundamental Rights (e.g. Denmark, Belgium and Croatia). In the first case, some countries have adopted provisions that may hamper freedom of expression depending on the interpretations provided by courts, such as "national security," "territorial integrity," "public safety," "prevention of disorder or crime" (e.g. Turkey and Slovakia).

9. Within the MEDIADEM countries, the interpretation and enforcement of freedom of expression strongly relies on national courts and increasingly on independent regulators. There are only a few cases where a potential overlap was acknowledged between the two (Greece); or between courts and private regulators (Denmark, Slovakia, and the UK). In general, courts seem to provide stronger protection for freedom of expression when it is balanced with privacy and dignity and the reputation of others. Although the degree of judicial protection is for the most part homogeneous across media, a few countries adopt a differentiated standard in the application of defamation rules depending on the type of media through which the message is published (not only between press and broadcast, e.g. Belgium and Slovakia, but also among newspapers, television, and blogs, e.g. Greece and Italy). The application of these standards to digital media and professionals working in the field is still quite diverse compared to the conventional media where there is more homogeneity. Among its other functions freedom of expression, interpreted by courts, is a driver of regulatory convergence across media compared to the important divergences emerging among national regulators.

10. Unlike the judicial perspective described above, regulatory approaches still differ across media within and between countries. Both the national and the European regulatory interventions are fragmented, predominantly inspired by national legal and political traditions. Divergences exist both horizontally among EU and between EU and non EU members of the Council of Europe. Within the EU the regulatory framework is organised around different conceptual pillars from the national ones, as it is the case for audio-visual media services. Another EU driven distinction is related to the linear versus non-linear services. But differences emerge among Member States even in areas where minimum harmonisation via EU legislation has been adopted. Both institutional and substantive legal frameworks still reflect local markets and regulatory cultures despite the pressure coming from the online media world to adopt more harmonised rules. The report highlights these differences and tries to discern those that reflect cultural diversity, which need to be maintained, and those that derive from local interest groups that have to be eliminated. Furthermore the report suggests that a strong influence is played by EU legislation on non EU members of the Council of Europe. Thence, we observe mutual influence of the two legal frameworks. On the one hand the ECHR and the ECtHR have strengthened the

constitutional dimensions of EU media regulation, on the other hand, the EU regulatory approach has influenced non EU members leading to greater minimum regulatory uniformity.

A multilevel system

11. The European regulatory media system reflects a multilevel structure where competences are divided between the EU and the Member States. The regulatory landscape is further complicated by the important role played by the Council of Europe whose membership is far greater and accommodates different approaches to media freedom and independence. The legal basis of the two regulatory pillars differ: the EU legal basis has so far been primarily freedom of services, while the Council of Europe is based on freedom of expression. This difference reflects a tension which affects pace and modes of regulatory convergence and the role of technology as a driver for the creation of a single media internal market

12. Even after the Lisbon Treaty, these distinctions are likely to stay and the regulatory framework will mirror the difference between a fundamental right and an internal market approach. Such tension is not necessarily a limiting factor if the outcomes of the two regulatory perspectives can be functionally complemented. From the analysis of ECtHR case-law about the limitations regulated by the second paragraph of art. 10 ECHR emerges the significant role of pluralism in the building of a democratic society; the Court's approach defines pluralism as an objective that should lead the different states in their adoption of media policies. In other words, pluralism is an aim that can be legitimately realised even through restrictions of the freedom of expression of certain operators, as long as they are proportionate. The Court, indeed, does not hesitate to declare in conformity with the Convention national measures introducing limitations for broadcasters participating in the activity of information, as long as they are intended to ensure the right of the public to a pluralistic media system.

13. The multilevel regulatory system encompasses various institutions at the European level, divided between the EU and the Council of Europe and at the national level. This structure is complemented by a plethora of private regulators organised around territories and functions across European countries. It reflects a complex and somewhat outdated allocation of competences, lagging behind economic and technological developments. The report clearly shows the need for a governance reform that should improve vertical and horizontal coordination in rule making and even more importantly in enforcement.

Protecting pluralism through competition policy

14. As mentioned above, freedom of expression of the media has been considered in connection with pluralism. The promotion of pluralism has been based on the assumption that exposing citizens to a variety of topics/opinions maintains and strengthens the democratic processes. One important way to promote pluralism and, consequently, freedom of expression is to rely on competition policy, with the aim of preserving so-called *external pluralism* or "ownership diversity" (the preservation of

a number of competing media outlets) and to a lesser extent *internal pluralism* or "content diversity" (when a single supplier is tasked with ensuring content diversity so as to ensure that the value of pluralism is achieved). This is very important, especially since media markets in Europe show an increasing trend towards integration among the most dynamic segments of media, thus leading to opportunities for consolidation and concentration of ownership. The report shows that often the most important effects of competition are indirect, triggering regulatory bargaining between different players along the production chain.

15. Many MEDIADEM countries have developed *ad hoc*, stricter merger control rules, specifically designed to safeguard pluralism in the media sector, with only a few countries using only general competition law (Denmark, Finland and Slovakia).

16. Although the systems for addressing the issue of media concentration and the protection of pluralism are different and strongly depend on media landscapes and political cultures, some features are common to more countries. On a more general level, the division of competences between national and regional level characterise Germany, Spain and Belgium.

17. Regarding competition policy, specific procedures for the media as regards mergers and acquisitions apply in Germany, Italy, Spain and the United Kingdom. In other countries general competition rules and criteria apply. However, also in the absence of sector-specific regulation, in some countries co-operation between the Competition Authority and the Communication Regulatory Authorities in mergers, acquisitions and other concentration cases concerning the communications market is introduced by legislative acts (e.g. Finland, and also Estonia with regards to Ministry of Culture).

18. Moreover, also as regards cross-ownership regulation, where present (i.e. Belgium (Flemish Community), Croatia, Germany, Greece, Italy, Slovakia, Turkey and the UK) the rules are mainly applicable to broadcasting and press companies, without introducing any reference to cross-media mergers between traditional and new media. Sector specificities also emerge depending on the type of regulatory framework adopted at national level. In most of the countries competition law is applicable regardless of the type of sector (Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Italy, Romania, Slovakia, Spain, Turkey); only in a few countries competition acts include media specific rules (Greece, Germany and the UK). However, among the first group of countries competition rules are included in media ownership regulation (Belgium, Bulgaria, Croatia, Estonia, Italy, Slovakia, Spain and Turkey). Among these, different approaches emerge according to the type of medium: in the press few ownership and few restrictions on foreign ownership are applied (exceptions are Croatia, Germany, Italy and Slovakia). As regards broadcasting, the picture is more fragmented with countries that adopt also the licensing system to protect pluralism (e.g. Belgium, Greece, Italy) and others that provide for specific ownership caps (e.g. Germany, Italy, Romania, Slovakia and Spain).

19. Accordingly, even if a merger would not be anticompetitive under general antitrust rules, it may be blocked under media ownership rules. Four main regulatory models can be observed differently combining ownership and competition rules:

- *Media ownership rules with proxies, plus competition rules:* where the stricter approach prevails (i.e. a merger will not be allowed if it fails either the media ownership or the competition test, or both)
- *Media ownership rules with complex pluralism analysis, plus competition assessment:* where the stricter approach prevails (i.e. a merger will not be allowed if it fails either the pluralism test or the competition test, or both)
- *No media ownership rules or pluralism analysis, and sole application of modified competition law analysis.*
- *No media ownership rules or pluralism analysis, and sole application of competition rules.*

20. Beyond these rules that mostly relate to horizontal mergers, the most common antitrust concern when media firms merge has been in relation to *vertical aspects of mergers*, where the new entity holds market power in the downstream market for content and is able to secure exclusive access to premium content in upstream markets. In past merger cases (e.g. *Vivendi/Canal+/Seagram*), the European Commission has imposed remedies aimed at ensuring that competitors to the merged entity have access to content, and this is achieved in two ways: (a) by a structural remedy whereby the merged entity divests ownership of content; or (b) by a behavioural remedy whereby the merged entity guarantees access to its content to competitors.

21. In relation to abuse of dominance, art. 102 TFEU (and national law equivalents) prohibits dominant firms from abusing their market power. Here, the analysis is based on a case-by-case approach, relying on sectors distinction in almost all countries but evaluating the degree of competition and substitutability among different media services. Besides indirect impacts (e.g. through the control of abuses of dominance by telecommunications operators), direct intervention in support of pluralism through rules on abuse of dominance is poised to become more common in the future, as internet provision of media and information becomes more significant. Similarly, the Commission's current investigation of Google, while based primarily on the commercial exploitation of information, may well have an impact on pluralism as the national investigations have had. Competition enforcement is forcing large players to engage into private regulation with other operators along the chain.

22. As a consequence of the regulatory approach adopted, the allocation of power to competition and media authorities is also different. In Denmark alone, the competition authority is in charge of both competition and regulation, whereas in Finland (in an almost identical regulatory framework) the media authority is in charge of regulatory power over dominant players in media markets. In all the other countries media authorities are in charge of achieving or protecting pluralism through competition rules. For instance, in Belgium, the *Conseil Superieur de l'Audiovisuel* is responsible for dealing with editors that have a dominant position if this threatens a diversified media. In Germany the rules administered by the Commission to Investigate Media Concentration (KEK) set dominance in TV markets at an audience share of 25% or more. In the UK Ofcom enforces competition law in the e-

communications and media sectors, and has played an active role in shaping external pluralism in the past few years (see the *BSkyB* case).

23. Finally, *state aids* play an important role especially when applied to public service broadcasters (PSB). Today, convergence between media has made the justifications for financial support to PSB less justifiable. In addition, the expansion of PSB to new media markets has broadened the range of activities which some find difficult to subsume under the category of public mission. The European Commission has adopted an interventionist approach establishing an obligation for the Member States to introduce an evaluation procedure whereby both the public value and the market impact of the new service need to be assessed beforehand. This ex ante assessment is known as the "Amsterdam test" or "public value test". This test currently relies only on the *ex post* scrutiny of the European Commission, which hardly fits the very dynamic and fast-changing nature of the media sector: accordingly, we observe that such scrutiny of state aids should also be carried out by national governments on an *ex ante* basis, before deciding to intervene. This is however quite difficult to achieve, since few governments adopt transparent procedures for the *ex ante* impact assessment of legislation.

Content regulation

24. Content regulation differs from structural regulation that primarily deploys ownership and competition law. The combination and scope of the two sets of instruments are affected by constitutional principles, in particular freedom of expression. Public regulation of content is limited by freedom of expression which leaves significant space to different forms of private regulation. In the countries analysed, content regulation is probably the most fragmented and controversial domain. Besides the protection of content diversity, all countries impose restrictions on content, aimed at protecting conflicting rights such as privacy and copyright. Such content regulation is very often specific to certain types of media (press, broadcasting, etc.), and does not respond to an integrated approach to media policy. At the same time, content regulation is carried out by a considerable mix of institutions, with private regulation increasingly being coupled with public according to different regulatory traditions. A further consequence is that the role of national courts has been significantly developed to permit the exercise of judicial review.

25. *The press* is the form of media in which content regulation by administrative entities has been most limited; indeed, "unfettered self-regulation" of the press has been perceived as a cornerstone of a free press and an open democracy. This is directly reflected in constitutional provisions in a number of countries including post-communist ones (e.g. Bulgaria, Germany, Greece, Slovakia). There are however areas covered by criminal law. The press is subject to criminal law scrutiny on issues relating for example to language inciting hatred, discrimination or violence (as in the case of Belgium) or libel, discrimination, or hate speech (Germany), or where a publication may influence forthcoming legal proceedings (the UK). In Turkey a wider range of criminal and civil laws restrict press freedom. As a result, even if mostly self-regulated, the press remains subject to an extensive framework of legal

regulation, much of which is carried out directly by the courts, using constitutional norms, Convention rights or ordinary law. Together with courts, in all countries there is a well-developed body of co- or self-regulation relating to press content: however, the use of self- and co-regulatory mechanisms in relation to the press has been highly controversial with major criticisms of both their effectiveness and their accountability (see the recent UK phone-hacking scandal in 2011, in which the Press Complaints Commission proved completely ineffective). In this respect, clearer criteria need to be developed to characterise the requirements for effective and accountable co- and self-regulation in the media field.

26. *Broadcasting* content has traditionally been regulated differently from the press, partly due to technological reasons linked to historic shortage of spectrum that also led to strong state presence through ownership or other forms of control. Both rationales have been overturned by the advent of digital television, but heavy public regulation of television still remains unchanged in many countries. In particular, in all countries regulation relies on "negative prohibitions" (which proscribe certain types of programme content) such as rules protecting minors, imposing standards of decency and preventing the broadcasting of hate speech, in line with the EU Audiovisual Media Services (AVMS) Directive. Such prohibitions can sometimes threaten freedom of expression, and are subject to interpretations by public regulatory authorities (UK) and/or self- and co-regulatory arrangements (Spain) (and eventually courts). In addition, regulation contemplates also "positive requirements" for programme content, including impartiality and obligations to give access to different views. These requirements seek to achieve two different but related objectives: protecting the apparently intangible concept of 'quality broadcasting', and 'internal pluralism'. Here, a distinction should be drawn between impartiality and diversity on the one hand, and quality on the other, as the former are acknowledged by almost all countries, with a sub-division between those countries that adopt them regardless the private or public nature of the broadcaster, and those that use the criteria to inform only public service broadcaster activity (e.g. Finland and Estonia). Quality, on the other hand, is relatively less acknowledged as a criterion, being framed rather in terms of accuracy (e.g. Germany) and completeness of information, and in several cases the implementation of this criterion is shared between public and private regulation (e.g. Finland).

27. In the domain of *digital media*, a distinction must be made between audio-visual media service providers covered by the AVMS Directive and all other digital media services. In the former case, some elements of content regulation flow from national implementation of the directive, and focus mostly on editorial responsibility similarly to what happens in broadcasting. In the latter case, the change of medium does not lead to a change in the regulatory treatment: changing the mode of delivery is not sufficient to enable evasion of the regulatory requirements applying to those media to take place, though the width of obligations is lower addressing only minors' protection and advertising. It is important to note that in a few countries, national authorities have called for a co-regulation on new services which are outside the scope of the AVMS Directive (e.g. Croatia and Belgium), or alternatively for a debate at European level so as ensure a uniformity of treatment across Europe (e.g. Italy).

28. Most importantly, online media have raised major competition and copyright concerns, as in the case of content aggregators and search engines. Such issues will rarely be expressed in terms of content regulation, but the questions they pose are relevant for pluralism. A further widely-debated issue in the digital media is that of the protection of minors online, normally achieved through a combination of the criminal law and of self- or co-regulation (e.g. the Internet Watch Foundation in the UK), and cooperation of the Internet Service Providers.

29. In sum, when as in the press there is less administrative regulation, self-regulation on the one hand and regulation through litigation on the other hand tend to emerge. The former operates *ex ante*, the latter *ex post*. Similarly, but for different historical reasons, in the field of digital media regulation has been first driven by private forms, then by the interaction with the courts whilst more recently there is a greater tendency to expand the public regulatory domain as exemplified by the amended version of the AVMS Directive. Broadcasting content remains the most heavily regulated field despite the disappearance of technological justifications that used to support a different balance from the press. The general question is whether these differences across media are still justified or even in content regulation an integrated approach is desirable.

Copyright protection and freedom of expression: an emerging trade-off?

30. A somewhat related field to content regulation is copyright protection. An emerging, fundamental policy issue is the potential conflict between copyright and freedom of expression within newly defined structures of supply chains for the production of news. The conflict lies on the very basic assumptions of the two rights: copyright grants content owners a limited monopoly with respect to the communication of their works; whereas freedom of expression – and the related freedom of information – warrants the freedom to hold opinions and to receive and impart information and ideas. Recently some national courts have interpreted the scope of copyright law quite narrowly to ensure that freedom of expression is not unduly compressed (see *AnyDVD* in Germany). In other Member States, courts have taken the opposite approach giving content producers stronger protection (see *Meltwater* in UK). This is a field where the balancing exercise by courts reflects different traditions in interpreting freedom of expression.

31. *Copyright protection of news* has become an issue in the online environment. It has been subject to specific regulations, due to the type of content that has usually been compiled and reused for informative purposes. In recent times, however, online news aggregators have come under strict scrutiny by courts to verify if their role and activity could be deemed lawful under current copyright legislation, due to the fact that they use third-party pre-existing contents, such as newspaper articles, photographs and audiovisual recordings, mainly provided by traditional content producers. The European Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society did not expressly define the threshold of originality to be applied to news articles in order to make them subject to its provisions. This has led to a very fragmented interpretation of the

threshold in several countries: only recently, the CJEU ruling in *Infopaq* seems to have facilitated a more harmonised interpretation regarding the level of originality to be applied to news snippets, as reflected in subsequent national decisions (*Copiepresse* in Belgium, *Meltwater* in the UK).

32. Importantly, regulatory interventions have also been undertaken at national level to tackle the problem of copyright infringements online. Also in this case, the regulatory landscape is very fragmented and several regulatory processes are ongoing. Some countries, most notably France, have adopted "graduated response" legislation, consistent with heavy traffic inspection by ISPs – this could be used to restrict freedom of expression, besides copyright enforcement. In other countries similar legislation has been proposed but rejected or suspended (Italy, Spain, UK). The recent rejection of the ACTA by the European Parliament was mostly due to concerns on the possible implementation of "three-strikes" or "graduated" response legislation, in violation of basic principles of freedom of expression and network neutrality. In the more specific case of news, two interesting cases are the German decision adopted in March 2012 by the coalition committee to require that ISPs pay an equitable remuneration for disseminating "press products", within the time limit of one year after the publication; and the proposed amendment to the Italian Law on Copyright Protection intended to provide stronger protection of copyright for newspaper publishers vis-à-vis search engines and news aggregators. Both proposals, though not yet approved, seem aimed at striking a different balance between the economic interests of traditional news providers vis-à-vis emerging nomadic giants such as Google.

33. The domain of copyright enforcement is also important since it is increasingly the realm of private agreements between content producers and ISPs, based on technologies such as Deep Packet Inspections. Such arrangements, often concealed, might affect users' rights, including privacy, personal data, freedom of expression and access to internet. It is an example of how private regulation complements adjudication as a mode to solve conflicts between fundamental rights. Accordingly, more light should be shed on their scope, and underlying goals. The new structure of information supply chains calls for a redefinition of conflicts among content producers and news aggregators both in the linear and non linear communication by way of private regulation subject to judicial scrutiny given the involvement of fundamental rights. The increasing global dimension of online media suggests that divergences among regulatory instruments might have a negative impact on pluralism and the development of new forms of media communication. Private regulation with enforceable agreements between content producers and service providers may provide an effective response to conflicting fundamental rights only if the potential anticompetitive effects of these agreements are fully considered and economic incentives for professional and non-professional content producers are correctly defined.

The regulation of media professionals

34. Journalistic activity has traditionally been considered as an instrument of freedom of expression. However, the boundaries of the concept of professional journalism are not so neat throughout MEDIADEM countries, as definitions of *journalists* by public regulation are lacking in most of the countries (exceptions are only Italy, Croatia and Belgium); whereas only private regulation provides for criteria that inform *journalistic activity facing problems of accommodating new forms of news production including user-generated content.*

35. Domestic and European courts, instead, have intervened more in qualifying journalistic activity and the rights and obligations flowing thereof. The jurisprudence of the ECtHR (followed quite closely by national courts) underlines this connection between freedom of expression and journalistic activity, allocating to the press the task to "*impart information and ideas*" and to the public "*a right to receive them*". However, in affirming the application of the freedom of expression principle, the Strasbourg Court has always linked it with duties and responsibilities that flow from that privileged position, specifically mentioning ethical obligations linked to editorial responsibility for respect for sources, accuracy in collecting information, and respect for fundamental rights of individuals and legal entities. Principles of editorial responsibility have been operationalised in private regulatory instruments taking the form of either self or co-regulation, depending on the medium and the legal system's approach. Even more importantly, the allocation of editorial control is often dependent upon distribution of ownership and contractual arrangements along the supply chain. Editorial responsibility and control have now become a regulatory milestone of the AVMS Directive and can represent a common pillar of an integrated notion of media, also being shared as an indicator in the new notion of media adopted by the Council of Europe.

36. Historically, journalism has been primarily self-regulated by the profession, as it fell into the press regulation category. Even within the "traditional" media the role of professional private regulation varies significantly. While in the press the role of professional self-regulation has been predominant, in broadcasting co-regulatory models have emerged due to the higher level of public content regulation and the presence of public service broadcasting which have also influenced commercial media. There is now consensus over the fact that the AVMS Directive has promoted the introduction of co-regulatory models at Member State level. Even within this general trend, defined by European legislation, differences across Member States remain remarkable. They concern both the scope and the instruments within the co-regulatory framework loosely defined by the AVMS Directive. In some cases integrated models across media regulate journalistic activity. Even in relation to the press, co-regulatory models emerge due to legislative intervention or, more recently due to developments of legislation (Belgium, Denmark), which have expanded the scope of activity regulation to electronic media. In other cases, regulation is fragmented and the press remains separated from broadcast and electronic media with the exceptions of online newspapers regulated within the press sector (Bulgaria, Germany and UK).

37. The definition of journalists and journalistic activity plays greater importance in defining regulatory strategies and the allocation between public and private regulation. Due to technological developments associated with the transformation of the supply chain, new issues concerning the *definition of journalist have emerged. The consequences of drawing the boundaries are* linked with the granting of special privileges, such as access to sources or events, or the statutory right to protection of sources, or constitutional protection from claims of libel or privacy invasion. The boundaries between professional and non-professional journalism have thus to be redefined taking due account of the technological changes that are restructuring access to the profession. Both public and private regulation struggle to find criteria that allow (or hinder) the inclusion of Internet bloggers, desktop publishers, freelancers, and a host of "public communicators" who disseminate newsworthy information to others, etc. within the definition of journalism. The analysis of the data available from the MEDIADEM project countries shows the emergence of two macro-models with important internal differences: (i) the *status based definition*, generally associated with the presence of a strong professional association based on membership, which defines who is a journalist and the applicable rules for journalistic conduct; and (ii) *activity based self-regulatory regimes*, developed where no strong professional associations exist; the scope of the rules is therein defined on the basis of the definition of what is journalism rather than who is a journalist. These transformations call for reform of both governance and instruments of professional regulation.

38. In terms of *regulatory bodies*, in most of the countries analysed journalists associations are not the sole private actors in charge of regulating journalistic activity; rather, often they "share" this power with industry representatives that are increasingly becoming part of press councils giving rise to multistakeholder bodies. New press councils have been set up, leaving the pure association model an exception (limited to Greece and Italy). In some cases their creation was triggered by the (threat of) state intervention in the field, and in a few cases the justification was found in the inability of the professional self-regulation to achieve the expected results of monitoring and enforcement of ethical rules among journalists. The involvement of industry associations, namely publishers (and in few cases broadcasters' associations), in private regulation was mostly welcomed by public actors and by journalists' associations as the way in which ethical codes and codes of conduct could be implemented in signatory media outlets. The cases of Estonia (where two press councils partly overlap, creating inconsistencies) and the UK (due to the phone-hacking scandal mentioned above) suggest that, although the press council model is advocated as the best option to guarantee the accountability of the media system, it could have major flaws. It is likely that institutional regulatory reforms concerning private regulation will continue both at national and European level.

39. In relation to the *instruments* of self-regulation and the *scope of codes of conduct*, all countries surveyed provide for multimedia codes of conduct. Formally, the majoritarian model shows that regulation applies regardless the medium through which journalists disseminate content; however, few exceptions still exist either based on content distinction (e.g. Bulgaria, Germany and UK) or on sector distinction

(e.g. Italy and Turkey). Nonetheless, the inclusion of citizen journalism and blogging within the remit of Press Council regulation is still scattered, though increasingly assuming public relevance, as testified by the recent initiative of the Belgian French-German Press Council, which published an opinion on rules of journalistic ethics applying to Twitter and Facebook. As a matter of fact, the distinction is based on the fact that social media are used by journalists to express their opinions and for disseminating news content to the public. This implies that is the fact that professional journalists use social networks that makes them subject to journalistic ethics, whereas the same rules are not applicable where an individual produces the same news content on social networks. Also in the UK, the Press Complaint Commission proposed a working group analysing under which conditions Twitter could be included in their jurisdiction.

40. Overall, the picture regarding professional regulation in new media is neither clear nor homogeneous. Technological developments have challenged traditional boundaries, having as a reaction sometimes a simple extension of the rules to new media, looking only at the subject providing the content (i.e. the journalist); a comprehensive revision clearly distinguishing between editorial content and user-generated content has been carried out only rarely. When new media have been taken into account, the approach by private regulation was corporatist: new media are interpreted as added instruments for professional journalists' communication to the public, without addressing the issue of new models of news production available.

Regulatory instruments and institutions

41. Despite a heavily fragmented landscape, some common features between surveyed countries can be identified in relation to the regulatory instruments and institutions used at national level. In the public domain, except for the case of Estonia, regulatory power has to a significant extent been taken away from government and given to independent regulatory bodies. This is not to say that national executives do not play a direct role in media regulation and management. In all the MEDIADEM countries independent regulators have policy implementation powers. Policy setting powers associated with rule making are not allocated to independent authorities in the majority of cases (exceptions are Romania, Turkey and the UK, but also here only in limited areas). Moreover, in many countries policy implementation still implies a shared system which gives the political bodies avenues into the governance of the media system. The most relevant issue is the allocation of licences to broadcasting companies. In some countries this is only a formal decision taken by the independent regulatory authority, whereas the definition of criteria is still in the hands of political bodies (e.g. Greece, Italy); similarly, the power of independent regulatory authorities to regulate is limited to standards regarding content or fairness (e.g. the UK) or regarding advertising and news (e.g. Greece).

42. Furthermore even when some competence on policy implementation is exclusively attributed to the independent regulator, independence is not homogenously granted. Governance regimes of public regulators vary rather significantly and so does their accountability via judicial review. As a matter of fact,

there are several cases in which either the appointment procedures of the regulators or the accountability rules related to the regulatory bodies were deemed to provide leeway for the politicised character of the independent authority (e.g. Bulgaria, Greece, Romania, Slovakia, Turkey, but on a more limited extent also Italy and UK).

43. As regards the correspondence between media convergence and institutional convergence, two main models characterise the structure of independent regulatory agencies (IRAs) in relation to the domain: the majority model presents two separate regulators one for media and one for electronic communications; the minority consists of an integrated regulator, overseeing both media and electronic communications. First, IRAs have assumed the most important role in the regulation of electronic communications and broadcast media, with only a few countries moving to the adoption of a fully integrated authority covering broadcast media and other forms of electronic and digital communications (Finland, Italy and the UK). Also among "independent" regulatory authorities the notion of 'independence' is itself a relative and controversial one: as confirmed also by other studies, in a number of countries there is considerable distrust of regulatory bodies as politically captured (Bulgaria, Romania, Slovakia, Turkey, and to a lesser extent Greece, Italy and the UK). The Commission and the European Parliament have acted to ensure independence denouncing the violations of freedom of expression (as in the most recent case of Hungary). This suggests that a clarification of the criteria to be adopted in assessing independence, and the use of clearer guidelines for such assessment, would be welcome, possibly expanding on the work already performed by the Council of Europe in its guidelines.

44. Responses to regulatory fragmentation might vary from regulatory integration to institutional coordination. One major governance issue is the *lack of coordination of different forms of regulation, public and private, in the media field reflecting an integrated notion of media*. We consider at least three existing bodies that could be tasked with such coordination: (i) the European Platform of Regulatory Authorities (EPRA) is the most evident candidate: however, its powers as defined by the charter would need to be expanded to enable it to issue guidelines and opinions that can contribute to coordination within the EU and between the EU and other European countries; (ii) the Contact Committee established under art. 29 of the AVMS Directive has undertaken work in relevant fields, but this work has been so far too limited in scope; and (iii) BEREC, the Body of European Regulators for Electronic Communications, has dealt with relevant issues such as IP interconnection and net neutrality, but here also its scope was limited, covering only a subset of the issues relevant to the MEDIADEM project. This is why EPRA seems to be the most appropriate candidate. In addition, when it comes to coordinating public and private regulation, the European Commission (DG CONNECT) might have a stronger role to play going further in the path just started with the Code for Effective Open Voluntarism, as a similar role was played by European bodies in the past in other policy fields (e.g. DG SANCO on nutrition-related aspects).

45. Another important finding is the growing regulatory role of courts, both national, CJEU and the ECtHR, in acting in effect as *ex post* regulatory bodies in

relation to media content, balancing freedom of expression with conflicting fundamental rights such as privacy and dignity of others. If litigation arises, courts could also cover issues such as the enforcement of IP rights, especially in the context of Internet piracy, which involves once more the balancing of freedom of expression with competing rights. This role of the courts may have one important advantage; they are more likely to be independent than other regulatory bodies, and in many of the countries there is a developed tradition of judicial independence. However, courts also have serious limitations as regulators since they operate *ex post facto* and within the scope of the litigation defined by the parties, at least in civil matters, which suggests that the courts work best in conjunction with other regulatory bodies rather than being an alternative.

46. One of the most evident features of the experience of the countries examined in the case studies is the *pervasiveness of private regulation*. Private regulation can be sub-divided into a number of different categories in relation to the topic and to the identity of the regulators: it is possible to distinguish between professional, technical and consumer regulation. The former is probably the eldest one and has gained relevance over time in the most mature democratic systems, giving rise to different forms of formal or informal delegation of regulatory functions including drafting ethical standards. The second is gaining relevance for the process of technological convergence which confers to digital media greater relevance. Regardless of the prediction about the degree of integration between electronic communication and media, clearly technical standards will play an important role including the protection of fundamental rights in the field of privacy and data protection. A third stream of regulation mirrors developments in consumer protection although the differences between media users and consumers of products are still relevant making transplants of consumer regulation inappropriate.

47. Different subject matters correspond to regulators with distinct governance features. (i) 'Professional regulation' operates in all MEDIADEM countries in relation to the journalistic profession, and is normally administered through a professional association or through a Press Council; (ii) media standards, notably in relation to privacy and ethics, are most often administered by or provided by Press Council with a broader range of members, including some from outside the profession; (iii) use of private companies as "gatekeepers" through regulating different forms of media access, mostly in the online environment, also by means of packet inspection and traffic filtering; and (iv) basic standard-setting, often seen as technical and so less subject to legitimacy concerns. The importance and variety of these forms of private regulation offers two important lessons. First, there is a need for a clearer classification of the different types of systems: the tendency to fit them all together within the category of "self-regulation" is profoundly misleading, as it ignores the different degrees of involvement of public and private stakeholders in the regulatory process, and also the different functions which private regulation may perform. The second issue raised is one of legitimacy: the need to ensure sound governance arrangements and adequate multi-stakeholder representation is often ignored in the policy debate. A related finding of our report is that there needs to be a rethinking of the meaning and role of private regulation, and of the mechanisms for

its legitimacy. In particular, the narrow conceptions of self- and co-regulation in the 2003 Inter-institutional Agreement on Better Law Making are far too restrictive.

B. Towards a new architecture of media regulation?

48. The report is mostly aimed at comparing MEDIADEM countries as regards their media policies. As such its main focus is descriptive, rather than prescriptive. However, from the observation of the common problems and emerging features of national media policies, a number of outstanding open questions for reform can be derived. Below, we distinguish between issues related to the need for a more integrated approach in media policy; questions on technological convergence and the technology neutrality of legislation; the relationship between *ex ante* sectoral regulation and competition policy; and the necessity to introduce governance arrangements and a stronger coordination of media policy in the EU.

Towards an integrated approach to media policy

49. Both the blurring of the boundaries between press and broadcasting, and the ongoing technological convergence on IP-based platforms are paving the way for a gradual shift towards a more integrated approach to media policy. An integrated notion of media implies that new and conventional media should be considered as part of the same regulatory field integrating linear and non linear communication systems. This does not necessarily mean uniform regulation across media: to the contrary, room for territorial and functional regulatory differentiation remains and should be rationalised taking also into account the development of the linear/non-linear divide. The rationales for public regulation have to be redefined and within them the role of public service has to be rewritten to fit with an integrated notion of media

50. A more integrated notion of media should trigger, at the same time, consolidation or at least coordination of regulatory functions between public regulators. In today's competitive landscape, telecom companies are seeking to enter broadcasting, giant application providers (Microsoft), social networks (Facebook, Twitter) and search engines (Google) are turning into media companies, and even some device manufacturers (e.g. Apple, Samsung) are entering media provision. The development of broadband digital platforms is changing the distribution of market power along the layered architecture of the Internet, making it unfortunate to operate with fragmented regulatory powers and approaches. This also relates to the Telecom Package at the EU level, which is still based on the separation between telecom and other services, as well as between fixed and mobile. Problems of access to infrastructure, network neutrality, search and application neutrality and ISP-enabled copyright enforcement, normally dealt with by regulators other than media authorities, have now entered the stage of media regulation in a way that cannot be ignored.

Towards technology neutrality

51. A related aspect is the need for technology-neutral regulation, especially for what concerns the public policy goals to be typically pursued in media policy. A concept traditionally embedded in the EU regulatory framework for e-communications, its extension to media policy entails at least three main changes, as described below.

52. First, the notion of media should not rely on any specific form of transmission, and should thus include both one-way and two-way forms of communications. In line with technology-neutrality, the definition of "media" should refer to the aggregation and provision of information to a generalised audience, coupled with some form of editorial control.

53. Second, duties and obligations that apply to media outlets should be clarified for all players that fit the technology-neutral definition, regardless of the technology they use. It is important to distinguish which types of information providers can fit the definition of *media*, as this will help distinguish them from mere news aggregators and search engines that reproduce and syndicate information, but should bear no direct responsibility for copyright infringement, defamation problems etc.

54. Third, the future of public service (and related privileges and obligations) should not be linked to any specific technology. It might very well be that in the future, access to public service TV will be organised around a mix of technologies. This, at the same time, also means that regulation should aim at eliminating differential treatment of some technologies – subject to what will be said below about the need for end-to-end communications to preserve pluralism.

Ex ante regulation v. ex post competition policy

55. The adoption of an integrated notion of media grounded on net neutrality above bears significant consequences for the relationship between regulation and competition policy. The latter, through flexible tools such as the definition of relevant markets, is potentially more technology-neutral than the former, and can be adapted to solve most of the concerns that characterise external pluralism in modern society. However, a number of concerns must be spelled out: (i) the tools of competition policy should be revisited to capture the complex dynamics of new media, which run over multi-sided platforms that compete across layers of the IP architecture, for the same "eyeballs" and with alternative, articulated business models; (ii) the *ex post* nature of antitrust scrutiny hardly fits the fast pace of change of new media markets, and as such players might find it more convenient to "infringe, then pay", given the importance of securing first-mover advantages in emerging markets; (iii) finally, the existing difference between the application of competition rules in media markets as opposed to other neighbouring markets (e-communications, online broadband-enabled platforms) should be harmonised.

56. At the same time, the debates on network neutrality and copyright

enforcement in cyberspace have shed light on the risk that new business models sacrifice the end-to-end architecture of the Internet on the altar of other policy goals such as protection of property and incentives to invest. It is important to keep in mind that the most important feature that enables freedom of expression on the Internet is the end-to-end architecture. As such, *ex ante* regulation should seek to at least impose on all market players the duty to ensure that a robust, best effort, unmanaged and unfiltered Internet can co-exist along with more managed, secure services that require minimum *Quality of Service* (QoS) (e.g. bandwidth-intensive and some cloud-enabled services). The use of copyright protection should be grounded, in this instance, on liability rather than property rules in order to minimize the impact on freedom of expression.

Towards better regulatory governance and sound institutional arrangements

57. Some of the most important questions triggered by the analysis of media policy in the fourteen MEDIADEM countries are related to the need for more responsive and accountable regulation in this field. The most important variables in this respect are the following:

– *Regulatory "styles".* In order to preserve the integrated and technology-neutral approach to media pluralism and freedom of expression, public and private regulation should rely more on outcome-based as well as principles-based regulation, rather than engaging in command and control regulation.

– *Openness, transparency and accountability should apply to all aspects of media policy*.

– *Respect for pluralism and freedom of expression should be always kept in the radar by policymakers*. This can be achieved at the EU level, for example, by improving the current guidance on assessing impacts on fundamental rights developed by the European Commission within its *ex ante* impact assessment system, to include guidance on how to ensure new legislation does not negatively affect these principles.

58. As regards regulatory powers, pan-European coordination of regulatory approaches, use of soft law and exchange of best practices seem key to a more integrated Single Market. Suggested ways to achieve this goal include a strengthening of the role and powers of EPRA, which could play a pivotal role in coordinating horizontally with the Contact Committee established under the AVMS Directive.

59. The regulatory capacity of both public and private regulators should be strengthened, given the emerging complexity of the value chains that support media production and distribution in the EU and at the global level. Emerging global chains in a world of integrated media call for appropriate regulatory responses that promote and monitor the use of private regulation

60. Accordingly, a significant effort should be devoted towards the development

of criteria and methodologies to assess the legitimacy and effectiveness of private regulation in the field of media. Several examples illustrated in our report testify that private regulation is essential in this field, but could also lead to very undesirable consequences due to lack of adequate governance, accountability, transparency, and also government monitoring. The European Commission should aim at developing concrete guidance for EU and national policymakers on when and how to assess the alignment of private regulatory schemes with public policy goals.

THE REGULATORY QUEST FOR FREE AND INDEPENDENT MEDIA

COMPARATIVE REPORT

1. Introduction

This comparative report contains a description and analysis of the variety of types of media regulation identified in the reports of the Mediadem project. Its objective is to provide an overview of the current regulatory strategies that are adopted at the national level regarding the media in the fourteen countries that are part of the Mediadem project, taking also into account the multi-level architecture that connects the national regulatory framework to the European one. The report does cover only a portion of the EU countries, nonetheless in a few cases reference to comparable issues addressed by countries that are not within the project is briefly given. The aim of this comparative report is to describe and emphasise the existing regulatory trends and their underlying rationales in order to identify common patterns and possible best practices that could enhance media freedom and independence both at the national and at the European level.

The report covers different levels of regulation; notably the distinction between national and European regulatory processes (including both the European Union and the Council of Europe), focusing especially on different forms of regulation, both public and private. It covers not only formally-established regulatory authorities, but the range of bodies normally conceived as self- or co-regulatory. The role of competition law is examined, with particular attention to tensions between competition and other policies designed to promote media pluralism. The major emphasis is on regulatory institutions and their relationships, taking into account the legitimacy of public and private regulation. Thus, the report assesses the relationship of different national and sectoral regulatory regimes with constitutional values such as freedom of expression, the right to enjoyment of a private life, and the right to peaceful enjoyment of possessions. Institutional accountability is also examined, looking at procedures for participation in regulatory decision-making and for challenge.

The comparative report is based on the Case Study reports and the Background Information Reports from the fourteen countries studied in the Mediadem project. Moreover, it relies on additional research based on academic commentaries, official reports and documents.

This report compares media policy currently in place in the fourteen countries covered by the MEDIADEM project, with a view to identifying common patterns, best practices and emerging problems, as well as developing recommendations for

future policy actions.[2] It adopts an integrated notion of media including digital media. The report covers various levels of regulation (national and European regulatory processes, including both the European Union and the Council of Europe); and various forms of regulation, including both public and private regulation, hybrids thereof, and multiple institutional and governance arrangements.

In the remainder of this introductory section, we discuss the constitutional dimensions of media regulation and the tensions currently leading towards a more integrated approach to media policy. Furthermore, we focus on the supply chain and emerging regulatory models, as well as on the evolving concept of public service broadcasting and media.

1.1. The constitutional dimensions of media regulation and their impact on regulatory choices

Freedom of expression (FoE) is a constitutional right shared in almost all the constitutions throughout Europe (Stone, 2011; Barendt, 2005). In its formulation, in art. 10 of the European Convention of Human Rights (ECHR), it encompasses the right to seek, impart and receive information (Casarosa, 2011; Lange, 2009; Council of Europe, 2011). The jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) demonstrate the continuous evolution of the scope of freedom of expression in relation to media regulation and its boundaries (Flauss, 2009; Voorhoof and Cannie, 2010; van Besien et al., 2012). Constitutional principles contribute to the definition of media and how to choose among different regulatory strategies regulating the media, including the type of complementarity between public and private regulation. As emerges from many national legal systems, they may lead to defining criteria that partition the regulatory space.[3] In particular, by setting the limits of legislation they 'implicitly' refer to the role of self- and co-regulation as a means to exercise self-determination through freedom of expression. The Council of Europe approach provides a powerful example of the link between fundamental rights and regulatory choices including the institutional framework. On the basis of art. 10 ECHR, for example, the Council of Europe has issued guidelines on the independence and functions of regulatory authorities in the broadcasting sector highlighting the importance of independent regulatory authorities.[4]

[2] Countries covered are: Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey, UK.

[3] A general overview of how constitutional principles are used to allocate regulatory power is described in sect. 2.

[4] The wording of the Recommendation REC (2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sectors, available at https://wcd.coe.int/ViewDoc.jsp?id=393649&Lang=en, is the following: "*Emphasizing that to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector it is important to provide adequate and proportionate regulations of the sector in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests*".

The regulatory implications of FoE are well known in relation to media pluralism (Feintuck and Varney, 2006; Katholieke Universiteit Leuven – ICRI, 2009; Barton, 2010). The protection of political and cultural pluralism calls for regulatory intervention in conformity with the principle of freedom of expression, drawing the functional boundaries between competition and sector specific media regulation. The report shows that competition law and policy can powerfully influence external pluralism, whereas they have little to say about internal pluralism, content and access regulation. Much less awareness seems to exist on the broader correlation between FoE and regulatory strategies, in particular the use of private regulation as a device to guarantee FoE (Puppephatt, 2011).

Constitutional principles are not always consistent. Conflicts between FoE and other fundamental rights have been primarily solved in the arena of adjudication. Courts in the past have a played a major role in balancing different rights, for instance between freedom of expression and privacy (Sheuer and Schweda, 2011). More recently the regulators have gained influence and some of these conflicts have become regulatory in nature. Regulators define, for example, privacy rules which may have an impact on freedom of expression and this in turn may trigger responses from the media regulator. Similar conflicts may arise when, for example, one of the regulators is private, as is often the case in the domain of press, and the other regulator is public. When the conflict moves from adjudication to regulation, courts intervene to adjudicate disputes among regulators within the scope of judicial review. As we show in this comparative report, regulatory strategies dictated by conflicts among fundamental rights significantly affect how media operate and should be organised.[5] The conflict with privacy and data protection is a paramount example of how conflicting fundamental rights have translated into regulatory conflicts between public and private regulators of privacy policies and regulators of media activities.[6]

We believe that the correlation between fundamental rights and regulatory choices has much wider implications than so far acknowledged and can influence the allocation of tasks between public and private regulation in different forms from self- to co-regulation (Metzger, 2003: 1377; Donnelly, 2009). Even within the framework of the principle of institutional autonomy, whose scope has recently changed rather

[5] See the self-restrained approach of the Estonian Supreme Court judge Märt Rask, emphasising that courts need to maintain a neutral position: "*The Court should not have any ambition to shape media practices or journalists' professional ethics otherwise than by consistently adjudicating specific cases. Assuming the functions of a media regulator would definitely affect the Court's objectivity. The role of the law court is rather to remain passive: to assure balance between the freedom of speech and the individuals' personal rights, when needed.*

In practice the courts possess an inevitable role in imposing responsibilities onto the media. The separate cases in an aggregated whole definitely shape the attitudes applied by the media and also frame the preparedness of the general public to commence a lawsuit to uphold one's reputation.' Harro-Loit and Loit (2011:11).

[6] Venables v. News Group Newspapers Ltd and others (9 BHRC 587).

dramatically, the possibility of having guidelines on the use of private regulation in media would contribute to the correct implementation of freedom of expression.[7]

Often the regulatory strategies defined by European legislation are related to effectiveness and delegation to private bodies, based on their higher knowledge and expertise.[8] There are examples of delegation to private bodies in the field of media regulation, formal via contracts or agreements, or informal via soft law. While we do not neglect these rationales, we advocate a more significant guiding role of constitutional principles e.g. FoE, for regulatory choices at EU level and in particular for the selection of the most appropriate private regulatory regime. If and how regulatory power can be exercised by private actors, and which requirements they have to meet in order to be made accountable is not a matter of pure discretion for European legislators or for the appreciation of Member States. The foundations of different forms of private regulation – ranging from professional codes of conduct to forms of agreement along the supply chains between content producers and service providers or broadcasters – constitute the manifestation of the principle of self-determination, embedded in the tradition of FoE. Constitutional principles both in the ECHR and in the EU Charter can thence provide guidance on who, what and how media regulation should be designed.

Fundamental rights and FoE in particular, thence, can affect both the shape of institutions and the regulatory approach. Given the different competences of the Council of Europe and the EU the effects might have different scope and possibly encompass an integrated notion of media including the press, which currently falls only within the scope of the Council of Europe competence.

But what is the current regulatory scope of freedom of expression?

The remit of FoE has changed and adapted to technological and economic innovation. Forms of direct participation through media have existed for a long time. Primarily they were realised through public service broadcasting (Alexander, 20005: 7).[9] Among the public service obligations stands out the duty to make space accessible to different civil society groups in order to guarantee pluralism (Psychogiopoulou et al., 2011). Access would occur within a regulated space and the framework that public service broadcasters would offer. Technology offers today many more opportunities for civil society to participate in the process of content production in media, thereby expanding pluralism. Should that be regulated and, if so, according to which

[7] The possibility to reconcile use of private regulation and the principle of institutional autonomy clearly emerge both in the recitals and on the wording of art. 4.7 dir. 2010/13. See Recital 44: "*Member States should in accordance with their different legal traditions recognise the role which effective self-regulation can play as a complement to the legislative and judicial/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this directive*". art. 4.7 provides: "*Member States shall encourage co-regulation and/or self regulatory regimes at national level in the fields coordinated by the use of this directive to the extent permitted by their legal systems*".

[8] The link between private regulation and better regulation is explicitly mentioned in recital 44 cited above. More generally see Cafaggi (2006); Price and Verhulst, (2005: 21); Koops, et al. (2006: 109).

[9] But see art. 17 of Dir. 2010/13.

principles? The remarkable development of user-generated content poses daunting challenges to the scope of FoE and its impact on regulatory strategies. The historical evolution has seen first a shift from the right to inform as the core of FoE to a more inclusive perspective, balancing the right to inform with the right to be informed; the right to be informed has gained constitutional protection with an impact on content and access regulation (Casarosa and Brogi, 2011; Zaccaria, 2010: 29).[10] The right to be informed, however, has still reflected a passive position of the information recipient whereas the technological developments, with the diffusion of the Internet, have permitted new forms of content production with users standing at the forefront of the scene. User-generated content has thence entered the scope and remit of FoE. The most recent trend suggests that several further changes are taking place. Some forms of user-generated content are moving towards forms of professionalisation often associated to commercialisation. Large web companies are buying the most successful user-generated content platforms, integrating vertically and modifying significantly the supply chain (Cafaggi and Casarosa, 2012). By itself this is not necessarily negative, but user-generated content needs active and affirmative regulatory action to ensure that it will stay alive and develop as integral part of the result of freedom of expression. This implies that regulatory intervention is needed to offer user-generated content legal protection and guarantee pluralism via participation beyond the traditional perspective in the field of broadcasting.

The scope of FoE and its influence on regulatory strategies is also related to other content producers that have become the weaker part of the supply chain: the traditional media, press and broadcasters. The restructuring of the information supply chain has modified news production with the emergence of new forms of news aggregation in the online world. Power relationships have shifted. FoE has been used in litigation on both sides with different purposes. It has been referred to by content producers to promote some form of propertisation, to protect their incentives by allocating part of the revenues to those who produce innovative content. It has been also advocated by large Internet Service Providers (ISP) for the opposite goal: to reduce copyright protection and grant open access to information on the web. We develop further these conflicting dimensions of FoE in the report,[11] but use this example to show how constitutional principles do affect decision on if, what and how information should be propertised in order to expand FoE.

A more conventional area where FoE serves as a beacon to decide who, what and how should be regulated is professional regulation of journalism. Journalistic activities in Europe are regulated by the profession in different forms ranging from pure self-regulation to co-regulation, delegated or ex post endorsed by the executive or by independent regulatory agencies (Cafaggi and Casarosa, 2012). The report shows that there are numerous models deployed in Europe which hardly fit with the traditional common-civil law distinction.[12] The current challenges brought by new technological

[10] ECtHR, Lingens v Austria, 1986: "Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them" (at par. 41).

[11] See below sect. 5.

[12] See below sect. 6

developments concern the boundaries of the profession, what constitutes journalism and which privileges should journalists enjoy vis-à-vis other non-professional content producers, including the forms of user-generated content alluded to above. The legitimacy and accountability of professional regulators, the scope and remit of their regulatory power should be defined by reference to constitutional principles and in particular to FoE.

In conclusion, we believe that a much stronger role of constitutional principles and in particular of freedom of expression to provide guidance to the regulatory architecture and the partitioning of the regulatory spaces and the scope of media should be acknowledged. In the report, we show how this guidance can be operationalised in several media regulatory domains.

1.2. An integrated approach to media regulation: shifting the paradigm

What has been the approach to media regulation so far? If and how should it change? The report shows that there are several factors that segment media regulation. At the state level, where no competence issues arise, there is regulatory differentiation between media and electronic communication (Table 1.1) and across media (Table 1.2.).

Table 1.1. Telecommunication v media – technological integration

	Electronic communication authority	**Media authority**
Belgium	Belgian Institute for Postal and Telecommunication Services (BIPT) After constitutional court decision, regulators work together through cooperation agreements: CSA, VRM and Medienrat are working together with the BIPT in a Conference of Regulators for the sector of Electronic Communications (CRC). Such result was achieved after a constitutional court decision (2004).	Different authorities based on different language ("Conseil Supérieur de l'Audiovisuel" (CSA) for the French Community, "Vlaamse Regulator voor de Media" (VRM) for the Flemish Community and the "Medienrat" for the German-speaking Community)
Bulgaria	Communications Regulation Commission (CRC)	Council of Electronic Media (CEM)
Croatia	Croatian Post and Electronic Communications Agency (CPECA)	Electronic Media Council (EMC)
Denmark	IT- og Telestyrelsen (part of Danish Ministry for Science)	Radio and Television Council (RTC)
Estonia	Technical Surveillance Authority	Ministry of Culture (only for broadcasting) and Public Broadcasting Council (for public service media)
Finland	Finnish Communications Regulatory Authority (FICORA)	FICORA
Germany	Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen	Broadcasting Councils in charge of monitoring PSB; State Media Authorities (SMA) in charge of monitoring private broadcasters; Regulatory Affairs

		Commission (ZAK)
Greece	National Telecommunications and Post Commission (NTPC)	National Council for Radio and television (NCRT)
Italy	Communication Authority (AGCOM)	AGCOM
Romania	ANCOM	National Council of Broadcasting (NAC)
Slovakia	Telecommunications Regulatory Authority	Broadcasting and Retransmission Board (BRB) and Council of RTVS (for public service media)
Spain	National Telecommunication Authority and Commission for the Telecommunication Market (CMT)	State Council on Audiovisual Media (CEMA) (only envisaged by recent legislation but not yet put in place)
Turkey	Telekomünikasyon Kurumu	Radio and Television Supreme Council (RTUK) Information and Communication Technologies Authority (BTK) (for internet and mobile communication)
UK	Office of Communication (OFCOM)	OFCOM

Table 1.2. Media regulatory authority – convergent v. sectorial regulators

	Regulatory authority – convergent regulators	**Regulatory authority – sectorial regulators**
Belgium		CSA and VRM, CRC
Bulgaria		CEM
Croatia		Agency for Market Competition Protection and Electronic Media Council, Croatian Chamber of Economy (CCE), EMC and CPECA
Denmark		Danish Competition and Consumer Authority, RTC, Telecom Regulator
Estonia		Ministry of Culture and Public Broadcasting Council
Finland	FICORA	
Germany		Commission on the Concentration in Media (KEK) and the Federal Cartel, Regulierungsbehoerde für Telekommunikation und Post, SMAs
Greece		NCRT, Hellenic Competition Committee, NTPC
Italy	AGCOM	
Romania		CNA, Competition Council, ANCOM
Slovakia		BRB and Council of RTVS
Spain		CEMA, National Competition Commission and CMT
Turkey		Information and Communication Technologies Authority and the Radio and Television Supreme Council, national competition authority
UK	OFCOM	BBC Trust for BBC, ASA for advertising, ATVOD for video on demand services, PCC for the press

In relation to media, there is a relative consistent pattern that differentiates press from broadcasting, which translates into a much stronger relevance of private regulation in the press and significant public regulation in the field of broadcasting with some degree of co-regulation (Table 1.3.).

Table 1.3. Which type of private regulation?[13]

	Self-regulation	Delegated self-regulation	Co-regulation
Belgium	Flemish Press Council	French community decree provides for the legal basis for the creation of the Press Council	French Community has provided, in a decree, for co-regulatory regime for certain areas such as short extracts, commercial communications, accessibility issues, respect for human dignity and protection of minors; to be exercised by the Advisory Assembly to the CSA.
Bulgaria		Journalists and industry self-regulation within the EU accession process.	The Media Act introduces a form of co-regulation between the Electronic Media Council and two self-regulatory bodies. The National Council for Journalistic Ethics set up an Ethics Commission and adopted rules of procedure for the Print Media Ethics Commission and the Electronic Media Ethics Commission in 2006 and since then it has been receiving complaints.
Croatia	Journalists association		
Denmark	Guidelines for the Marketing of alcoholic beverages enforced by the Board of Alcohol Advertising Guidelines for food marketing to children issued by Forum for Responsible Food Marketing Communication	The Media Liability Act (2005) provides for the constitution of a Press Council in charge of monitoring a set of Press ethics norms	
Estonia	Journalists' Union's and Newspaper Association's press councils. Media services providers have drawn up and approved a self regulatory code of	The Media Services Act provides in several aspects self-regulation as the first choice. In case the self-regulation is not applied, the regulator may set the rules (e.g. regards to advertising addressed to minors).	Some measure in broadcasting and advertising

[13] The information available from the Mediadem Case Study Reports on this issue was integrated with the information available in the Table on the transposition of art. 4(7) of Directive 2010/13/EC, presented at the 35th Meeting of the AVMS Contact Committee, 23rd November 2011, available at http://ec.europa.eu/avpolicy/docs/reg/tvwf/contact_comm/35_table_3.pdf.

	conduct on responsible advertising policy in children programme in order to protect children and their health.		
Finland	Press Council. Self-regulation by main Finish television companies covering more areas (watershed, advance advertising).		FICORA decided to apply the self-regulatory provisions by the main Finish broadcasters to the broadcasting of all Finish television companies.
Germany	Press Council. German Advertising Association - members include advertising companies and audiovisual media service providers. Self-regulatory body - Advertising Council. Two self-regulatory bodies in the area of protection of minors: FSF – self-regulatory body of private broadcasters. FSM - self-regulatory body of well-known Internet service providers and Internet companies		Self-regulation in the area of Protection of Minors is supervised and accredited by the Commission for the Protection of Minors in the Media (KJM) – of the media authorities of the Länder. *Ex post recognised self-regulation*: Legislative recognition of journalistic standards to broadcasting (also online published) (art. 10 ITB)
Greece	Journalists' trade unions. The Greek Code of Advertising Communication enforced by the Council of Communications Standards	Law 2863/2000, published in the Hellenic government official gazette A, 262/29 November 2000, provides for self-regulation mechanisms by instituting self-regulatory bodies in respect of radio and television services. *Ethics committees*, which national broadcasting media (both public and private) are required to establish. Within the existing legal frame, law provides that, in order to be licensed, radio and television channels must create and enter into multi-party self-regulatory agreements that define and adopt rules of conduct and ethics standards concerning media content. The parties to such self-regulatory agreements are also required to establish	*Ex post recognised self-regulation*: Most of the principles contained in the codes of conduct binding journalists in the press, are 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). This code of conduct takes the form of a regular law. As implementation of AVMS directive, the law provides that television operators can establish (but they are not explicitly required to do so) alone or with others self-regulatory contracts to control the content of news and programmes. [Presidential

		ethics committees overseeing the implementation of the respective content-related rules and principles, which must in turn communicate their decisions to the NCRT.	Decree 109/2010]
Italy	Self regulation of advertising standards on the detailed description of how products will be placed and on the management of the relations between audiovisual media service providers and independent producers	Law delegates self-regulatory power to the Journalist Association	Coordination between Data Protection Authority and Journalist Association with regards to privacy protection in journalistic activity. Co-regulation (adopted in statutory law) concerning minors protection issues in broadcasting Failed attempts of state steered self-regulation regarding dignity protection online
Romania	Press council for industry and journalists (no more working) Romanian Advertising Council and the Romanian Audiovisual Communication Association		Complementing and detailing the legal provisions, CNA negotiated with the broadcasters and the civil society a collection of more specific norms: the Code on the Broadcast Content. It has the statute of secondary legislation and is the main instrument for the CNA to judge and sanction the violations of the law.
Slovakia	Journalist and industry self-regulation		
Spain	Journalists association. Agreement signed in 2002 between the main TV operators (both national and regional), AUTOCONTROL (Association for Advertising Self-regulation) and the Association of Spanish Advertisers Self-regulatory Code on TV Contents and Children.	A User's Bill of Rights of electronic communication services has been passed in Spain. The aim was to provide legal protection for telecommunications' users, coherent with European standards. Regulation should be completed with a new General Telecommunications Statute, not been passed by Parliament, yet. According to the General Law on the Audiovisual Communication, since 1 May 2010, the non-compliance with the self-regulatory codes constitutes an administrative infringement and may be sanctioned.	The LGCA has recognised a "right to self-regulation". LGCA empowers independent supervisory authorities to verify the legality of a code, and even to impose financial penalties for non-compliance. The main code is the Código de Autorregulación de contenidos televisivos e infancia (2004).

Turkey	Journalist association.		
UK	Press industry self-regulation.		Video on demand (VoD) is co-regulated by ATVOD and Ofcom in order to give effect to the AVMS Directive. ATVOD sets minimum content standards for VoD services that offer content comparable in form and content to television programmes. In case of non-compliance fines can be imposed by Ofcom and, in extreme cases, the service suspended.

Models differ importantly across Member States as also the report on the implementation of the AVMS directive suggests.[14] In this context new media are still primarily privately regulated with increasing absorption for technological and economic reasons into the remit of broadcasting and the oversight of public regulators. Often, however, the distinction across media intertwines with that between linear and non linear services. Countries differ in their approach to linear media: some remain into the remit of the medium regardless of the online/offline distinction; others instead define the regulatory remits along the linear/non linear.

A second, well known, set of factors affecting the changing scope of regulation is related to the technological and economic convergence between electronic communication and media. The process of integration is working both ways, but with different intensities. In many instances media companies are penetrating into the electronic communication markets; in fewer cases, and mostly in the past, electronic communications have bought or integrated with content providers (BEREC, 2012). Vertical coordination between different media and between them and electronic communication is bringing about radical changes in the two industries. Online newspapers and television progressively take over information provision, leaving to their offline versions the role of opinion makers rather than fact finders. The degree of integration between them is far from being achieved. Often, they act as competitors rather than being cooperative actors, but this seems to be a remnant of the past. The near future will move to increased coordination between online and offline news providers.

These transformations raise issues concerning the necessity/desirability of regulatory integration across media and between media and electronic communication. Technological grounds for different regulatory styles and different regulatory regimes are no longer justified, hence, some form of regulatory integration is needed. This does not mean, however, that it would be necessary to lift all the restrictions among the existing types of media as if they were homogeneous. Rather, it would be more

[14] First Report on the Implementation of the AVMS Directive, presented at the Contact Committee, available at http://ec.europa.eu/avpolicy/reg/tvwf/contact_comm/index_en.htm.

feasible both in political and technical terms to keep the different media alongside each other within a unitary framework, because there is still the need for different media products, allowing for difference among regulatory regimes but this should not be imposed for technological reasons, rather to safeguard a plural media sphere.

This integrated notion of media can be more easily adopted at member state level and within the scope of the Council of Europe where the legal basis is provided by art. 10 ECHR (Council of Europe, 2011). The competence system at EU level may render more difficult the adoption of a fully integrated notion, but there is certainly room for improvement and as mentioned constitutional principles can provide useful guidelines.

An integrated notion of media implies that new and conventional media should be considered as part of the same regulatory field. This would not necessarily imply uniform regulation across media. On the contrary, space for territorial and functional regulatory differentiation will remain, but will not be defined along the conventional lines distinguishing between different types of media. The current high degree of differentiation between press and broadcasting and between conventional and new media might not totally disappear, but can be rationalised taking into account the development of the linear/non-linear divide. The important role of public regulation in broadcasting was primarily associated with resource scarcity. This issue does not pose problems any longer. The rationales for public regulation have to be redefined and within them the role of public service has to be rewritten.

1.3. Supply chain and regulatory models

As mentioned above, Internet communication has had a disruptive effect on traditional means of information distribution, and this is even clearer in news supply chains (Wu, 2010). The changes that characterised the socio-economic sphere, however, have not affected the regulatory approach yet.

The way in which news is produced underwent a radical transformation, moving from a structure that was based on two main actors (namely news agencies and publisher/networks) to a more fragmented structure that involves either new content producers and new intermediaries (Bowman and Willis, 2003:10; Wunsch-Vincent and Vickery, 2010). Dissemination of information is no longer in the hands of industrial publishing companies, but it has increasingly become a shared activity for users, readers and consumers (Grueskin, Seave, and Graves, 2010; Picard, 2011). If initially this was developed as an alternative model of content production able to monitor the selection and the accuracy of distributed news,[15] now it has started to become complementary to industrial methods. The space for user generated content has increased both in electronic newspapers and in online television, the latter having introduced systems of enhancing and improving the quality of content supplied through collaborative relationships. The network-based organisation models (Benkler,

[15] For an analysis of the media accountability systems adopted in the online environment, among which blogging and citizen journalism are also included, see Heikkilä, et al. (2012).

2006) that emerge then raise the issue of if and how social production could be incorporated into the commercial sphere. The preservation of the social dimension of new media could be based on a notion of democracy, which recasts the defence of pluralism away from public ownership, and public service into preserving free and inexpensive accessibility to the web (La Rue, 2011; Redding, 2009).

New intermediaries have entered the supply chain: either as aggregators of existing news content available online (e.g. Google news) or as providers of device technologies (e.g. Apple television) (Artymiak, 2011: 33). Again the situation remains in flux as new trends are emerging heading to the vertical integration of content production phase. This is currently happening in both cases of intermediaries, possibly leading to issues of dominant positions in the market (e.g. Google competition case in EU and several Member States)[16] and of interoperability of standards.

The reaction of traditional media to this new framework has been hectic, either adopting a reactive approach (1) limiting access to content and (2) refraining from any collaborative effort with new intermediaries perceiving them as competitors, or allowing some leeway to cooperative projects that could improve interoperability (as in the case of Electronic Programme Guides). The future has to be cooperative. The litigation serves to position at the bargaining table to redefine roles and revenue shares along the chain.

As business models of conventional media have changed and new business models have emerged, the identity of standard setters and, consequently, the operation of private regulation is changing. A major driver of these transformations has been revenues shifting from traditional to new media and from content to service providers. The different distribution of revenues along the chain is both the cause and the consequence of the new private regulatory landscape, and triggered the emergences of several conflicts between news aggregators and content producers. [17]

One of the most dramatic consequences of these changes is the allocation of property rights over news content under the justification of protecting freedom of expression. Information directed to the public, unlike that used for economic purposes, has always been considered a public good, inapt to become the content of a property right. Protection for information content has been offered to content producers primarily via liability rules. Content producers, partly as a response of shifting revenues distribution along the supply chain in favour of service and access providers, have tried to protect content production via property rights. This has been occurring in different ways both in Europe and US, given the different approaches to copyright and the applicability of copyright laws to news. From a different perspective, these transformations are also changing the boundaries between professional and non-professional content

[16] See also below par. 3.4.

[17] On the link between private regulation and industrial organisations with specific reference to the supply chain see Cafaggi, "Transnational regulatory contracts and supply chains", unpublished paper on file with the author. Other examples of different forms of revenue sharing are available in Grueskin, et al., (2011: 108).

production (Cafaggi and Casarosa, 2012), blurring the distinction among content creators, editors and distributors. This shift requires a reframing of private regulation so as to guarantee its role in ensuring pluralism and freedom of expression.

1.4. Public service broadcasting and public service media

A central issue for consideration is that of the relationship between public service broadcasting and digital media. Technological and business changes call for new and possibly more demanding functions of public service. This raises two distinct questions; the extent to which existing public service broadcasters should be able to use new forms of delivery, and the second is the extent to which the delivery of public service content should be contestable, in the sense that it may be provided by a range of different new media actors rather than a dominant public service broadcaster or broadcasters.

The first question has been discussed in detail in another Mediadem report (Psychogiopoulou et al, 2012). It concluded that a 'broad view' of public service media had been increasingly endorsed by international organisations, including UNESCO, the Council of Europe and the EU. This permits the use of a wide range of digital media for public service provision. Where this has been offered by the dominant PSB provider, supported by public resources, such provision has however led to complaints from competing private broadcasters, which accused public service providers of foreclosing markets and engaging in unfair competition. As a response there has been the adoption of the 'Amsterdam test' by the European Commission, involving a test of 'public value' in the provision of new public service provision, including provision over new forms of delivery.[18] This is designed to accept that it is of value for public service providers to adopt new means of delivery, but that a clear remit should be given for this in order to achieve a balance between public service and open competition. The authors of the Mediadem report note that this has been criticised as leading to unnecessary bureaucracy and as constraining the powers of Member States to adopt the public service broadcasting remit to their own needs. Such *ex ante* assessment may also raise serious concerns about public service broadcasters' independence, since detailed criteria will be laid down by the state. Nevertheless, if we accept that public service broadcasters should have the opportunity to employ fully new modes of delivery, some test of this kind is likely to continue to be necessary to avoid competition concerns.

The second question raises the possibility of resources being made available to a wider range of public service providers in order to meet public service goals; the emphasis turns from that of public service as a set of institutions to a functional approach that focuses on how achieving the goals themselves. In this respect there is a similarity to the approach taken to universal service in the liberalisation of electronic communications; rather than entrusting it to a single dominant provider which can fund it by cross-subsidy, support to public service is contestable, with bids to a public

[18] See below par. 3.5.

service fund from a number of competing suppliers, thereby enabling provision at the lowest cost and avoiding entrenchment of market dominance. Indeed, there are already signs of a move in this direction; the Mediadem report referred to above notes ‘a shift from public support solely offered to public service operators to public support offered to particular public service programmes, beside the PSBs (Psychogiopoulou et al, 2012: 21). Examples given are the use of licence fee revenue in Denmark for a Public Service Fund supporting the provision of drama and documentary programmes on commercial television and radio stations, and a similar model which exists in Croatia. Neither of these cases, however, provides full contestability but rather each supplements core provision by dominant public service broadcasters.

Full contestability would raise serious problems for public service broadcasters. In particular, this is an area where considerable economies of scale exist for large broadcasters; the production of, for example, expensive drama and current affairs programmes is likely to be more efficiently done if they can be made available across a variety of different delivery modes by the same broadcaster. In addition, the chipping away at parts of the mission of public service broadcasters which such contestability would permit could seriously threaten the ability to deliver a public service remit. For these reasons it would not desirable to advocate full contestability for the provision of public service broadcasting. However, there may be room for support of user generated content in this way. This could occur through the provision of contestable funding for such provision. An advantage would be that this could replicate some of the advantages of public service broadcasting in the older media by avoiding the restrictive effects of the increasing commercialisation of user generated content in the new media. Considerable care would have to be taken however to ensure that the conditions for the award of such funding did not in themselves limit freedom of expression; once more issues of regulatory design become central, with a need to avoid public regulation dominated by governmental interests and private regulation dominated by key commercial players, and instead to a adopt a more open approach.

2. Freedom of expression as a driver for regulation

As mentioned in the introductory part, constitutional principles can contribute to the choice among different regulatory strategies addressing the media, and in particular allocating the regulatory power on public and private actors. In order to understand how freedom of expression is defined and if the national constitutions already provide the criteria to partition the regulatory space, the following section will provide an overview of the approach towards freedom of expression at European level, taking into account both the EU and the Council of Europe perspective. Then, a country comparison describes how freedom of expression and its limitations are defined at national level and the consequent allocation of regulatory power, briefly addressing also the conflict between freedom of expression and other constitutional principles.

2.1. The freedom of expression principle as a tool to allocate regulatory power

In many European countries, freedom of expression is 'the cornerstone of the democratic order', meaning that it is not possible to talk about democracy in absence of an effective flow of ideas and comparison among them (Rolla, 2010; Verpeaux, 2010).[19] Even before the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights of European Union (hereinafter EU Charter) becoming primary law (Mastroianni, 2010 and 2012), the CJEU considered freedom of expression one of the core principles of the European legal order;[20] after the adoption of the EU Charter,

[19] Several MS' courts have addressed the point, i.a. in Italy, the Constitutional Court in many occasions has underlined that a democratic society is based on effective freedom of expression. Starting from decision 105/1972, then through decisions 826/1988, 348/1994 and 466/2002, the Court affirmed that freedom of expression and the right to be informed are two sides of the same coin and both aim to define and thrive a pluralistic environment. In the UK, the House of Lords also addressed freedom of expression principle vis-à-vis defamation, in the recent case law Jameel v Wall Street Journal ([2006] UKHL 44), Grobbelaar v News Group Newspapers ([2002] UKHL 40), McCartan Turkington Breen v Times Newspapers ([2001] 2 AC 277), Hamilton v Al-Fayed ([2001] 1 AC 395), Berezovsky v Michaels ([2001] 1 WLR 1004) and Reynolds v Times Newspapers ([2001] 2 AC 127). In Germany, the Federal Constitutional Court, in judgment of 16 June 1981, no. 1 BvL 89/78, in BVerfGE 57, 295, declared that the expression and imparting of opinions and freedom of information are human rights enshrined in the Constitution and that the exercise of these rights requires constitutional protection; moreover, in judgment of 5 August 1966, no. 1 BvR 586/62, NJW 1966, p. 1604, the Court affirmed that free and independent media are intrinsic to a democratic society, and this intrinsic character applies to traditional forms of press and broadcasting as well as electronic and combined thus converged forms of media. In Spain, a recent decision of the Constitutional court emphasised that freedom of expression and information are freedoms on which media freedom and independence is based, together with pluralism and other constitutional values (Judgment of the Constitutional Court 31/2010, 28 June).

[20] For instance in judgment of 22 October 2009, Kabel Deutschland, at para. 37: "*It should be noted that the* maintenance *of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which freedom is one of the fundamental rights guaranteed by the Community legal framework*". More recently, in a judgment of 16 December 2008, Michaniki, the Court was confronted with, a provision of the Greek Constitution establishing an incompatibility between the public works sector and that of the media, holding that "*A Member State's desire to prevent the risks of*

EU institutions are even more expected to respect this right when exercising their powers and competences.

One point that should be stressed is that in the media pluralism field (inherently linked but not coincident with freedom of expression *tout court*), a uniform approach is not necessarily appropriate nor desirable, given the failed attempts to arrive at an harmonisation directive on pluralism and given the specificities (political, historical, cultural) of each country.[21] Most of the regulatory measures to enhance media pluralism (e.g. from merger control rules to content requirements for public broadcasters and to the professional status of journalists) remain, according to the subsidiary principle, the Member States' responsibility.

Nevertheless, as just observed, the EU institutions are not only expected to respect media pluralism, but also to support it in the Member States, as shown by some provisions contained in the AVMS directive.[22] One interesting issue is to what extent this wider margin of discretion left to the Member States turns into freedom to choose also the nature of these regulatory tool(s) - public, private and combination of the two – according to Member States' constitutional and political traditions, and, to their normative approach.[23]

Two main normative approaches could be, in fact, identified: on the one hand, the neo-liberal 'marketplace of ideas' model,[24] based on competition and freedom of

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interference of the power of the media in procedures for the award of public contracts is consistent with the public interest objective of maintaining the pluralism and the independence of the media. (…) It follows that Community law does not preclude the adoption of national measures designed to avoid, in procedures for the award of public works contracts, the risk of occurrence of practices capable of jeopardising transparency and distorting competition, a risk which could arise from the presence, amongst the tenderers, of a contractor active in the media sector or connected with a person involved in that sector, and thus to prevent or punish fraud and corruption".

[21] Katholieke Universiteit Leuven - ICRI (2009: 2-5), where a broad definition of media pluralism is adopted, as 'the scope for a wide range of social, political and cultural value, opinions, information and interests to find expression through the media'. See also the decisions of the CJEU on this point, in particular, judgment of 25 July 1991, Gouda, where the court classified media pluralism as a cultural policy objective that can be considered as an "*imperative reason of public interest*" capable of justifying national measures restricting the free movement of services, provided that such measures are proportional and do not go beyond what is necessary to achieve the objective pursued.

[22] See art. 3, 4, and 5 of directive 2010/13/EC.

[23] It may be noted that, if a uniform approach in defining media pluralism and the measures to better achieve it is not opportune, another thing is the harmonisation of the interpretation and protection of the freedom of expression, as right (to which yet pluralism is linked), as testified by several decisions of the European Courts that limited the margin of appreciation of MS (see the ECHR *Handyside* and *Sunday Times* cases, in Yourow (1996), who affirms about the margin of appreciation that "*this quicksilver notion may take the guise of a method of interpretation which the Court invokes at its discretion (…) and of a test which the Court obliges itself to address*".

[24] According to this system, there can be no restrictions on the ideas that can be advanced in any debate. Filter mechanisms based on orthodox notions of truth cannot be tolerated. As with free market theories of economics, this idea trusts in the ability of the market to determine the value of a particular proposal. Theories succeed or fail on their own merits. In legal terms, the adoption of this theory thus tends to result in a situation of generally unrestricted media freedom. See the first proponent of this approach Mill (1909).

choice and; on the other hand, the public sphere approach, based on a 'principled pluralism', aimed at serving the society in its entirely.[25] These different views are reflected in different regulatory approaches to media pluralism: the market approach, supporting the idea of diversity as freedom of choice and absence of governmental constraints; and the interventionist or public regulation approach, emphasising the importance of varied political and cultural views, that may require state intervention, but could also be achieved by complementary self- and co-regulation.[26] Whatever the regulatory approach, major threats for the freedom and independence of media, from a legal perspective, could arise.[27]

Considering the freedom of expression principle, as it is enshrined by the EU treaties, by the EU Charter and as recognised in national constitutional traditions, a first distinction could be seen in the functional or non-functional nature: in the latter meaning its protection is awarded to the individual as such (citizen or not) and regardless of the contents of the expression.[28] As objects of this right, academic literature and jurisprudence have identified at least four subjective situations, positive and negative aspects of the same freedom: (1) the right to freely express oneself; (2) the right to use any available means to disclose the own thought; (3) the right to be informed; (4) the right to be silent (Harris et al., 2009; Van Rijn, 2006).[29] From each

[25] According to the democratic model, the press is supposed to ensure that the public are equipped to make an informed judgment about the qualities of their representative officials and institutions. The constitutional protection of the press is implicitly confined to stories which are accurate, and which concern issues relevant to the democratic process; thus, restrictions based on the content of stories, and on their accuracy, are permitted.

[26] As it has been observed, '*there is no way to avoid the regulation of communications and information, but the problem is which type of regulation to provide*', see Sustain (2001), who also denounces the excessive fragmentation of the information (especially that passing through Internet, the 'supermarket of ideas') and the market-oriented development of media policies. See also Prosser (2011).

[27] See the examples of legal indicators for each kind of risks in Katholieke Universiteit Leuven - ICRI (2009: 36).

[28] See for example the Italian Constitution, art 21, whose formulation is due to the need, after the Fascist period, to safeguard the possibility to express publicly and freely the own opinions, not also their diffusion: in that the Italian constitution is different from the German one, which states the loss of the freedom for those who abuses of it. In both MS, yet, the freedom of expression is regulated, in order to safeguards other fundamental constitutional values and to avoid that it can turn into its contrary. For a wider analysis of the Mediadem countries see below.

[29] See i.a. ECtHR, Vogt v. Germany, 1995 where the Court affirmed that the freedom to hold opinions includes the negative freedom of not being compelled to communicate one's own opinions; ECtHR, Lingens v. Austria, 1986 where the Court affirmed that it is incumbent on the press "*to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them*"; ECtHR, Groppera Radio AG and Others v. Switzerland, 1990 and more recently ECtHR, Casado Coca v. Spain, 1994 where the Court held that states may not intervene between the transmitter and the receiver, as they have the right to get into direct contact with each other according to their will; ECtHR, Autronic AG v. Switzerland, 1990, where the Court concludes that the freedom to receive information includes the right to gather information and to seek information through all possible lawful sources, covering also international television broadcasts.

of them, we can derive sub-rights and obligations that have an impact on the way in which the regulatory tools in media field are chosen and by whom they are adopted.

Concerning the limits to this freedom, common limits to several Member States are in particular those derived by the protection of other rights, privacy, honour and reputation or state secrets, contained generally in state regulation, eventually complemented by co- and self-regulation.[30] It is interesting to notice that, often the constitutional texts and art. 10 ECHR refer literally to the 'law', as grounding restrictive measures of the freedom of expression: one could question if the term law (at European or national level) could in principle be interpreted also as secondary law - therefore as co-regulatory or self-regulatory provisions - especially when other relevant value are at stake.[31] Clearly, when self or co-regulation protect conflicting constitutional values like privacy or data protection with self-regulatory codes, it is to the constitutional provision that references should be made to. This issue could have important results for the media regulatory framework, especially for the private regulation about electronic journals or other interactive forms of dissemination of one's thoughts.[32]

A particular aspect of this freedom, usually derived by the interpretation of the constitutional Courts, is the 'right to information', in the sense of providing information, as typical activity of journalists but not limited to them. This has many corollaries, among which the fact that, at given conditions, the journalist is 'excused' from liability for slander or defamation and that he has the right to access to the sources (with consequent obligations, especially for the public bodies, to provide

[30] See ECtHR, Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic of Germany, 1989, where the Court acknowledged that "*even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect privacy of others or the duty to respect the confidentiality of certain commercial information are examples*."

[31] See ECtHR, Peck v. the United Kingdom, 2003. After the claimant complained to the UK broadcast regulators BSC and ITC and to the UK PCC for the publication of a video and related photographs, having his complaints upheld by the Broadcast regulator, whereas rejected from the PCC, he applied for judicial review of the press self-regulatory body, but this was rejected. In relation to this, the European Court found that in the UK there was no adequate protection for privacy (Article 8 of the ECHR) as the self-regulatory and statutory regulators did not offer sufficient redress: "*The Court finds that the lack of legal power of the commissions to award damages to the applicant means that those bodies could not provide an effective remedy to him. It notes that the ITC's power to impose a fine on the relevant television company does not amount to an award of damages to the applicant. While the applicant was aware of the Council's disclosures prior to "Yellow Advertiser" article of February 1996 and the BBC broadcasts, neither the BSC not the PCC had the power to prevent such publications or broadcasts*".

[32] See the Italian Court of Cassation, criminal section, decision n.10535/2008, though referred to a case of forum on line: the Court has clarified that the law could prohibit expressions of thoughts offensive of other values rather than the public morality (in this case, the principle of reserve of primary law would be in force), but the same Court does not expressively exclude that the protection of these other values could be contained in a civil instead of criminal law.

information).[33] This right includes independence from political power and is at the core of the values associated with freedom of expression.[34]

Concerning the 'passive' perspective of freedom of expression (the right to be informed), as a corollary to it, courts acknowledge several obligations for those who exercise the right and for those who hold the means of information (from journalists associations to media enterprises) associated with pluralism (Cafaggi, Casarosa, 2012; Lipari, 1978; Pace, 2008). There is in fact a recognized social function of the right/freedom to information, in connection with the right to be informed, that is extended also to media other than the press: with the consequence that TV is considered, commonly, as a general public service and that is reflected in *internal pluralism*, i.e., the remit of completeness of information (Katholieke Universiteit Leuven – ICRI, 2009).[35] It is interpreted as extended not only to public broadcasters but also to private ones. The right to be informed has therefore governance repercussions: its link with internal pluralism calls for a regulatory framework which includes public service obligations.[36]

Different from the internal pluralism is the principle of *external pluralism*, i.e. ensuring a plurality of owners of means and of sources of information (Goldberg, Prosser and Verhulst, 1998). For instance, private television is generally admitted at national level, but under state regulation: among other rules, a ban on abuse of a dominant position – monitored and sanctioned also by independent Authorities.[37]

New technologies have broadened the scope of the right to inform by including user-generated content. These new forms of information production redefine the right to inform/right to be informed distinction since the former passive recipients have become producers themselves. Support to freedom of expression requires governance intervention rather than protection of individual rights. User generated content is a collective not an individual good which calls for specific legal means of protection.

The following section will describe the way in which national constitutions and consequently courts have interpreted the freedom of expression principle as defining the boundary between the public and private dimension.

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[33] From the protection of freedom of expression of the journalist could be derived also the 'conscience clause' that impacts directly on private regulation in the sense that is included in the contractual relationship between the journalist and his employer.

[34] Council of Europe (2000) provides the following: "*Emphasizing that to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector it is important to provide adequate and proportionate regulations of the sector in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests*".

[35] See below sect. 4.2.2.

[36] ECtHR, Observer and Guardian v. the United Kingdom, 1995; ECtHR, Informationsverein Lentia and Others v. Austria, 1993. where the Court affirmed that the State's right to license the media companies received a new sense and purpose after the development of technology (at that time satellite and cable television), namely the guarantee of liberty and pluralism of information in order to fulfil public demand.

[37] See below sect. 3.

2.2. Country comparisons

2.2.1. Freedom of expression

The freedom of expression principle is the first and main reference that at national level shapes the regulatory strategies regarding the media sector. Although differently framed in each country, freedom of expression is legally protected in all the countries analysed within the project. Except for the UK where the reference point is to be found directly in art. 10 ECHR;[38] in all other cases, national constitutions include this freedom as part of the general principles associated with citizens' rights. The meaning associated with freedom of expression is the possibility to have and express opinions, both directly or indirectly (sometimes through case law, as in Germany and Italy) related to the role of the media in disseminating information and providing the citizen with a range of different views and opinions.

Only a few of the analysed countries provide for a clear distinction between freedom of expression and freedom of the press within their constitutions, introducing added or extended constitutional articles on this point. An example is the Belgian constitution which provides for a general declaration of freedom of expression in art. 19 applicable to any citizen, and a specific formulation dedicated to freedom of the press in art. 25; similarly the Bulgarian and the Slovakian constitutions develop the relationship in several articles. In other few cases, additional legislation supports the constitutional principle addressing freedom of the press or freedom of the media (e.g. Croatia and Finland) or further reference to media freedom within the context of media legislation (e.g. Estonia).

Table 2.1. How do the constitutional principles as enshrined in national constitutions affect the partitioning between public and private regulation?

	Freedom of expression as enshrined in national constitutions
Belgium	Possible private regulation for press. Public regulation for broadcasting (articles of the constitution are interpreted as non-technology neutral)
Bulgaria	Public regulation for restriction in case of: • public decency • incitement of a forcible change of the constitutionally established order, • the perpetration of a crime, • the incitement of violence against anyone.
Croatia	Appears to be nothing in the constitution that creates a distinction between different forms of media justifying different types of regulation for press and broadcast.
Denmark	Appears to be nothing in the constitution that creates a distinction between different forms of media justifying different types of regulation for press and broadcast. Public regulation for restriction in case of: • libel • hate speech

[38] Note that UK adopted the Human Rights Act in order to implement ECHR at national level.

Estonia	Private regulation for press and online; Public regulation for broadcasting (audiovisual services). No regulation providing media special rights (exceeding the general level), except for the Personal Data Protection Act, which justifies disclosing private data in case of predominant public interest and appliance of good conduct. Public regulation for restrictions in case of: • public order and morals • rights and liberties, health, honour and reputation of others • state and local government officials • protecting state or business secrets or confidential communication • protecting the family life and privacy of other persons • in the interests of justice
Finland	Public regulation for the implementation of principle in practice. Restriction based on minors' protection.
Germany	Public regulation for restrictions in case of: • protection of young persons • right to personal honour • protection of privacy Public regulation for broadcasting and telemedia (commercial and PSB) Basic public regulation for press (for instance: right to reply)
Greece	Public regulation for broadcasting. Public regulation for restrictions on: • an offence to religion • an insult to President of the Republic • public order • decency The above concern freedom of expression (art. 14 Const.). With regard to freedom of information and the right to participate in the information society (art. 5A Const.), public regulation for restrictions for reasons of national security, combating crime and protecting the rights and interests of others can be imposed.
Italy	Private regulation for press. Public regulation for restrictions in case of: • public morality
Romania	Public regulation for broadcasting. Public regulation for restriction in case of: • protection of dignity, honour, privacy of person, and the right to one's own image • defamation of the country and the nation • any instigation to a war of aggression, to national, racial, class or religious hatred • any incitement to discrimination, territorial separatism, or public violence • any obscene conduct contrary to morality
Slovakia	General ban on censorship Public regulation for broadcasting. Public regulation for restrictions in case of: • protection of rights and freedoms of others • state security, law and order • health and morality
Spain	Public regulation for public service media in the light of pluralism. Public regulation for restrictions in case of: • protection of right to honour • privacy • personal reputation • protection of youth and childhood
Turkey	Public regulation for the implementation of principle in practice. Public regulation for restrictions in case of : • protecting national security, public order and public safety

	• the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation • preventing crime, punishing offenders • withholding information duly classified as a state secret • protecting the reputation and rights and private and family life of others • ensuring the proper functioning of the judiciary
UK	Private regulation for press Public regulation for broadcasting

A common feature of the definition provided by national constitutions of the freedom of expression principle is the limit to state intervention in the press sector, leaving market actors (industry and professionals) to regulate themselves through different forms of private regulation (Tambini, Leonardi, and Marsden, 2008). The argument put forward in several national case study reports is that there was suspicion towards government regulation in the press sector and a preference towards private regulation would be justified by freedom of expression (Barendt, 2005: 38).[39] Here, the clearest case is the one provided by Bulgaria where the Constitutional court, interpreting art. 39, 40 and 41 of the Bulgarian Constitution, stressed the need to grant institutional, financial and technical separation between the press and the state, this implying that no regulation or intervention by public actors could be considered admissible in this sector. The Bulgarian constitutional court, adopting a market approach, went on allocating on market mechanisms, namely competition among market actors, the task of achieving a plurality of views.[40] However, additional examples can be made, in particular regarding the case of Belgium where effectiveness based on more efficiency of private regulation has been put forward, in order to overcome the allocation competences between communities and state level (Van Besien, 2011).

A different rationale for regulation emerges looking at the distinction between freedom of the press, traditionally associated with the printed press, and freedom of the media in general. In general, due to historical reasons, the drafting of the constitutional principles in several countries dates back to the period when only the printed press was in charge of informing citizens; thus, the formulation of freedom of the press in the respective languages is clearly connected to this origin. In those countries where no constitutional reform addressed freedom of the press, only through the jurisprudence of constitutional courts was the concept extended to the subsequent technological developments, namely broadcasting first and then eventually to new

[39] See in particular the decision of the Italian Constitutional Court on the point, decisions n. 11/1968, where the Constitutional Court affirmed that the Journalist Association would be an illegitimate limitation of freedom of expression if the enrolment was a *conditio sine qua non* in order to publish material through any type of media; and then decision n. 71/1991, the court affirmed that the Journalist Association should be also interpreted as a guarantee for the exercise of the freedom of expression of journalists vis-à-vis the publishers which could limit their editorial freedom.

[40] For the court "t*he 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.*"

media.[41] Technological developments, instead, were taken into account into the countries that provided for recent constitutional reforms, such as in the case of Greece.[42]

As regards broadcasting, then, freedom of expression does not necessarily allocate the power to regulate on private actors; rather this sector is covered by public or at most co-regulation. Such a different approach was based on a set of reasons: first, scarcity of the technological facilities, i.e. airwaves, suggests that the government must regulate the assignment and use of the airwaves because there is a limited number of useable frequencies in the electromagnetic spectrum; thus government can allocate, and potentially deny or revoke, a broadcaster's licence to use a frequency, so long as that action is in the public interest. Secondly, sector specificities imply that broadcasters have a more "captive" audience than print media; thus, government should ensure that these unique media are programming in the public interest. Finally, airwaves do not have the traditional physical boundaries that other, more tangible means of communication share. Consequently, because broadcast messages are more pervasive, their potential for social influence is great; thus, government can regulate broadcasting and limit, to some extent, freedom of expression (Salomon, 2008: 12). For instance, in the Bulgarian case, the above mentioned decision of the Constitutional Court affirmed that the need for the regulatory role of the state towards electronic media is required by "*juridical, financial, technical or technological reasons*". Among the technological reasons, the relevant one is the right of the state with respect to the radio frequency spectrum (art. 18(3) of the Constitution) allowing state intervention in limiting the freedom of the electronic media. In the Court's view, since the freedom of the electronic media is crucial for guaranteeing access to information to the public, the regulatory power regarding electronic media organisation, structure and financing, by an independent state body, is not only admissible but required (Smilova, Smilov and Ganev, 2011).

Another example where a paternalistic approach towards broadcasting was adopted is the Greek case, where art. 15 of the Constitution emphasises that '*Radio and television shall be under the direct control of the State. The control and imposition of administrative sanctions are under the exclusive competence of the National Radio and Television Council, which is an independent authority, as specified by law*'. Here, the article of the Greek Constitution frames freedom of expression so as to allocate regulatory power to public actors; not only a preference for public regulation is expressed but it goes as far as identifying explicitly the type of regulatory body in

[41] One exception to this general trend is the Belgian case that shows the conflicting interpretations given by the constitutional court and civil courts regarding the extent to which constitutional principle apply to new technologies. The specific articles of the Belgian constitution refer literally to 'press', but in the decisions of the highest civil court freedom of the press and the prohibition of censorship is interpreted restrictively as applying only to the written press, and not to radio or television. On the contrary, the constitutional court adopts a more technology neutral approach, shown in particular in the decision regarding the recently adopted legislation on protection of journalistic sources, where it intervened so as to enlarge the scope of application of the law to anyone exercising journalistic activity, regardless the means of expression and the status they have.

[42] The latest constitutional reform addressing freedom of expression dates back to 2001.

charge of the enforcement activity, namely the national independent regulatory authority for communication.[43] A similar allocation of regulatory power to independent regulatory authorities, though shared with the state, is provided also in the case of Spain. In art. 20 (3) of the Constitution it is affirmed that "*The law shall regulate the organization and parliamentary control of the mass communication means under the control of the State or any public agency and shall guarantee access to such means by the significant social and political groups, respecting the pluralism of society and of the various languages of Spain*." [44] Here, the allocation of regulatory power to the state is also supported by the fact that freedom of expression falls into the category of "*fundamental rights and public freedoms*": art. 81 of the Spanish constitution provides that the type of legal instrument that can be used for the implementation of such kind of rights and freedoms is the so called Organic Law. [45]

2.2.2. Limitations

The freedom of expression principle, in its formulation in art. 10 ECHR, provides for a clear example where the protection of the fundamental right is coupled with the recognition of the need to balance it with conflicting rights able to restrict its scope (Rosenfeld, 2003). The Strasbourg Court has clarified in several occasions that the exercise of freedom of expression cannot exclude duties and responsibilities.[46] Similarly also the EU Charter of fundamental rights provides for a general clause regarding the possibility to limit rights and freedoms where they are in conflict.[47] The same need to balance freedom of expression is acknowledged in the national constitutions of countries within the Mediadem project.

It is useful to distinguish between countries that have an 'ad hoc' limitation clause and those that have only a general limitation clause, respectively following the models of the ECHR, and of the EU Charter. In the latter case, constitutions implicitly allocate the burden of striking the balance between competing interests on domestic courts, whether civil or criminal. The cases of Denmark, Belgium and Croatia clearly

[43] See also above in the Bulgarian constitutional court decision the reference to the independent regulatory authority.

[44] It is interesting to note that, among the countries analysed within the Mediadem project, this is the only one where the pluralism objective is explicitly mentioned.

[45] Yet, the Court argued that a *direct* regulation of the freedoms 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, thus, 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. See Decision 127/1994, 5 May 1994.

[46] The jurisprudence of the ECtHR has also interpreted art. 10 ECHR providing a set of principles that circumscribe the scope of national legislators in imposing limits on freedom of expression: namely the precise definition and interpretation of the limitations allowed by art. 10; the requirement of limited measures that correspond in scope to "*preeminent social needs*"; the "*proportionality*" of the limitations with respect to the objectives that the legislator intends to accomplish; and a necessary balancing of the interests affected. See also Groppi (2005).

[47] See art.52.1 EU Charter.

fall into this category, where the limitation clause does not provide any list of issues, leaving an open clause regarding possible liability to be evaluated in court.[48]

Instead, in the other countries where an 'ad hoc' limitation clause is included, a different set of issues is to be taken into account, depending on the constitutional value protected. Three are the possible options: limitations linked with the rights of other people (1), limitations that protect public values (2), and finally temporary limitations (3).[49]

(1) *Limitations that are closely linked with the rights of other people:* In this category it is possible to find different rights, for instance reputation or the honour of someone else; private and family life; dignity and one's image right. In this respect, defamation and privacy are the most relevant fields where possible conflicts arise, allocating the task of providing standards to balance between them to courts, as it will be explained below.

(2) *Limitations that protect public values, values of the state and society*: In this category, limitations to freedom of expression are grounded on public order (e.g., "national security," "territorial integrity," "public safety," "prevention of disorder or crime"); or limitations could be based on the protection of the basic characteristics of the State; or for defamation of the country and the nation. A parallel set of justifications for limitations to freedom of expression concern morals: obscene conduct contrary to morality or pornography can justify limits to freedom of expression.

(3) A third category refers to *temporary limitations* upon the declaration of war, military or other state of emergency.

It should be underlined that the second category could have a strong effect on freedom of expression, as the clauses in this case are very broad (e.g., "national security," "territorial integrity," "public safety," "prevention of disorder or crime") and can be interpreted in a restrictive way so as to deprive the freedom recognised of any effective significance. Then, the constitutional value of the freedom of expression should be also coupled with the will of judges and legislators to effectively implement it in their activity. One clear example in this sense is the case of Turkey, where the Constitutional Court's case law on freedom of the press and expression did not help in defining a strong protection for such principle. For instance, the Court has declined to review restrictive criminal laws, interpreting an Anti-Terror Law provision to be compatible with the Constitution and rejecting the request for annulment. Also in the dialogue between the legislator and courts, the latter have hampered the legal reforms adopted in accordance with the ECHR standards, overturning those changes.

[48] See art. 76 Danish constitution: "*Any person shall be at liberty to publish his ideas in print, in writing, and in speech, subject to his being held responsible in a court of law*." Similarly the Belgian constitution provides at art. 19 that "*Freedom of worship, its public practice and freedom to demonstrate one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished*."

[49] For an analysis of these three categories in Eastern European countries see Groppi (2005).

2.3. The standards applicable to different media in the balance between freedom of expression and other fundamental rights

Freedom of expression not only contributes to the allocation of regulatory space between public and private regulation it also defines the relationship between *ex ante* regulation and *ex post* adjudication. Within the fourteen countries analysed, the implementation of the freedom of expression principle strongly relies on courts, whether constitutional courts or civil and criminal courts.[50] In some cases, courts acknowledged the important role carried out by private regulators in striking a balance between conflicting fundamental rights,[51] but in most of cases, domestic courts affirmed their competence in interpreting and ensuring sufficient protection of citizens where conflicts among fundamental rights arise.[52]

This significant function of courts in granting protection to freedom of expression and solving conflicts with conflicting fundamental rights has been recently 'eroded' by the increasing role of regulation, both public and private. For instance, independent regulatory authorities have adopted decisions that were based on their remit, e.g. data protection, but that could affect freedom of the press, then interfering with the remit of press councils.[53] Only in few cases, however, has a potential overlap between courts and independent regulators been recognised, such as in the case of Greece; or between courts and private regulators, such as in the cases of Denmark, Slovakia, and UK.

It is then foreseen that next courts will only intervene to adjudicate disputes among regulators, having the latter already stroke the balance between conflicting rights

[50] See in the UK, the House of Lords considered freedom of expression issues in several contexts: *In Re S* ([2004] UKHL 47) it set out for the first time the principles for balancing Articles 8 and 10 in the context of the reporting of criminal trials; *In Re British Broadcasting Corporation* ([2009] UKHL 34) again, emphasised the importance of freedom of expression in the context of reporting restrictions on a criminal appeal; as regards privacy, in *Campbell v MGN* ([2005] UKHL 61) it upheld the plaintiff's claim for misuse of private information resulting from the publication of a photograph, whereas in *Wainwright v Home Office* [2003] UKHL 53) it held that there was no general common law tort of invasion of privacy.

[51] See Silber, J. Judgement R (on the application of Ford) v The Press Complaints Commission [2001] EWHC Admin 683, CO/1143/2001, 31 July 2001, where the court acknowledged that "*the [Press Complaint] commission has to consider and balance in many cases the important but countervailing freedoms of privacy and of expression. The Commission then has to exercise a judgement on the particular facts as to when the right to privacy of a complainant ends and where the freedom of expression of the publisher against whom the complaint is made begins*".

[52] Venables v. News Group Newspapers Ltd and others, cit., where the High Court affirms in relation to a balance between freedom of expression and protection of the new identity of the claimants, "*the press code, as applied by the Press Complaints Commission, is not, in the exceptional situation of the claimants, sufficient protection. Criticism of, or indeed sanctions imposed upon, the offending newspaper after the information is published would, in the circumstances of the case, be too late. The information would be in the public domain and the damage would be done. The press code cannot adequately protect in advance.*"

[53] See in Italy, the case Tribunale Civile di Milano, Sezione Prima, 14 October 1999, where the court affirmed that the Data Protection Authority could not adopt decisions that indicate the type of content that should be the object of news, reducing the autonomy of journalists in this respect.

within their competence remit. An example of this hypothesis could be the Italian case of AGCOM, which tried, but yet failed, to identify its competence as regards the possibility to introduce a new notice and take down procedure where decisions on copyright infringements could be taken by AGCOM itself, implicitly extending AGCOM regulatory competence over the balance between copyright protection and freedom of expression (Psychogiopoulou, Kandyla and Casarosa, 2012).

As the situation currently stands, courts seem to provide stronger protection for freedom of expression when it is balanced with privacy and dignity and the reputation of others.[54] However, different approaches exist at national level in particular regarding the standards applicable to different media, and those applicable to public figures.

As regards to the first case, the comparison among the Mediadem countries shows only a few countries adopting a different standard in the application of defamation rules depending on the type of media through which the message is published. In the Belgian and Slovakian cases it seems that courts treat press and broadcast differently, and this was acknowledged, as regards Belgium, also in the ECtHR jurisprudence, which states that the Belgian court's interpretation of art. 25 of the Constitution was disproportionate.[55]

However, in the cases of Greece and Italy, the application of libel and defamation rules is different when they are applied to newspapers and television, also in their electronic versions, or to bloggers. In Greece, though different decisions exist, it seems to have become a standard judicial practice to consider blogs as not included within the scope of legislation concerning media, particularly as regards the civil responsibility of the media. Stronger disagreement among lower courts has been acknowledged in Italy, where only very recently the Court of Cassation has intervened on the topic excluding blogging activity from being subject to the same rules as the press.[56]

[54] See that exceptions to this general perception are Finland, where courts judging cases where the freedom of speech and right for privacy are in conflict do not allocate much weight to public interest (Kuutti, Lauk and Lindgren, 2011); and Spain, where it seems that the recent case law of the Supreme Court is less favourable to media and more protective of other fundamental rights (De la Sierra and Mantini, 2011).

[55] See ECtHR, *Leempoel & S.A. Ed. Ciné Revue v Belgium* (no. 64772/01), 9 November 2006 and ECtHR, *RTBF v Belgium* (no. 50084/06), 29 March 2011.

[56] See Italian Court of Cassation, decision 10 May 2012.

3. Structural regulation[57]

3.1. Freedom and independence of media and pluralism

Media markets in Europe show an increasing trend towards integration among the most dynamic segments of media; however, the strategy in delivering new products and services and new geographic markets focuses less on organic growth than on alliances and mergers in order to: create either multi-media offshoots; bid for control of content rights; increase products and services diffusion; develop technologies for conditional access; etc. (Buigues and Rabassa, 2004). The result of this strategy is the increasing level of concentration both in traditional media and in new media.[58]

Although in principle, concentration is not an issue as such, it can affect the level of freedom and independence of the media. The fewer the corporations that are controlling mass media, the higher is the risk for bias and interference with editorial independence. In this framework, the reference point has become the concept of media pluralism as a necessary condition for freedom of speech which can contribute to the development of informed societies where different voices can be heard (Commissioner for Human Rights, 2011).

Also at European level, freedom of expression of the media has been considered in connection with pluralism, which has granted it a sort of "indirect" relevance as a possible purpose, allowing national rules to restrict the economic freedoms stated by the Treaties. In other words, the value of pluralism has been granted the status of "*overriding requirement relating to the general interest*" that justifies restrictions of the European principles concerning freedom to provide services or competition. These assertions are based on the acknowledgment of the strong relationship existing between the value of pluralism and the fundamental right of freedom of expression.

3.1.1. Terminology

We define pluralism as a situation where the viewer/listener/reader is exposed to a variety of topics/opinions, and that the major benefit of this is that democratic processes are maintained/strengthened. We note that there is an assumption by many that pluralism is not necessarily achieved by market forces alone, so that creating competition in media markets (a task for sector-specific regulation), or preventing the lessening of competition (a task for competition law) are perceived to be insufficient tools to guarantee pluralism.[59]

One way of achieving this is through a single supplier who is tasked with ensuring content diversity so as to ensure that the value of pluralism is achieved, also known as

[57] Sect. 3 has been drafted by Giorgio Monti (para. 3.1-3.4.).

[58] See the clear example of Italy, where concentration is one of highest in Europe (Venice Commission, 2004), and in general see the market overview in MEDIADEM (2011).

[59] The issue has been discussed at length. For a recent synthesis Keller (2011).

internal plurality. In most Member States, public service broadcasters are entrusted with the duty to offer content diversity. At one point in time such broadcasters may have held a monopoly but in today's climate public service broadcasters compete with a number of privately owned suppliers.

A second way of achieving pluralism is through a number of media outlets, also known as external plurality. In theory, competition among media outlets will encourage each to diversify their content provision so as to maximise revenue. In this way, competition yields not only consumer welfare but also pluralism. Evidence as to whether competition among media outlets is *sufficient* to deliver pluralism is mixed. In Germany for example, it is reported that while there are 300 private broadcasters, 84% of viewers watch only ten of those channels regularly, and two broadcasting companies drew an average of 46.5% of viewers (Müller and Gusy, 2011: 28). Germany's state media authorities have also noted that the amount of politically relevant content of the two leading companies had been shrinking for a number of years. The percentage of politically relevant information by the major private TV channels ranges from 0 to 4% and this compares unfavourably with the output of public service broadcasters which is 17 and 18% for the two nation-wide TV channels (Müller and Gusy, 2011: 30). That said, ownership plurality is the best proxy available to identify a plurality of viewpoints (OFCOM, 2006).

In the EU, both methods for promoting pluralism (content diversity (internal pluralism) and ownership diversity (external pluralism)) are used, so that there is a 'dual system' of public service broadcasters and privately owned media companies. This affects the analysis of pluralism because the public service obligations impose a degree of content diversity so reducing the significance of having a number of diverse players. However, this duality has no effect on the analysis under competition law, which in the main focuses on external pluralism.

3.2. The relationship between competition law and pluralism[60]

Competition laws apply to all economic sectors, unless legislation specifically excludes them. In media markets, certain activities that fall to be scrutinised under competition law may also be reviewed under sector-specific legislation. The consensus today is that competition law is applied to activities of market players that limit competition and thereby harm consumer welfare. In the EU, all Member States have national competition legislation, and most Member States have rules that are very similar to those found in EU law. In this report we are mostly concerned with the following three sets of rules:

[60] This report is based, in part, on the findings of national reports, but it will focus on a closer study of those MS where the link between competition law and pluralism has been developed more fully and where there are decisions affecting the media sector which allow one to study how the rules operate in practice. The coverage of the issues of this section is then broader than the coverage of the issues in the case study report.

- Merger control: mergers that have an EU dimension are reviewed exclusively by the European Commission (with some space for national considerations, inter alia in relation to media mergers); mergers that do not have an EU dimension are reviewed by one or more national competition authorities that have subject matter jurisdiction. A number of Member States have sector-specific merger rules for the media industry. Mergers with an EU dimension which raise pluralism concerns may be handled in parallel by the EU and the Member State where the pluralism concern arises. (Analysis in par. 3.3.)

- Provisions on abuse of a dominant position: these rules may be enforced by either (1) the application of national law (when the abuse has no effect on trade with other Member States) or, if trade between Member States is affected (2) by the parallel application of national and European Union law by a national court or national competition authority (and in this case normally the application of national law may not result in the prohibition of practices that are allowed under EU competition law), or (3) by the application of EU competition law by the Commission. (Analysis in par. 3.4)

- State aid rules. These rules exist only in EU Law. They forbid the grant of state aid (subsidies), but also authorise the grant of some state aid under strictly defined conditions. For the purposes of this report, there is a direct link between state aid law and pluralism, because some state aid may be lawfully granted to beneficiaries whose output will make a positive contribution to pluralism. In this context, some anticompetitive effects arising from state aid are tolerated because of the public interest in pluralism. (Analysis in par. 3.5.)

We will not consider other issues that are not as relevant for the purposes of this report. For example we do not cover the application of competition law to such core areas like price fixing agreements among competing newspapers, which are forbidden under competition law,[61] or other cartel-like behaviour that risks occurring because of increased concentration in certain markets (e.g. the newspaper industry in Finland). While prohibiting these practices will likely favour pluralism, it is unlikely that competition authorities will need to do more than apply the relevant competition rules as they apply for any other industry that engages in collusive conduct. Nor will we cover the question of how far some other forms of state regulation, e.g. licensing procedures, may be challenged under the competition rules. This of course is a significant issue because a poorly designed system of licensing raises entry barriers and thereby reduces pluralism. There is evidence that licensing is a barrier in some of the countries surveyed, but these concerns are best addressed by means other than competition law. And we will not consider how pro-competitive state legislation may contribute to pluralism. A good example of how this kind of competition policy is linked to media pluralism is the policy of the Finnish government which promotes high-speed internet connections as a means to invite more communications providers through this medium (Kuutti, Lauk and Lindgren, 2011: 7). Increasing competition among media players indirectly contributes to pluralism, as indicated above.

[61] E.g. 2 actions taken by the Croatian NCA (Švob-Đokić and Bilić, 2011: 18-19).

3.2.1. How competition law and pluralism interact

There is an indirect link between the application of competition law and the values embraced by pluralism. Here are two examples to illustrate this.

- A merger between two TV broadcasters may be prohibited by a competition authority when there is a risk that it would substantially impede effective competition (e.g. if there are only three broadcasters and the merger reduces the number to two), and this result would also safeguard pluralism. However, a merger in the media sector may raise pluralism concerns even if it raises no concerns from the perspective of competition law (e.g. if there are six broadcasters and two small ones merge, it may be that from a competition law perspective there is no risk of harm, but there is a risk that pluralism is damaged). In a number of countries, this gap in competition law has been addressed by sector-specific regulation which allows for the stricter monitoring of practices that do not fall to be prohibited from a competition law perspective; below, we label these 'media ownership rules.'

- The Bulgarian Football Federation sold the exclusive right to broadcast the football championship to one broadcaster. Absent any dominant position on the part of the football federation, this exclusivity is not anticompetitive. However, in the name of ensuring that certain important events are made available to the public via all broadcasters, the Bulgarian regulator (the Council for Electronic Media) decided that all broadcasters were entitled to have access to short highlights of the matches (Smilova, Smilov and Ganev, 2011).

These two examples illustrate a general proposition: competition law cannot act as a substitute for sector-specific regulation designed to promote pluralism because it only applies when there is a significant degree of market power, a threshold that is often perceived to be too high to ensure pluralism is safeguarded. As the examples illustrate a merger or an agreement may not be anti-competitive but may still threaten pluralism.

Before we turn to a comparative review of the rules, we explore a little more closely how far competition law does, or might, accommodate the value of pluralism.

3.2.2. Competition law and pluralism

There are a few academic studies which take a view different from that identified in par. 3.1.1. above. According to one view, the notion of competition may be legitimately reshaped when addressing media markets so that in determining the pro or anti competitive effects of a practice, one asks to what extent this affects the so-called 'marketplace of ideas'. In this approach one incorporates pluralism analysis into a competition law test. This view has been mostly proposed in the United States literature. The gist of this approach is to suggest that antitrust law moves away from only considering market power as the power to reduce output and increase price, and consider other measures, such as the power of a firm to reduce consumer choice. In

this vein a merger of two radio stations in a competitive market may not create concern using the traditional approach, but it may gain power to determine what content it broadcasts, and this may reduce diversity of content, to the detriment of consumers (Stucke and Grunes, 2001). This view has been criticised as being insufficiently robust, and has not had much impact on US law to date (Baker, 2007).

According to a second view, there is evidence that pluralism considerations have played some role in competition decisions. However, (i) this approach has not been articulated clearly or consistently in the decisions; (ii) it is not particularly clear whether this approach is a legitimate application of competition law, because rather than prohibiting anti-competitive conduct, competition authorities require undertakings to modify their behaviour to benefit other market players. We consider this view more fully in par. 3.3.

3.3. Merger control

3.3.1. Mergers and media ownership rules

In many countries mergers in the media sector are regulated by media ownership rules which are specifically designed to safeguard pluralism. The upshot of these rules is that even if a merger is not anticompetitive, it may be prevented under media ownership rules.

Table 3.1. Comparing TV (or cross-media) ownership rules and competition rules[62]

	Media ownership rule	***Merger rule***
Croatia	Arts 54-62 Electronic Media Act	Yes, no media-specific rules
Denmark	None	Yes, (no media-specific rules applicable, only a competition-based test)
Finland	None	Yes
France	Maximum holding of 49% in a national TV licence if the TV audience share is above 2.5%. Maximum holding of 33% in a local TV licence if audience share is above 2.5% Holder of a 15% interest in one TV licence may not hold more than 15% in another licence Holder of 5% in two TV licences may not hold another 5% No more than seven digital licences may be held by the same person No more than two licences for satellite TV	Yes

[62] Information available in the table is based on OFCOM (2006) with additional reference to MEDIADEM case study reports where available.

	Cross-media (national): one may not hold more than two of the following positions: (a) licences for TV with audience of 4 million; (b) licences for TV with audience exceeding 30 million; (c) editor/owner of newspaper with a market share exceeding 20% Cross-media (local): one may not hold more than two of the following positions: (a) licence for local TV; (b) licence for local radio with potential audience greater than 10%; (c) editor/owner of daily newspaper available in local area.	
Germany	Yes	Specialised agency tasked with reviewing pluralism in mergers involving TV broadcasting Competition authority runs a competition-based test. For newspaper mergers, the competition laws apply, but with a lower market share threshold for intervention.
Greece	Media specific-component to competition law concerning the assessment of concentrations between media undertakings.	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.
Netherlands	Newspaper owner with a share of 25% of newspaper market may not own a commercial TV station (must limit control of commercial broadcaster to 1/3) Newspaper owners (or the group where they are part of) with more than 50% share in a certain regional or local newspaper market may not own a regional or local commercial broadcaster in that region unless there is also a regional or local public broadcaster. (reform in progress)	Yes
Romania	Up to 2008 the law prohibited the holder of one broadcasting licence from owning more than 20% of another TV. Since 2008: market share test and an influence share test.	
Sweden	None	Yes (but uncertainty as to whether this is applicable)
UK	No person may acquire a Channel 3 licence (whether directly or indirectly) if he runs one or more national newspapers having an aggregate market share of 20% or more. The holder of a Channel 3 licence may not acquire an interest of 20% or more in a corporate	In addition to a competition-based test for media mergers, the Secretary of State may require an analysis of whether the merger is in the public interest, using the following criteria: the accurate presentation of news and free expression

	body corporate running one or more national newspapers with and aggregate market share of 20% or more. Local ownership rules have been watered down by Media Ownership (Radio and Cross-media) Order 2011. Cross-media rules bar holding a certain mix of newspaper, radio and TV at local level.	of opinion in newspapers; plurality of views in the markets for newspapers; plurality of the media; the need for a wide range of high quality broadcasting appealing to a wide range of tastes and interests; the need for media enterprises to have a genuine commitment to the objectives of section 319 of the Communications Act.

On the basis of the table, we can identify four regulatory models when it comes to acquisitions in media markets:

(1) Media ownership rules with proxies, plus competition rules: where the stricter approach governs (i.e. a merger will not be allowed if it fails either the media ownership or the competition test, or both) (e.g. France, the Netherlands, and Greece)

(2) Media ownership rules with complex pluralism analysis, plus competition assessment: where the stricter approach governs (i.e. a merger will not be allowed if it fails either the pluralism test or the competition test, or both) (e.g. UK, Germany)

(3) No media ownership rules or pluralism analysis, and sole application of modified competition law analysis (e.g. Germany for newspaper mergers)

(4) No media ownership rules or pluralism analysis, and sole application of competition rules (e.g. Finland).

The upshot is that modified analysis under the competition rules is the exception. Instead, an additional pluralism inquiry is carried out, normally by a body specifically established for carrying out this task. For the purposes of this segment of the report, some analysis of the first two types of approach appears useful. In brief, the first approach utilises very simple media ownership rules, based on market shares, while the second approach tries to secure a more accurate measurement of pluralism by considering various other indicators.

It is hard to speculate how far any of the four approaches affect the level of pluralism. In theory, model 4 is the least sensitive to pluralism, and there may be a risk that mergers might be authorised that reduce pluralism to dangerous levels. Model 2 is the most suitable to address pluralism concerns because of its greater precision, however this comes at a high administrative cost. Models 2 and 3 are similar in effect because both rely on a simplified pluralism test which may be over or under inclusive. However, it must be kept in mind that in reality the media ownership rules are often designed to favour the status quo or a given market player, so the application of a flawed standard may lead to suboptimal results.

3.3.2. Greece: Media ownership rules with proxies

Law 3592/2007 has complemented Law 703/1977, the general Greek competition act, by laying down specific provisions on the notion of dominant position and concentration of companies in the media sector (Psychogiopoulou, Anagnostou, Kandyla, 2011: 19-22; Anagnostou, Psychogiopoulou, Kandyla, 2010: 255). There is no other sector-specific law that the Greek Competition Authority applies. This in principle indicates a certain sensitivity to the 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.

Precise "dominance thresholds" are established, ranging from 25% to 35%, depending on the number of the media markets involved. The thresholds on the basis of which concentration in the media (and the dominant position of the undertaking/s involved) is accessed are:

> *Article 3.3. Definition of media concentration (and dominant position)*
>
> *a. If the undertaking/s possesses one or more media outlets in the same product market (TV, radio, newspapers, magazines): 35%*
>
> *b. If the undertaking is active, for instance, in more than one product markets:*
>
> *b.a. no more than 35% in each product market*
>
> *b.b. i. no more than 32% when active in two product markets, i.e. 32% in total*
>
> *b.b.ii no more than 28% when active in three product markets*
>
> *b.b.iii. no more than 25% when active in four product markets*

The law has an irrefutable presumption of dominance based solely on market shares. This means that if the market share thresholds are not met, then no additional criteria may be used to prove a risk of harm.

According to Article 3.4, the basis on which these market shares are calculated are as follows:

- For TV and radio, the market shares are calculated on the basis of advertising revenues and revenues from programme sales or other audiovisual services (the law does not specify what kind of other services, it refers broadly to any type of revenues TV and radio broadcasters may have access to) on a 12-month basis.
- For newspapers and magazines, the market shares are calculated on the basis of advertising revenues and sales revenues again on a 12-month basis.

The provision also obliges media outlets that are active in different product markets (i.e. an owner of both a TV channel and a newspaper) to keep separate accounts but only for advertising revenues.

Article 3.4. is not in line with Article 3.1, which defines concentration in the media as the percentage at which the public is affected by the media, i.e. the degree of influence that the media can exert on public opinion. A market-share calculation based on advertising revenues demonstrates the position that the undertaking holds in the advertising markets, and not necessarily in the market for audiences.

Article 4.10 obliges the non-profit undertakings that are entrusted with calculating audience ratings figures to submit their results to the Competition Authority on a monthly basis. The way the provision is drafted leaves open the question whether the National Competition Authority (NCA) is obliged or may base its decision on these ratings. However, considering this vagueness in combination with Article 3.4 which does not mention other criteria to be taken into account when calculating the market shares leaves little room to argue that the NCA is actually obliged to take them into account. However, the problem appears to be that at least until recently the measurements were made by a firm holding a dominant position in the Greek market, casting doubts on its impartiality.

3.3.3. Germany and the UK: More complex media ownership analysis

There are two countries that illustrate the working of the second model (UK and Germany) and these are worthy of some attention because they seek to replace an imperfect pluralism proxy (media ownership) with a more comprehensive analysis of the risks a merger creates for pluralism. As we have a decision in both jurisdictions, this helps identify the working of the models in these two countries. The third country in this group, Bulgaria, has no reported decisions but it has been suggested that the new test is so muddled that it is not clear how it should be applied (Ghinea and Avădani, 2011: 16). As we will see, this is also the concern emerging from the experience in Germany and the UK.

In Germany, mergers in the TV broadcasting market (but not the press or internet markets) are reviewed by the Federal Competition Authority (the Bundeskartellamt) and the German Commission on Concentration in the Media (the Kommission zur Ermittlung der Konzentration im Medienbereich – KEK). The Bundeskartellamt applies conventional merger laws, while the KEK is entrusted with applying the Interstate Treaty on Broadcasting (Rundfunkstaatsvertrag - RStV). This double review led to the first prohibition of a merger in 2006. This concerned the proposed merger between Axel Springer AG and ProSiebenSat.1 Media AG.

The KEK applied section 26(1) of the RStV, which empowers it to forbid the acquisition of dominant power of opinion. Axel Springer AG was a player in the markets for newspapers, TV magazines, popular magazines, online content and audio broadcasting, while Pro Sieben Sat 1-Group was present in TV broadcasting. KEK found that the merged entity would have had an audience share attributable to TV

broadcasting of 22.06%, but taking the other media markets, the merged entity would have had an audience share of more than 42%, well over the thresholds in the RStV. (To reach this result it translated the market shares expressed in terms of sales into audience shares, for example, the "Bild" newspaper's 26% share in the overall daily press market was converted into an audience share of 17%.) (Scheuer, 2006). As a result the merger could be prohibited (KEK, 2007). But the merger showed that the KEK's rues were unsuited to handle cross-media mergers, and section 26 of the RStV was amended so that the effects of similar types of mergers would be more clearly visible:

> *If the services attributable to an undertaking reach an annual average audience share of 30 per cent of all viewers, dominant power of opinion shall be assumed to be given. The same applies for an audience share of 25 per cent if the undertaking holds a dominant position in a media-relevant related market or an overall assessment of its activities in television and in media-relevant related markets shows that the influence on the formation of opinion obtained as a result of these activities corresponds to that of an undertaking with a 30 per cent audience share.*

One can understand the KEK's sentiments: surely a large media player can use various outlets to dominate public opinion, however this reform seems to highlight the narrowness of the scope of the Treaty in the first place. A more desirable outcome would be to empower a regulatory agency like KEK with the power to oversee all media markets. Furthermore, the fact that the Treaty considers that 'power over opinion' may be held by controlling a range of media-related markets throws some doubts over the continuing insistence that TV broadcasting remains a specific market. (Given that TV broadcasting is the primary beneficiary of subsidies, one can speculate that the double-standards applied here are politically motivated: to acknowledge that all kinds of media outlets can serve to discharge public service missions would throw the special status of TV broadcasting into confusion.)

The Bundeskartellamt also acted against the merger, but on different grounds. (1) the parties would have had a 40% share of the advertising market, in particular because the newspaper BILD is seen as the only economically viable alternative to TV advertising, and advertisers would lose the competition that currently exists between these two platforms; (2) the merger would have strengthened Springer's position in the market for newspapers; and (3) the merger would have also strengthened Springer's dominance in the market for newspaper advertising (Bundeskartellamt, 2006). These competition-based concerns are distinct from those of the KEK, but on the other hand they also provide a more satisfactory approach. The Bundeskartellamt also found that the markets for TV broadcasts and newspapers were linked, but rather than artificially attributing an audience share for newspapers, it considered the advertising markets, which allowed for a more natural analysis of the market power of the two undertakings and for an assessment of how far the two advertising 'sites' (national TV and newspapers) were in competition. This approach seems more robust, but there is no guarantee that a competition-based analysis will always suffice to protect pluralism.

Turning to the UK, it is important to explain the context of the media-specific merger rules: they were introduced in 2003 after the Government had relaxed the media ownership rules. Therefore, the role of the media-specific merger rules is to apply only when, even if the merger passes the media ownership criteria, there are some concerns about pluralism. This is different from the German rules, where the KEK always has jurisdiction. In the UK instead, the media-specific merger provisions catering for pluralism are only engaged at the discretion of the Secretary of State. The two UK examples are (i) the bid from BSkyB (active in satellite broadcasting and newspaper markets) to purchase a 17.9% shareholding in a terrestrial broadcaster (ITV) and (ii) the bid by NewsCorp to acquire all remaining shares in BSkyB in 2010.

There are a number of institutions that play a role in advising the Secretary of State on the risk to pluralism: the actual report is due from the Office of Fair Trading (in the first phase of merger assessment) and from the Competition Commission (if the merger is referred to them for more detailed scrutiny). In addition, Ofcom (the regulator for electronic communications) provides guidance to the two competition bodies on pluralism issues. This is a further difference from the German model, where a specialised body handles pluralism issues.

In the first case, the Secretary of State was concerned about the pluralism implications of this transaction, but the Competition Commission issued a decision rejecting the merger on competition grounds, finding no pluralism concerns. The competition findings were upheld on appeal. Since it was found that the transaction could be blocked on competition grounds, it was unnecessary to address the pluralism grounds, but there is a helpful analysis of this basis in the decision of the Competition Commission, which found that the merger would not risk harming pluralism.[63]

The Competition Commission's pluralism analysis was qualitative, and asked whether the merger would bring about any change in the existing level of pluralism for national TV news and cross-media news, both at the level of production and consumption. It noted the relevance of Internet news but judged that in the foreseeable future, pluralism analysis could safely rest upon news broadcast via TV channels. It noted that the market was already highly concentrated, and that ITV and BSkyB had 30 per cent of the share of news viewers. In spite of this, it concluded that it would be unlikely that the transaction would reduce pluralism, mostly on the grounds that BSkyB would be unable to influence ITV's news production because of existing regulatory provisions, and strong editorial independence.[64]

Turning to the competition assessment, three relevant markets were analysed: (1) in the retail provision of TV services (where free to air, pay TV and Video on Demand services were considered to be in competition) it was found that there were four main players (BBC, ITV, Sky and Virgin) and that the merger would give BSkyB the

[63] There was also considerable discussion, on appeal, about the interpretation of the relevant legislation, which came under fire, but discussion of this point is beyond the scope of this paper. See *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2.

[64] Competition Commission, *Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc* (2007), paras 5.15 to 5.79

ability and the incentive to affect ITV's future investments so as to reduce the competition between free to air services and pay TV. For example, BSkyB could affect investment in new content production, or could hamper ITV's ability to bid for sports rights. The merger would substantially lessen competition by reducing quality and innovation and raise prices. (2) In the TV advertising market it was found that in spite of ITV being the largest and BSkyB the third largest supplier of advertising, there would be no incentive to lessen competition. (3) In the market for the wholesale provision of news, while the market was highly concentrated, again there was found no evidence that BSkyB would harm competition via its control of ITV.

As with the decision by the Bundeskartellamt, the UK authorities looked to both sides of the market (advertising and the wholesale and retail markets) to measure the degree of market power. It is interesting to contrast the methods used under the competition analysis and the pluralism analysis: in both the impact of new technologies is taken into consideration, but only for a pluralism analysis is any weight at all given to Internet provision. This shows that while a competition analysis focus upon the effect on a merger on allocative, productive and dynamic efficiency in the market, a pluralism analysis has a wider remit.

As far as the second example, the transaction was abandoned. As regards pluralism, Ofcom's Report is worthy of note because it sought to take into consideration the impact of pluralism on a merger that had an effect across several media (free to air TV, pay TV and newspapers). It developed a 'share of reference' approach, based on what consumers consider their main source of news. This allowed it to take into account all news outlets, including Internet blogs, and weigh the influence of each. The focus on news is justified as diversity in the way news is presented is the most significant variable in a pluralism analysis. It analysed both the wholesale and retail market for news production using this framework. The report suggests that on the facts of the case the merged entity would hold a 22 per cent 'share of reference', with the BBC having a 37 per cent share, ITN 12 per cent and two smaller entities 4 and 5 per cent respectively. However it is not clear why 22 per cent raises pluralism risks (OFCOM, 2010).

3.3.4. Access issues in media mergers

Perhaps simplifying to some extent, the analysis of the relationship between media ownership rules and merger rules above dealt with horizontal aspects of mergers (mergers between two operators offering the same media outlet), or conglomerate mergers (e.g. mergers of newspapers and TV broadcasters, when these two retail markets are distinct). The most common antitrust concern when media firms merge has been in relation to vertical aspects of mergers, where the new entity holds market power in the downstream market for delivering content and is also able to have exclusive access to upstream content that is perceived to be very important for the commercial success of any downstream content provision. In these situations, merger analysis under competition law has stressed the need for other competitors to have access to some of the merged entity's programmes. Some examples can shed light on how this is handled.

The 2008 merger decision by the Finnish Competition Authority authorised a merger between two of the major pay TV broadcasters, who were also each other's closest competitors and who owned most of the popular broadcasting rights. The merger was approved subject to the following conditions: (1) granting competitors access to some popular content owned by the merged entity; (2) requesting that the merged entity sell its shares of rights in the Finnish National Hockey League's pay TV market, thereby allowing a new entrant. (Appeals were unsuccessful) (Finnish Competition Authority, 2010: 26). The purpose of these remedies is to facilitate the entry into the pay TV markets of new players.

In the application of EU merger law to these kinds of transactions, the Commission has also been concerned about access to valuable content (Chalmers, Hadjemannuil, and Monti, 2006, 1100-1103). A good example is the vertical merger in Vivendi/Canal+/Seagram where one of the concerns was that the merged entity would have access to considerable premium content, in the shape of Hollywood major films, and there was a risk that if these films were shown exclusively on the merged entity's downstream pay-TV platforms, this would create entry barriers to other pay-TV operators. As a result the Commission secured a commitment from the merged entity that they would not supply their downstream pay-TV platform more than 50 per cent of the premium films available, so making the rest available to competitors, and Vivendi divested its stake in BSkyB so severing what links there were with Fox studios, and so reducing the amount of upstream premium content controlled by the merged entity.[65]

There are a number of merger decisions that have had a similar outcome in many Member States, and the approach taken is very similar. The competition authority is worried about the vertical link between the upstream content market and the downstream market for access to content. There is a fear that if a downstream operator has access to too much content that is seen to be essential for penetrating the downstream market successfully that then this will foreclose market access. Normally the remedies imposed resolve this by ensuring that competitors to the merged entity have access to content, and this is achieved in two ways: (a) by a structural remedy whereby the merged entity divests ownership of content; or (b) by a behavioural remedy whereby the merged entity guarantees access to its content to competitors. Structural remedies are favoured by competition authorities because they are easier to monitor once the assets are sold to a new company, and also because even when subject to behavioural remedies the merged entity will have disincentives to grant access to its competitors and may try and disfavour them in ways that are difficult to monitor by a competition agency. Resolving the competition concerns of course also helps the policy goal of increasing pluralism because it allows new entry and new entrants will also need to offer alternative programmes in order to compete against the existing players and may develop diverse programmes to target certain niches.)

[65] Case COMP/M.2050, 13 October 2000.

3.4. Dominance and pluralism

3.4.1. Article 102 and pluralism

Article 102 TFEU (and national law equivalents) prohibits dominant firms from abusing their market power. As with merger law, we can identify interventions by competition authorities that have an indirect effect on pluralism, for example the Finnish Competition Authority challenged a local newspaper which held a dominant position and which was required to amend its advertising price lists so as not to harm smaller rivals (Kuutti, Lauk and Lindgren, 2011).

The most significant (indirect) impact that Article 102 can have for the purposes of ensuring media pluralism today is the way in which it is presently being used, by the Commission and National Competition Authorities, to challenge practices by the incumbent telecommunications operator so as to facilitate the entry of new players at retail level, and in so doing the view of the authorities is that this helps new entrants climb the investment ladder. While, as we saw from the merger case law, at the present moment internet provision is not so significant in an analysis of pluralism because broadcast TV is the main source of information, this is likely to change, and if the Commission is successful in opening up the market for electronic communications, this creates the space for pluralism in the future.[66]

A forthcoming issue, in light of the increased relevance of the internet is the regulation of access points through which users will obtain information (Balkin, 2009). In this respect the Commission's current investigation of Google, while based primarily on the commercial exploitation of information, may well have an impact on pluralism. In this respect, the commitment decision obtained by the Italian Competition authority in an earlier investigation of Google's practices is worthy of note.

In 2009 the Italian Federation of Newspaper Editors submitted a complaint to the Italian antitrust authority (AGCM) expressing concerns about some of Google's practices. The AGCM considered two issues: (1) allegations that if a newspaper publisher would ask that some of its content be excluded from Google News, then this would mean that the same news item would also be unavailable using the ordinary Google search engine; (2) allegations that there was a lack of transparency about the remuneration received by publishers (including newspapers, but also any website or blog) using AdSense.[67]

[66] Especially interesting are the competition authorities' efforts in the following cases: Case C-280/08 P Deutsche Telekom; Case C-52/09 Telia Sonera; Case T-336/07 Teefonica.

[67] In brief, Adsense is a facility whereby any firm may create an online advert (using Google Adwords) which would then be shown on websites that participate in AdSense. When a visitor clicks on an advertising link, the firm pays Google, and some of those revenues go to the publisher. Google adds considerable value because it facilitates targeted advertising on the websites. For a clear explanation, see http://www.adsensehowto.net/google_adsense/how_google_adsense_works.php.

The antitrust story in this episode is this: newspapers need advertising revenue and Google News creates a risk that readers do not click through to the newspaper site so there is a loss of advertising revenue; but if exit from Google News also leads to one losing its presence on the search engine, then further advertising revenue is lost. The lack of transparency in Adsense contracts between Google and publishers also risks denting advertising revenue. But why would Google consider harming newspapers' online business? After all, Google is merely an intermediary between content producers and customers, so it needs content to thrive. However, Google might well be motivated to downgrade content that raises less revenue, and tease AdSense users to extract as much revenue as possible while keeping them in the loop – after all, use of AdSense is free for publishers. Much the same motivations may explain the ongoing investigation of Google by the EU. Without expressing any view as to the correctness of the major allegations that have surfaced through the press releases, one can understand why a firm like Google would be interested in demoting the search results of 'vertical search engines' that compete against Google's own services, or require those firms who pay Google to have their results shown first not to host competing links on their websites. After all, if a firm's revenue depends exclusively on selling advertising space, then protecting that stream of revenue, while maximising its search powers, is a rational strategy.

The media pluralism story in this episode is this: Google has the power to control 'citizens' access to a variety of information sources, opinion, voices etc.' On the one hand, Google and Google News are an added communications channel that enhances media pluralism, but on the other hand, Google's dominance in the market for search (estimated to be around 90% in many EU Member States) means that if it excludes certain voices, it can have a significant adverse impact on media pluralism. If content moves further away from print to web, the impact of Google's exclusionary practices becomes more pronounced.

The investigation of the Italian Antitrust Authority ended with a commitment decision in January 2011 (Catricalà, 2011). This is an unusual decision because the AGCM had concluded that there were no anticompetitive concerns, and yet it accepted a set of promises from Google. In brief, Google undertakes to ensure that opting out of Google News has no effect on the search results in Google and that those earning revenue from AdSense will benefit from greater transparency. Perhaps significantly the AGCM also made a recommendation to the Italian Parliament that copyright rules may need reform to ensure that producers of information are protected from the use Google and similar websites make of their information. This echoes the call of many traditional media players who consider that search engines free ride on their material.

3.4.2. Control of dominance to protect pluralism directly

As to whether any country regulates dominant players so as to achieve or protect pluralism, the overall impression is that there are few such rules in the legislation, and these are seldom utilised. However, some interesting practices emerge:

- The **Belgium (French Community)** the regulator (Conseil Superieur de l'Audiovisuel de la Communauté Française) is responsible for dealing with editors that have a dominant position if this threatens a diversified offer of the media. The legislation defines a pluralistic offer as one through which a variety of independent media reflect the widest range of opinions and ideas. This is rendered more concrete by certain indicators: owning more than 24% of the capital of two TV companies (or radio companies) in the French speaking region; and when the audience share reaches 20%. These are indicators of dominance. If these are found then the regulator is empowered to negotiate a solution with the dominant player. Only if this fails may the regulator impose penalties (e.g. fines, revocation of licences).

- The **German** provisions (administered by the KEK and discussed above) forbid dominance in TV markets, which is defined as an audience share of 25%. As we noted above, this provision has been applied to mergers, but it is in principle also applicable to endogenous growth, although this has not yet occurred. It has been suggested that the threshold for dominance in the legislation was set at a level that allowed the existing market player to retain their positions (Müller and Gusy, 2011: 20).

- The **UK**: Ofcom's decision in 2010 to fix the wholesale prices for BSkyB's satellite sports channels (Sports 1 and 2) was on the basis that this premium content is necessary for anyone else (in this case Virgin media) to compete in the pay-TV market. The decision is subject to appeal, but it is the first time that one sees the regulation of access to content outside the framework of a merger decision (decisions which were discussed above). However, this decision was not based on competition law, but on Ofcom's regulatory powers under section 316 of the Communications Act 2003.

These examples suggest that one of the gaps in competition law is that it is unable to address internal growth, so the Belgian and German laws try and remedy this in a direct manner. However, to date, these provisions have not yet been used. It is not clear why this is so, but the potentially draconian remedy of shrinking the size of an existing player may well raise the criticism that the law is used not to enhance pluralism, but to stifle it.

The British example is part of a wider trend to use sector-specific regulation as opposed to competition law, in part as a result of the higher evidentiary requirements that courts place in antitrust cases.

3.5. Public service broadcasting and state aid issues

In the field of broadcasting, financial support for public service broadcasters at national level has always been granted by states, though this approach has been subject to critics since the dual broadcasting system emerged. If, on the one hand, state aid was justified by the need to fulfil fundamental education, cultural and democratic needs such as the provision of impartial information, cultural diversity,

freedom of expression and the preservation of a pluralistic media landscape across the Union;[68] on the other, state aid was interpreted as an intervention capable to distort competition[69] and raise consumer barriers.[70]

The debate, however, had not prevented Member States from granting financial support to their national PSB. The reasoning pursued assumed that financing of public broadcasting can be granted to safeguard media pluralism, accommodate to the needs of racial and linguistic minorities and build a shared sense of national identity, but it must not run counter to competition. Moreover, whether these measures were deemed to affect intra-Union competition and trade, they felt under the supervision of the Commission, in charge of ensuring that a level playing field between public and private operators is always safeguarded.[71]

Nonetheless, new developments in technology leading to convergence of media made the previous justifications for financial support to PSB no more fit for the purpose. In particular, the expansion of PSB to new media markets brought the development of activities which are difficult to subsume under the category of public mission. Again Member States affirmed that the fulfilment of the PSB's mission must continue to benefit from technological progress,[72] whereas the Commission has accepted that public broadcasters may enhance technological developments and distribute content over different platforms upon the condition that public service provision complies

[68] See, for instance, the European Parliament Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system, [2010/2028 (INI)], para. 2. See also Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on public service broadcasting, OJ C 30/1 of 5 February1999.

[69] Financing of public broadcasting activities is usually considered likely to distort competition as it puts public broadcasters in a more favorable position than their competitors (see, for instance, Decision NN 88/98 on BBC News, para. 17) and affect intra-Union trade due to the cross-border effects of advertising, the fact that public broadcasting organisations are active in the acquisition and sale of programme rights, often taking place at the international level, as well as the fact that their ownership structure normally extends beyond national borders (see, for instance, Decision C 62/99 on Ad hoc payments to RAI, para. 91).

[70] This is the stance that the private sector has taken ever since the sector was liberalised, see, for instance, European Commission (2009), para. 3.

[71] If State financing is excessive and/or in the absence of efficient control systems to verify whether overcompensation has taken place so that appropriate action can be taken, measures supporting such activities are likely to crowd out private initiatives. In several instances, only the fact that a competitor is in receipt of public money creates significant entry barriers for newcomers or hinders projects of already established operators to the extent that the latter expect that the resulting competitive advantage will be offset by the granting of aid to public undertakings. These considerations are particularly relevant for the broadcasting market considering the substantial investment that needs to be made to enter the market or the high costs the production of an innovative programme usually entails. Moreover, the lack of mechanisms to ensure that State funding is limited to the costs incurred in the discharge of public service obligations or that commercial activities of public broadcasting organisations are developed in accordance with market conform principles facilitate public broadcasters to engage in anticompetitive behavior which may take different forms, for example, the granting of privileges to commercial subsidiaries such as reduced prices in the acquisition of programme rights, or the undercutting of prices in the advertising markets.

[72] European Council (1999) at point (3).

with the State aid rules.[73] The Commission's tolerance is directly related to the fact that the Member States are, in accordance with the principle of subsidiarity, entitled to define and organise the public service remit as they deem appropriate. In other words, it is up to the Member States to decide whether public broadcasters' online presence fulfils certain societal needs. This is also rooted in the assumption that television is not the point of reference it once was, thus "*being present on the Internet, in social media and on mobile applications should indeed be core public service broadcasting mission and each medium should be used according to its own logic in a strategic way and not solely as a complement to existing television programs. Otherwise, public service media lose their relevance to the public, especially the younger generations*" (Pauwels, 2010).

However, the move towards public service media was not left unregulated by the Commission, under pressure from the private sector and conscious the amount of monies dispersed to support PSB.[74] As a matter of fact, the Commission adopted an interventionist approach establishing the obligation for the Member States to introduce an evaluation procedure whereby both the public value and the market impact of the new service need to be assessed beforehand. This *ex ante* assessment, also known as the Amsterdam test, was inspired by the BBC's Public Value Test (PVT), introduced in 2007, as a means to better position the BBC's role in the digital age.[75]

The test envisaged by the Broadcasting Communication requires the appraisal of both the public value of the new service and its impact on the market. The Commission, however, did not provide detailed guidance on the public value assessment on the grounds that each Member State is in a better position to decide whether a new service substantiates the wording of the Amsterdam Protocol taking into consideration the specificities of the national public broadcasting systems and the respective societal needs. Whereas, as regards the effects on the market, the Commission provides for a set of factors that can be included in the analysis such as the existence of similar or substitutable offers, editorial competition, the market structure, the position of the public service broadcaster in the said market, the level of competition and the potential impact on private initiatives.[76] The Commission requires this impact on the market to be balanced with the public value of the service

[73] Commission decision E 3/2005 on Financing of public service broadcasters in Germany [2007] OJ C 185/1, para. 231.

[74] According to information provided by the Commission, European public service broadcasters receive more than €22 billion annually from license fees or direct government aid, occupying the third place, after agriculture and transport companies, in the list of recipients of state aid: See, for instance, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1072 This must be seen in comparison to other figures representing sector-specific State aid, for instance, the coal or the shipbuilding sectors which received in 2007 € 354 million and € 3.4 billion respectively according to the Autumn 2008 Scoreboard update, available at: http://ec.europa.eu/competition/state_aid/studies_reports/archive/2008_autumn_en.pdf.

[75] For more information on the BBC Charter review see Department for Culture, Media and Sport (2006a).

[76] Ibid., para. 88.

and "[i]*n the case of predominantly negative effects on the market, State funding for audiovisual services would appear proportionate only if it is justified by the added value in terms of serving the social, democratic and cultural needs of society, taking also into account the existing overall public service offer*".[77] Finally, the procedure must also involve interested stakeholders by means of an open consultation.[78]

From the regulatory perspective, it is interesting to address the way in which the Commission required the implementation of the Amsterdam test on the Member States, as it raised a lively debate regarding the competence of the Commission on this issue.[79]

In its State Aid Action Plan, the Commission lays down a shared responsibility between the Commission and the Member States for the application of the state aid rules on the basis that "*the Commission cannot improve State aid rules and practice without the effective support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly*".[80] In that respect, the responsibility of the Member States lies primarily in the provision of complete notifications and the effective enforcement of state aid law at national level. The introduction of the *ex ante* test seems to go a step further through the decentralisation of the application of art. 106(2) TFEU in the fast-evolving media market. On that point, it leaves to the Member States the freedom to conduct the relevant balancing exercise and decide on whether the proposed service substantiates the wording of the Amsterdam Protocol. The imposition of an ex ante assessment has been codified in the revised version of the Broadcasting Communication, and has therefore been included in among the soft law instruments that the Commission has adopted in this field. Considering the mechanisms the Commission has set up to make its soft law binding, these include the indirect enforcement via individual decisions (i.e. adopting a decision which reflects the provisions of the soft law instrument) and the threat of opening formal investigations procedures in all the relevant existing schemes.[81] Given that several Member States have already adapted their systems to this requirement,[82] the obligation to conduct a

[77] Ibid.

[78] Ibid., para. 87.

[79] It has been argued respectively that art. 107 and art. 106(2) TFEU, as interpreted by the Court and further explicated in the Broadcasting Communication, do not stipulate the criterion of a prior evaluation procedure for new media services as such, and therefore, the Commission may not declare incompatible with the Treaty a support scheme which has not set up an ex ante assessment. See in particular the position of European Federation of Journalists (2008), 7 and European Region of UNI-MEI Global Union 2008, 5.

[80] European Commission (2005) at para. 15.

[81] For instance, after the Commission managed to get all MS but Germany to approve the revised version of the regional guidelines, it opened an investigation into all regional aid schemes which closed only once Germany had finally approved the revised rules. For more information about this case as well as a comprehensive overview of how the Commission manages to make its soft law binding upon the Member States see Blauberger (2008).

[82] The Amsterdam test has been introduced in nine Member States (Austria, Belgium, Denmark, Finland, Germany, Ireland, the Netherlands and Sweden) and has been implemented in only four thus

prior evaluation procedure has prevailed.

The fact that no sufficient evidence exists in order to appraise the effectiveness of the *ex ante* test has to do mostly with the reluctance of the Member States supporting the provision of new media services with public funds to comply with the commitments they made to the Commission, the German and the Flemish cases being a good example in that regard, as well as the fact that several Member States, most notably the Southern European Member States,[83] still struggle to reposition public broadcasting in the multimedia era (Psychogiopoulous et al., 2012). The above analysis shows that striking the right balance between competition and public service media, a duty that has traditionally been exercised by the Commission but has recently been decentralised, is far from an easy task: the introduction of a clear-cut evaluation procedure as well as its effective implementation require reflection on the role of public broadcasting organisations in the current media landscape, legislative changes, financial resources and specialised bodies entrusted with conducting the relevant remit and financial controls.

First of all, the impact of State aid control on achieving this balance seems to be significant. The obligation to set up an *ex ante* test must be seen alongside other changes introduced to national schemes supporting the provision of public broadcasting services such as the requirement to found independent bodies monitoring public broadcasters[84] and establish efficient *ex post* control mechanisms to ensure that no overcompensation and cross-subsidisation of commercial activities have taken place.[85] Nevertheless, the above analysis sufficiently proves that these changes are still to come. More particularly, while the Broadcasting Communication outlines the main aspects of the *ex ante* test, namely the public value and the market impact assessments as well as a consultation with interested shareholders, the Commission entrusts the Member States with setting up a mechanism that best suits the national media environments. And, while in Germany a more concrete procedure seems to have been put in place, in other cases, for instance, in Flanders and Spain, the national legislator merely included a description of the Amsterdam test as laid down in the Broadcasting Communication. This, of course, is not what the

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far (Germany, Ireland, the Netherlands and Austria). Therefore, it is still early to assess whether it is an efficient tool of public sector governance.

[83] In comparison to the North-West European countries where the public broadcasters have expanded their activities to new media markets and the Amsterdam test has been introduced, the Southern European countries are way behind. For instance, Spain and Italy still struggle to reposition public service broadcasting with Spain having initiated reforms to ensure *inter alia* RTVE's commercial independence but without introducing in the modified framework an *ex ante* test. Italy has not initiated any reforms, including reforms relating to the legitimacy of RAI's online presence, whereas in Greece, while statements regarding the transition from public broadcasting to public service media have been made by the government, no concrete action in that direction has been taken yet.

[84] See, for instance, Commission decisions E 4/2005 on State aid financing of RTE and TNAG (TG4), paras. 97 and 151 and E 2/2008 on State funding for Austrian public broadcaster ORF, paras. 177 and 209.

[85] See, for instance, Decision E 3/2005 on financing of public broadcasters in Germany, paras. 314-320.

Commission had in mind when introducing the Member States' requirement to establish a well-defined prior evaluation procedure.

Besides reflecting on the added value the prior evaluation procedure is likely to create in the media markets, one should also consider the effects on the Commission's practice had such procedure not been envisaged. In light of the continuous development of new media activities by PSB, the lack of an ex ante assessment and the case-by-case approach followed by the Commission in such cases would substantially increase its workload and therefore the quality of the decisions adopted in the field. It is to be noted that, until September 2010, 40 relevant tests were ongoing in Germany only (Donders and Pauwels, 2010: 6). It may therefore be argued that the establishment of an *ex ante* assessment for new media services may reduce significantly the Commission's workload and contribute to a more efficient decision-making in the sector. Additionally, public broadcasters could be discouraged from undertaking innovative initiatives as proposing a new service would imply notifications and lengthy investigations; while waiting for the Commission to adopt its decision, the service could lose its relevance to the public.

Taking the above considerations into account, the following question arises: Can the Amsterdam test be an efficient tool to achieve the desired balance between competition and public service media? In principle, yes. In the fast evolving media environment, which enables the proliferation of public new media services, the *ex post* manifest error control the Commission exercises does not seem sufficient to guarantee that no freewheeling of public broadcasters to neighbouring media markets takes place. The imposition upon the Member States of the obligation to conduct the balancing exercise between national public interests that need to be catered for and the impact the proposed service is expected to have on the market, leaves upon them the freedom to define the online remit in accordance with the diverse societal needs that arise in the digital era. The *ex ante* assessment may also increase transparency in the sector as each case is assessed individually and the procedure requires the involvement of interested stakeholders. Nevertheless, the preceding analysis provides proof that a number of actors need to contribute to the transition from public service broadcasting to public service media for such a balance to be struck. These actors are primarily the Member States' authorities and the public broadcasters themselves, the latter still needing to reflect on how diversification of the broadcasting offer serves a public mission and the former being in charge of establishing clear criteria under which such diversification may justify public expenditure. And, where the above conditions are not created and thus the interests of the private sector and the citizens are not effectively protected, the Commission should not neglect its position that "*subsidiarity does not mean a blank cheque. Someone has to assess the market impact and if Member States do not do it, the Commission would be obliged to carry out the full assessment itself under the Treaty rules*" (European Commission, 2008).

Thus, it is apparent that there are two key drivers of plurality in relation to media regulation. The first is that of freedom of expression, based on article 10 of the European Convention of Human Rights. The second is the more commercial concerns for economic freedom expressed in competition law at both European and national

levels. It is clear that there are some tensions between the two, and, for example, there have needed to be significant additions to the normal competition law reflecting the special requirements of pluralism in the media sector. Competition law is also inadequate to deal with requirements of internal pluralism, and it is here that public service broadcasting has had a major role. This has now given rise to new issues about the role of public service broadcasting in the new media landscape; the 'Amsterdam test' attempts to make this compatible with the requirements of open competition, but has been criticised as limiting both the scope and the independence of public service broadcasters.

4. Content regulation

The area of content regulation is one both of change and of controversy. It has been very different for each form of media, and this is changing once more with the development of digital media. However, it is important to avoid drawing simplistic conclusions from this process. The picture shown in the national reports is not one of a continuing decline of content regulation freeing up untrammelled freedom of expression. Some of the more traditional forms of direct content requirements applicable to broadcasting may have been lifted, but surprisingly substantial requirements of this kind remain. These are supplemented by what could be termed 'new content restrictions'. Rather than being imposed directly by governments or by regulatory bodies, these are often applied by the courts, and notable examples would be those relating to the protection of privacy rights and preventing the infringement of intellectual property rights in the digital media. In other cases they will be applied through forms of co- and self-regulation, for example in the application of professional standards in the press or the protection of the rights of minors in the digital media.

This means that rather than seeing a decline in the amount of content regulation, there has been change in the institutions applying it and in the instruments used to implement such regulation; indeed the picture has become much more complicated with the continual development of digital media. It may also have had some effect on the balance of responsibilities of different levels of governance. In the past, broadcasting content regulation was a paradigmatic example of a national responsibility; although the Audiovisual Media Services Directive requires some minimum standards in relation to the protection of minors and hate speech, these were minima and Member States remained free to impose more demanding requirements should they wish to do so, so far as these are compatible with general principles of EU law.[86] However, the new forms of content regulation involve both the law of the European Convention on Human Rights in relation to privacy issues, and EU law (notably the E-Commerce, Information Society and Enforcement Directives) (Daly and Farrand, 2011: 6-12) in the context of protection of copyright in the digital media, an issue which will be covered below in section 5 of this report. A further consequence is that the role of courts has been significantly augmented, alongside that of more conventional regulatory bodies. As well as this movement upwards, there has been a movement downwards with an increased role for co- and self-regulation through professional bodies and industry associations. Once more, this will be covered in sections 6 and 7 below, but some consideration will be given to it here. One consequence of the changes to new forms of content regulation at new levels of governance is that accountability arrangements will be far more complex, and this question will be addressed further in the conclusion to this section of the report.

[86] See arts 4, 6, 27.

4.1. The press

The press is the form of media in which content regulation has been most limited; indeed, 'unfettered self-regulation' of the press has been perceived as a cornerstone of a free press and an open democracy. This is reflected in constitutional provisions in a number of countries, as shown in section 2.1. For example, the Bulgarian Constitution provides for freedom expression, of the press and of other mass media, and of information (Smilova, Smilov and Ganev, 2011: 6-7). In Germany, it has been noted in the national report that 'due to its salience for open and democratic societies, the Federal Constitutional Court has declared that the expression and imparting of opinions and freedom of information are human rights enshrined in the Constitution and that the exercise of these rights requires constitutional protection.' (Müller and Gusy, 2011: 6). Similarly, the Greek constitution explicitly protects freedom of expression and freedom of the press, distinguishing it from broadcast media through the former's lack of direct state control (Psychogiopoulou, Anagnostou and Kandyla, 2011: 8). This may give an especially central role to a Constitutional Court; see for example the case of Slovakia, where it was described as the only institution which 'has shown a long-term effort towards the protection and promotion of freedom of expression and the media.'(Školkay, Hong and Kutaš, 2011:8). In other cases the protection comes primarily from the protection of freedom of expression under art. 10 of the European Convention of Human Rights. In the UK this is now incorporated into domestic law by the Human Rights Act 1998, which also provides some special protection for the press against prior restraint through requiring prior notification where practicable of a court order which may restrict freedom of expression, and particular regard to be paid to the importance of freedom of expression and, where proceedings relate to journalistic, literary or artistic material, to the public interest and to the Press Complaints Commission's privacy code (for which see below). Given that there is no distinct legal category of the press or of a journalist in UK law, this is stated in general terms, but is clearly directed at supporting press freedom. Turkey stands out because of the number of decisions of the European Court of Human Rights finding violations of art. 10, and the limited action taken to correct them (Kurban and Sözeri, 2011: 26-27).

However, it is worth stressing that this freedom is mainly concerned with the absence of prior restraints on the press rather than ex post facto restrictions; see for example the discussion of this in the context of Belgium and the provisions of the Danish Constitution (Van Besien, 2011: 17-18; Helles, Søndergaard and Toft, 2011: 8-9). Of course, the press is subject to the ordinary criminal law on issues relating for example to language inciting hatred, discrimination or violence (as in the case of Belgium) or libel, discrimination, or hate speech (Germany), or where a publication may influence a forthcoming legal proceedings (the UK). Once more, the case of Turkey is striking in view of the range of penal laws restricting press freedom and their active use against journalists (Kurban and Sözeri, 2011: 23-26). The press is also regulated through a number of branches of the civil law, and this may have a substantial effect on press freedom. One example, to be discussed in section 6 below, concerns journalistic rights to protect the anonymity of their sources, protected in both national law and by means of the European Convention on Human Rights, though in practice a

difficult balance may have to be drawn between such protection and broader public interests, for example the interests of justice to permit legal proceedings to be brought.[87]

Another area in which substantial issues have arisen is that of the balance of freedom of expression under art. 10 ECHR and of the right to respect for family and private life in art. 8 ECHR. This need for balancing also arises under a number of national constitutions.[88] One particularly interesting example is that of the UK, where art. 8 ECHR has in effect enabled a right to privacy to be fashioned by the courts for the first time. Similarly, the area of defamation has been a highly controversial one. In a number of cases law relating to defamation or other attacks on reputation has the potential to be a serious impediment to the freedom and independence of the press; once more, the most striking example is that of Turkey, although in the UK also the restrictive civil law of defamation has been heavily criticised by the press and is currently facing reform (Craufurd Smith and Stolte, 2011: 29-32).

These developments cannot be analysed in detail here, but the important point is that, though the press benefits from substantial expectations of freedom from formal regulation, especially in the case of prior restraints, it remains subject to an extensive and still developing framework of legal regulation. Much of this will be carried out directly by the courts, using constitutional norms, Convention rights or ordinary law, and the courts have to resolve some potentially intractable issues here. Thus the degree of independence of the media will depend on the independence also of the judicial system in each nation, and the attitude taken to the implementation of rights under the European Convention.

However, courts are not the only actors involved in the regulation of press content. In many of the nations examined in this project, there is a well-developed body of co- or self-regulation relating to press content. Thus in all cases there is some form of private regulation of journalistic activity; see table 4.1. This may be developed further into a system involving a press council, with representation not only of journalists but of the proprietors of newspapers and in some cases of lay members and sector representatives; see table 6.4. Such a system may be established for a variety of reasons, but does have the advantage of appearing to avoid direct state involvement which may threaten press freedom whilst providing some form of indirect supervision and of informal remedies for those affected by breach of professional norms. Examples would be the 2004 Ethics Code of the Bulgarian Media and the German Press Council (Smilova, Smilov and Ganev, 2011: 28-31; Müller and Gusy, 2011: 14-15).

[87] See *Goodwin v UK*, (1996) 22 EHRR 123; *Ernst and others v Belgium* (no. 33400/96), 15 July 2003.

[88] See above par. 2.2.

Table 4.1. Which sector is regulated by private regulation?

	Print	**Broadcast**	**New Media**
Belgium	Journalistic activity	Journalistic activity	Journalistic activity
Bulgaria	Journalistic activity	Journalistic activity	
Croatia	Journalistic activity		
Denmark	Journalistic activity	Journalistic activity	Journalistic activity
Estonia	Journalistic activity	Journalistic activity	Journalistic activity
Finland	Journalistic activity	Journalistic activity	Journalistic activity
Germany	Journalistic activity	Content regulation (minors protection issues)	Content regulation (minors protection issues and ISPs)
Greece	Journalistic activity	Journalistic activity	Journalistic activity
Italy	Journalistic activity	Journalistic activity Content regulation (minors protection issues)	Content regulation (minors protection issues and ISPs)
Romania	Journalistic activity (fragmented and no more working)	Content regulation	
Slovakia	Journalistic activity	Journalistic activity	Journalistic activity
Spain	Journalistic activity	Content regulation (minors protection issues)	
Turkey	Journalistic activity	Journalistic activity	
UK	Journalistic activity	Audiovisual media services providers	Journalistic activity

As the experience of these two institutions shows, however, the use of self- and co-regulatory mechanisms in relation to the press has been highly controversial with major criticisms of both their effectiveness and their accountability. Key questions are the extent to which all relevant media actors are subject to the private regulatory regimes, whether any effective sanctions are available and the degree of openness of the regulatory regimes to interests other than the press itself, and the extent to which outside scrutiny of their processes is possible. Although such concerns seem pervasive across the different countries studied in this project, they have come to a head in the UK since the eruption of the phone-hacking scandals in 2011. Here the Press Complaints Commission, despite having a majority lay membership, was seen as completely ineffective in the investigation of allegations of serious abuse by the press and as offering weak redress for complainants, except in minor cases where mediation could be effectively arranged. The Commission is now to be abolished, and it is likely that its replacement will continue as a form of private regulation but with a stronger system of sanctions based on contractual obligations by newspapers. The record of self-regulation as revealed in the national case studies is not an impressive one, and for example appears to have failed completely in Greece (Psychogiopoulou, Anagnostou and Kandyla, 2011: 51-52). However, it is difficult to see any politically feasible alternative to some form of self-regulation for the press, so the central question is now how its operation can be made more effective and accountable. In particular, clearer criteria need to be developed to characterise the requirements for effective and accountable co- and self-regulation.

In relation to the press, then, the existing regulatory system is an untidy one. At the top the role of the courts is of considerable importance, and is based on constitutional

norms (national and European-wide) and on a variety of forms of ordinary criminal and civil law. For reasons of freedom of expression, there is no middle level of regulation by statutory bodies or government. There is an extensive use of private regulation, but unlike in other areas where it has proved successful (for example setting technical standards or advertising regulation), in the case of the press there has been extensive criticism of how private regimes have worked, both in relation to effectiveness and responsiveness to broader public interests. There is little coordination between the courts and the private regimes. One interesting point may arise in the future; in Denmark it was noted that all Danish newspapers depend on state support for their viability (Helles, Søndergaard and Toft, 2011: 7). Increased competition from newer forms of delivery may lead to a similar need for such support to secure survival of newspapers in other nations, raising difficult issues of press freedom and independence.

4.2. Broadcast media

Traditionally, the regulation of broadcasting has been radically different from that of the press. Reasons for this include the historic shortage of spectrum limiting opportunities for competition and the strong state presence through ownership or forms of control of broadcast media. Both these rationales have been subject to radical change in recent years with the development of digitalisation making possible a profusion of broadcasters, and through the withdrawal of states from direct participation in broadcasting (although an important public presence remains in many European countries, with varying degrees of distancing from governments). A further reason for regulation was that of the perceived additional intrusion of the television set into the home, with greater difficulty in controlling access by children and exposure to the unexpected; this has also been affected, though not entirely overtaken, by technical and market developments. As a result, far more extensive public regulation of broadcasting compared to that of the press was the norm, administered either directly by governments or by regulatory agencies with varying degrees of independence. Such regulation can be divided into two categories; negative prohibitions and positive requirements.

4.2.1. Negative prohibitions

Negative prohibitions are those which proscribe certain types of programme content, and so represent a set of minimum standards for broadcasters; they are summarised in table 4.2. Familiar examples are rules to protect minors, to protect standards of decency and to prevent broadcasting of hate speech. As mentioned above, these reflect requirements of the Audiovisual Media Services Directive and are widespread; thus some forms of negative requirements exist in all of the jurisdictions studied. Examples include prohibition of incitement to hatred, discrimination or violence in Belgium, inadmissibility of programmes propagating intolerance, violence, cruelty or racial, ethnic, gender or religious hatred in Bulgaria; restrictions on the broadcasting of programmes which can seriously injure the physical, mental or moral development

of minors in Germany; prohibition of broadcasts which humiliate or insult people on a wide range of grounds in Turkey; and detailed requirements in many areas under the Ofcom Broadcast Code in the UK.

Table 4.2. Negative requirements

	Hate speech	**Minors protection**
Belgium	The General Anti-discrimination Act of 10 May 2007 prohibits discrimination on various grounds and includes also cases where language that incitement to hatred, discrimination or violence is punishable. See also Racial Equality Act of 10 May 2007 and Gender Equality Act of 10 May 2007. Art. 38-39 FLBA and art. 9.1 FRBA hold that broadcast activities may not incite to hatred, violence or discrimination.	Art. 42 FLBA and art. 9.2.a FRBA: Linear television broadcasters must not broadcast programs that could seriously affect the physical, mental or moral development of minors, in particular programs that include pornography or gratuitous violence. These provisions also apply to other programs that may damage the physical, mental or moral development of minors. art. 45 FLBA and art. 9.2.b FRBA: Nonlinear broadcasters must guarantee that minors will normally not watch or listen to services that could harm the physical, mental or moral development of minors (art. 9.2.b FRBA specifies that this should be done via conditional access measures and adds that such programs should be preceded by an acoustic warning or identified by the presence of a visual symbol throughout their distribution).
Bulgaria	See on right side	Art. 10 of LRT 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.
Croatia	The EMA forbids 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.	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.
Denmark	Not mentioned in the report	This issue has primarily been discussed in relation to television drama with violent content, and the Radio and Television Council has taken steps to establish a clearer understanding of what it considers to be 'harmful to children' and how to evaluate violent media content.

Estonia	Banned by the Constitution	Regulations in the Media Services Act and the Advertising Act regards to advertising addressed to minors. Also the Act to Regulate Dissemination of Works which Contain Pornography or Promote Violence or Cruelty indirectly applies.
Finland	Requirements to prevent dissemination of harmful content and establish principles of responsibility of online service providers. Gradually, legislation concerning the content of web sites is being developed in Finland. In the Act on the Exercise of Freedom of Expression in Mass Media (460/2003), the responsibility of Internet service providers is limited to technical and distributional matters, such as deleting illegal material after a court decision and revealing technical identification information during criminal investigation. New amendments to the Penal Code specify the dissemination responsibility of web-operators (administrators) for the content of their sites. Particularly, the amendments concern racist and hate speech and dissemination of child pornography.	The only acceptable restrictions to freedom of expression regard minors' access to videos or other pictorial programmes (including for instance violence or sex) that are suitable only for adults.
Germany	General provisions apply in variations to all areas, regarding 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. Particularly provisions for the protection of young people and intellectual property shape the regime and the practice regarding Internet content.	See on left side
Greece	Television channels must refrain from showing programmes or providing information that provokes hatred on the basis of race, sex, religion or citizenship.	Presidential decree 77/2003 (code applicable to news journalist and political programmes). 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. Public and commercial TV stations are obliged to refrain from showing programmes that can seriously injure the physical, mental or moral development of minors.
Italy	See on right side.	The Code on Audiovisual media service 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. It also embeds the co-regulatory instrument approved in 2002, 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.
Romania	Mentioned but not described	Provisions against pornography are directed to protect children. 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.
Slovakia	There is a softer protection of human dignity in the case of audiovisual media service on demand and stricter protection in the case of standard television broadcast. According to Law on Broadcasting and Retransmission audiovisual media service on demand and programme service must not propagate violence and in a hidden or open form instigate hatred on the basis of gender, race, colour of skin, language, faith and religion, political or other thinking, national or social origin, membership in a national or ethnic group, etc.	The Law on Broadcasting and Retransmission defines that a broadcaster is obliged to ensure that programmes or other elements of the programme service are not broadcast which can impair the physical, mental or moral development of minors, especially such as contain pornography or coarse unjustified violence. Provider of audiovisual services on demand has to ensure that this service, if it can endanger physical, psychical or moral development of minors, especially programmes with pornography or brutal, unjustified violence, could not be accessible to minors under normal circumstances.
Spain	Hate speech as such is not considered a crime per se, unless a clear and present danger concurs.	The Spanish Constitution includes references to rights which restrict information contents, namely children's rights. 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 (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).
Turkey	See on right side	Law no. 3984 on broadcasting respects the right of reply and rectification, 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.
UK	Several provisions in statutory acts as well as regulatory codes	Ofcom Broadcasting Code s.1 contains extensive provisions for the protection of minors, as well as rule 11 of the ATVOD rules, ss. 5 and 9 BBC editorial Guidelines and ss. 6 and 7 PPC Code.

A number of issues arise concerning these prohibitions. First, many of them are extremely broadly drafted. They may rely on more detailed specification in regulatory codes produced by regulatory agencies (e.g. in the UK) or by a process of co- or self-regulation (e.g. in Spain). However, many examples have considerable potential for abuse through restricting freedom of expression, for example through the over-enthusiastic use of provisions designed to protect groups from insult or humiliation. This raises the further issue of the extent to which the exercise of regulatory powers is subject to judicial control and to other forms of oversight. Once more, Turkey provides the clearest example of the abuse of this sort of provision (Kurban and Sözeri, 2011: 20-21).

Secondly, the negative prohibitions relating to broadcast content may take the form of special requirements applying to broadcasters through the use of broadcasting legislation, or through the employment of the general law relating to hate speech, the protection of minors and in other areas. This adds to the complexity of the law and also makes it more difficult to engage in deregulation simply by amending statutes relating to broadcasting.

Thirdly, we can see several different levels of regulation at work in this area. Some prohibitions may be administered by the criminal courts, others by regulatory agencies or government and in other cases there may be elements of co- or self-regulation, for example in the elaboration of the regulatory requirements. Once more this makes it difficult to engage in any straightforward process of deregulation, and it may raise problems of coordination between the different regulatory levels. As always, issues of institutional design are central to effective regulation.

As mentioned above, some of the traditional rationales for negative prohibitions in regulation have disappeared or have reduced considerably in importance. Moreover, the digital media to be discussed below are not subject to many of the constraints applicable to traditional broadcasters (with few exceptions, notably the attempts in Turkey to block internet content). However, it is apparent from the national case studies that there has not been a withering away of negative prohibitions in relation to broadcasting, and that they still have considerable importance in all the nations studied. However, there may have been some changes in the forms of regulation. Firstly, it may have become more focused with a clearer specification of the norms through a process of rule-making by agencies (Van Besien, 2011: 9). Secondly, as mentioned above, there has been some use of self- and co-regulation in the development of clearer norms (Hans Bredow Institute, 2006). Apart from the use of self-regulation in relation to the protection of minors, a striking example relates to the regulation of the content of broadcast advertising in the UK. This has been delegated by Ofcom, the statutory regulator, to the industry's own Advertising Standards Authority, subject to Ofcom retaining some residual backstop powers and the establishment of an independently-chaired advisory committee. In one sense the use of co- and self-regulation might make regulation of broadcasting closer to that of the press but essential differences remain in that the content prohibitions for broadcasting do go beyond the general law applicable to all media. Despite the major technological and market developments of recent years, we have not seen anything resembling a

wholesale deregulation of broadcast content, and that continues to be highly unlikely. The central question, to be referred to below, is the extent to which such requirements can be applied to digital media.

4.2.2. Positive programme requirements

The other form of regulation of content which is special to broadcasting is that of the positive requirements for programme content; these are summarised in Table 4.3. They also cover a broad range of different subjects, including requirements for impartiality, especially in the treatment of news and current affairs; for programmes which meet a wide range of different tastes and interests, and for various forms of quality broadcasting. Indeed, it was the existence of these requirements which was seen as central to public service broadcasting in the past, and indeed could be said to define such broadcasting more accurately than merely looking to public ownership.

Table 4.3. Positive requirements

	Impartiality	**Diversity**	**Quality**
Belgium	Community legislation on news reporting apply in broadcasting only FRBA provides that local TV broadcasters should remain independent from political, trade unions, religious authorities in their programming activity. FLBA provides that all informative programs (and informative components of other programs) should be made and broadcasted in a spirit of political and ideological impartiality.	Duty of neutrality: audiovisual media may not discriminate against political, social, cultural or other currents in society. Rules regarding access to airtime for various philosophical or religious associations.	Community legislation on news reporting
Bulgaria	The requirements of objectivity and impartiality of the national BM were introduced by Grand National Assembly, convened to adopt a new Constitution.		The 1998 LRT and the 2004 Ethics Code of the Bulgarian Media contain a variety of legal provisions and self-regulatory rules, aimed to guarantee that the media content meets standards of responsibility, quality, objectivity and pluralism.
Croatia			The Media Act in relation to the obligation of the printed media 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, whereas these obligations are imposed on broadcasting.
Denmark	The important role of the media when it comes to news reporting and the stimulation of public debate is primarily reflected in the requirements for PSBs to be impartial and fair in their news and current affairs programmes. PSBs may not represent any opinion on controversial issues, and any journalist working for a PSB may not express his or her personal opinion on politically sensitive matters.		The Radio and Television Broadcasting Act provides that the supply of programmes and services shall aim at quality, versatility and pluralism. Regarding the dissemination of information emphasis should be put on factuality and impartiality.
Estonia	Mostly applies to the PSB (Estonian National Broadcasting Act, art. 6)	Mostly applies to the PSB (Estonian National Broadcasting Act, art. 6)	Mostly applies to the PSB (Estonian National Broadcasting Act, art. 6). The rules are described in detail by the Public Broadcasting council's guidelines.
Finland	Imparity requirements are included in public service broadcaster´s guidelines (presentations of different kinds of opinions and appreciations).	Public service broadcaster's programmes must provide "a wide variety of information, opinions and debates as well as opportunities to interact" as well as "to produce, create and develop Finnish culture, art and inspiring entertainment".	No legal criteria. According to ethical guidelines journalist must aim to provide truthful information, information must be checked as thoroughly as possible, information sources must be approached critically and headlines, leads and other presentation material must be justified by the substance of the story.
Germany	Impartiality and balance requirements exist only for public service broadcasters, while private broadcasting is required only to take different opinions into account, and print media or political blogs are more free to publicise content with a clear bias, as long as journalistic standards are	Interstate Broadcasting Treaty defines the term 'full coverage programme' applicable for private broadcasting channels. It means that a licence for a full coverage channel can only be issued and retained if the broadcaster fulfils specific requirements, including a	Any journalistic or editorial content is subject to regulatory content requirements regarding accurate reporting. Rules apply for private and public broadcasting, stemming from the Interstate Broadcasting Treaty regulation and statutory

	respected (i.e. delineation of fact and comment)	programme plan with a diverse content of information, education, advice and entertainment. the Interstate Broadcasting Treaty requires that private operators give representation to the diverse and relevant political, ideological and societal opinions in the programmes of full coverage channels.	legislation. Print products must respect basic accuracy rules laid down in statutory state press laws and self-regulatory, detailed standards laid down in the Press Code.
Greece	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. 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.	Domestic legislation contains several rules devised to promote content diversity in broadcasting. Besides these, broadcast media operators which apply for a licence to the NCRT are required to submit a declaration of the type of programmes they wish to air ('informational' or 'non-informational') on the basis of detailed criteria prescribed by law.	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. The quality of content depends on the correct use of Greek language, which all public and private radio stations and TV channels must respect.
Italy		Italian legislation, at the national and the regional levels, promotes to some extent the production and diffusion of diverse and plural content mostly by providing incentives and subsidies for different commercial activities.	The TUSMAR lists as principles applicable freedom and pluralism of media, freedom of expression, freedom of opinion and the rights to receive and communicate information or ideas with no limits, objectivity, completeness, loyalty and impartiality of information, the protection of rights of others, copyright and intellectual property, openness to different opinions and political, social, and cultural and religious tendencies, etc .

Romania		Statutory provisions entirely dedicated to secure a fair, balanced and diverse content.	Special diversity requirements are imposed to the public broadcasters – both radio and TV. The two public broadcasters have the legal obligation to secure, in all they do, "pluralism, free expression of ideas and opinions, free flow of information as well as the correct information of the public". They also have a legal obligation to abide by the professional standards.
Slovakia	The Law on Broadcasting and Retransmission provides that a broadcaster has the duty to ensure the universality of information and plurality of opinion within the broadcast programme service, and to ensure objectivity and impartiality of news programmes and current affairs programmes; opinions and evaluating comments must be separated from information of a news type. This duty does not relate to broadcast via Internet or to audiovisual media services on demand. The Law on Digital Broadcasting (No. 220/2007) guarantees that provider of multiplex offers services of its multiplex freely and independently.	Content regulation aims at the protection of media and cultural pluralism, support for cultural and language diversity, protection of children and youth, protection of human dignity, protection of consumer and protection of copyright and related rights. It also promotes diversity of information and plurality of opinion within the broadcast programme services.	There are just general claims.
Spain		Article 5 of the LGCA stipulates that the broadcasting of programmes reflecting the cultural and linguistic diversity of citizens is a common right.	
Turkey	n.a.	n.a.	n.a.
UK	'Due impartiality' and 'due accuracy' are requirements set by the Communication Act 2003. Detailed in OFCM broadcasting code. The press have not comparable obligation as the	OFCOM regulates both commercial and PSB (requirements set out in Communication Act 2003) Press diversity is stimulated only through ownership controls	

	PCC provides only not to publish inaccurate, misleading or distorted information and/or pictures.		

Overall, these sorts of requirements may be seen as seeking to achieve two different but related objectives. The first is that of protecting the apparently intangible concept of 'quality broadcasting'. It is easiest to define this by what it is not; the filling of the schedules with low-quality imported programming, including programmes from the United States where the size of the domestic market means that programming can be offered abroad cheaply. Thus there may be a concern with protecting domestic broadcasting production, and also with ensuring that expensive programming, such as up-market drama and coverage of international affairs, is not neglected.

The second concern is of particular relevance here; it is that of 'internal pluralism'. This requires not simply that there are competing providers for services (as discussed in an earlier section of this report), but that there is a broad range of different programming offered within a single broadcaster's service. This may refer to the types of service offered, and require that programming appeals to a wide range of different tastes and interests. This is particularly associated with public service broadcasters. Of course, with the digital revolution, this no longer provides a *general* model of sustainable broadcasting, with the proliferation of channels leading to highly specialist services appealing to niche audiences. However, as we shall see in a moment, important provisions remain requiring *some* broadcasters to offer such internal pluralism, thereby complementing the niche operators. Secondly, in a different sense internal pluralism protects the presentation of a diversity of different views, especially political views, through requiring impartiality in the presentation of news and current affairs. This is designed to prevent broadcasters becoming mouthpieces for the views of their proprietors or staff, and of course represents a radical difference from the position of the press where the newspapers are closely associated with particular political viewpoints which they champion and which shapes fundamentally their treatment of news and current affairs.

It is these requirements which could be expected to have declined with the greater marketisation of broadcasting reflecting the effects of technological developments. However, in one sense they have become more important. As noted earlier in section 3.5., the European Commission has, through the 'Amsterdam Test' required a much clearer specification of what special requirements apply to public service broadcasters in order to avoid challenges based on competition and state aids law; it is no longer sufficient simply to leave public service broadcasting as a matter for cultural expectations rather than legal norms. Perhaps reflecting this, a large number of such requirements still remain in the countries examined in the national case studies. They are mainly applied to public service broadcasters but in some cases may apply more widely.

For instance, in Belgium local TV broadcasters and Flemish private and regional television broadcasters have requirements of independence, for example from political, trade union and religious bodies; a duty of neutrality applies to all

broadcasters (Van Besien, 2011: 29). There are also quotas on compulsory investment in content production. Croatia has extensive quotas to ensure a balancing of different types of programmes (Švob-Đokić and Bilić, 2011: 26-28). In Denmark public service broadcasters are required to be fair and independent in their news and current affairs programmes and neither they nor their journalists must express their personal opinions on politically sensitive matters. The programmes of Finland's public service broadcaster must provide 'a wide variety of information, opinions and debates as well as opportunities to interact' as well as 'to produce, create and develop Finnish culture, art and inspiring entertainment' (Kutti, Epp and Lindgren, 2011: 23-27). German public service broadcasters are subject to impartiality and balance requirements, and in Spain the legislation stipulates that the broadcasting of programmes reflecting the cultural and linguistic diversity of citizens is a common right (De la Sierra and Mantini, 2011: 28). Most strikingly, in the UK the BBC is subject to extensive requirements under its Charter and Agreement that include sustaining citizenship and civil society, promoting education and learning and stimulating creativity and cultural excellence. It is also subject to extensive requirements for impartiality (Department of Culture, Media and Sport, 2006b; Department of Culture, Media and Sport, 2006c). Positive obligations may also apply to other broadcasters; the extent to which they do so is summarised in table 4.4. These requirements may also apply to online services where a broadcaster has 'general control' of them, thereby making the Code applicable to broadcasters' websites.

Table 4.4. Are content requirements different for public and commercial media service providers?

Belgium	Duty of neutrality is applicable to all public and private broadcasters (for informative programs), whether they broadcast at a national, regional or local level (at least in the Flemish Community). In general, programming and content of both private and public broadcasters should stay clear from political, philosophical and ideological influences (at least in the Flemish Community). This is also covered by self-regulation. Duties of impartiality are imposed on community public broadcasters, whereas the obligations for private service broadcaster do not have monitoring mechanisms nor sanctions in case on non compliance.
Bulgaria	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.
Croatia	Regarding quota rules and obligations to invest in content production, the Electronic Media Act 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, the Croatian public broadcaster will have a significantly higher quota and obligations regarding the mentioned works than the commercial broadcasters.
Denmark	The requirements are, however, applied differently within the various media. There are thus three different kinds of content regulation in the Danish media system. Firstly, the PSBs are regulated by a public service contract or a broadcasting permit, which contains comprehensive, detailed content requirements. Secondly, two nationwide

	privately owned radio channels are regulated via concessions in which certain requirements regarding content are included. Finally, local radio and television are subject to content obligations in as far as the broadcasters promised to deliver a particular kind of programming when they applied for a licence.
Estonia	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.
Finland	Direct content requirements, based on law, only concern the public service broadcaster.
Germany	Interstate Broadcasting Treaty provisions are rooted in the judgments of the Federal Constitutional Court, in which the court clearly stated that private broadcasting programmes do not have to fulfil the same strict standards as public service broadcasters, but nevertheless are required to broadcast content which serves free and independent public opinion forming.
Greece	Presidential Decree 77/2003 applies to all broadcasters. There are no substantive differences between commercial media and public service media as far as content requirements are concerned.
Italy	The 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. 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.
Romania	n.a.
Slovakia	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 cultural values, achievements, etc. Also there is the obligation to ensure broadcasting a prescribed portion of own production, European works and audiovisual works of independent producers
Spain	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 "framework contracts" between the respective governments and managers of public broadcaster
Turkey	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 Ataturk's ideals and reforms; and complying with the national security politics and national economic interests of the state.
UK	Communication act 2003 and OFCOM broadcasting code apply to all broadcasters, though the BBC is also subject to the BBC Editorial Guidelines, which are in some respects wider ranging than those in the Ofcom Broadcasting Code.

4.2.3. Other content controls

It is worth noting also that of course broadcasters will be subject to the other types of content regulation discussed above in relation to the press, under general criminal or civil law. Thus the rules relating to defamation will apply to broadcasters, as will

those relating to the right to a private life. This means that constitutional requirements at the level of the European Convention of Human Rights will apply and may have important effects, a notable example being that of the legality of far-reaching restrictions on political advertising in the UK currently before the Grand Chamber of the European Court of Human Rights.[89] In Turkey there has been a number of important decisions of the Court relating to freedom of expression, with limited steps taken to implement them (Kurban and Sözeri, 2011: 26-27). Given the more extensive regulation of broadcasting, privacy rights may also be implemented through special regulatory authorities; for example, in the UK the Ofcom Broadcasting Code has extensive provisions relating to privacy and these are the subject of frequent adjudications. Another example would be the role of a Data Protection Authority in relation to the protection of privacy, as in Denmark (Helles, Søndergaard and Toft, 2011: 16). This will of course also raise major issues of EU law relating to data protection.

Overall, then, in the case of broadcasting, it is striking that the growth of on-line media and a proliferation of channels has not led to wholesale deregulation of content. Both negative and positive content requirements continue to play an important part in the nations studied by this project. Broadcasting remains very different from the press and from other forms of on-line media, and the remaining content controls still result in a very different culture from that in the other media; indeed, broadcasting can be seen as complementing those other media through, for example, providing more authoritative sources of information and shared coverage of important national events.

The regulation of content is undertaken by a considerable mix of institutions. What is striking is that the traditional government department or regulatory agency has increasingly been supplemented by bodies more usually associated with press regulation in the form of self- or co-regulatory institutions. This may have advantages in creating a more flexible and responsive multi-level regulatory regime, but may also create problems of inadequate communication between different regulatory bodies or conflicts between regulators (Smilova, Smilov and Ganev, 2011: 17) and of the absence of the sort of public controls and accountability associated with public regulation. This is a theme to which we shall return later in this report.

4.3. Digital media

At first sight it might appear strange to be including a section on the digital media in discussion of content regulation, as these media are often seen as precisely those where content is unregulated and freedom of expression at its most untrammelled. Yet on closer examination it is clear that important elements of content regulation occur here as well.

First, a distinction must be made between audio-visual media services providers covered by the Audiovisual Media Services Directive and all other digital media

[89] See *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

services. In the case of the first, some elements of content regulation flow from the national implementation of the directive; in some cases this will include specific guidance on what is a non-linear video service provider. Currently only four European countries have provided such guidelines; UK, Italy, Belgium and the Netherlands. The relevant factors may be editorial responsibility and that they broadcast 'TV-like programmes' but additional elements may be added by the national authorities in order to define in more detail the scope of regulation.[90]

If newspapers and broadcasters have an online presence but do not fall within the category of non-linear service providers, they will be subject to the regulatory systems which apply also to their more traditional forms of output. There may be particular questions surrounding the exact scope of such coverage (for example, what constitutes the degree of control over a website needed to bring a newspaper or broadcaster within regulatory jurisdiction) but nevertheless it is clear that changing the mode of delivery is not sufficient to enable evasion of the regulatory requirements applying to those media to take place.

Second, as is well-known from recent experience, online media may raise major competition concerns. These are not normally expressed in terms of media plurality, but related questions are likely to arise. Examples where they might do so are in the context of the role of search engines as gateways for access to information (Daly and Farrand, 2011). Such issues will rarely be expressed in terms of content regulation, but the questions they pose are similar to many of those discussed above relating to access to a number of competing views and to material directed at a wide range of different tastes and interests. However, this form of regulation is firmly in the field of competition law rather than in that of imposing special regulatory requirements, with the possible exception of the 'must carry' rules to ensure that the material of public service broadcasters is made available on competing platforms, as employed for example in Denmark and Romania (Helles, Søndergaard and Toft, 2011: 26; Ghinea and Avădani, 2011: 23-25).

Thirdly, a rapidly emerging issue of enormous importance to the digital media is that of the policing of copyright. This will be discussed in the next section of this report, but the point should be made here that it also raises questions about access to content; indeed, attempts to prevent internet piracy have frequently been criticised by their opponents as attempts to engage in censorship of the internet. Two examples can be used to illustrate this. The first is from France where the Conseil Constitutionnel decided that clauses in the original version of the so-called HADOPI law were unconstitutional because they introduced the power for a new administrative authority to suspend access for subscribers to the internet when it had decided that that they had repeatedly breached copyright on-line through illegal downloading.[91] Its reasoning was that 'given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression

[90] For example, catch-up TV is likely to be covered as a non-linear service in the UK but not in Italy.

[91] Décision no. 2009/580 du 10 Juin 2009, *Loi favorisant la diffusion et la protection de la création sur internet.*

of ideas and opinions', the right to free communication of ideas and opinions in the Declaration of the Rights of Man implied freedom to access such services (para. 12). The wide power vested in an administrative authority (not a court) to restrict the right to communicate freely in order to protect intellectual property rights was, in effect, a disproportionate restriction on freedom of expression. A new version of the law is now in place avoiding these criticisms through extending the right to judicial review. Similarly, in the UK action has been taken on a number of occasions in the courts by copyright owners to compel internet service providers to block access to websites infringing copyright.[92] Copyright cases relating to the internet are clearly capable of raising major issues relating to freedom of expression, and there the adequacy of private law and of private companies acting as gatekeepers may be called into question as forms of regulation (Daly and Farrand, 2011).

Finally, a further widely-debated issue in the digital media is that of the protection of minors in relation to a variety of material on the internet. This includes the use of the internet for online grooming or bullying, access to pornographic or violent material, and against their abuse through child pornography on the internet (Casarosa, 2011). This form of content regulation takes place through a combination of the criminal law and of self- or co-regulation. Examples of the latter include the work of the Internet Watch Foundation in the UK, which receives complaints about pornographic images, especially those relating to children. This may result in a notice requiring ISPs to remove content and if this is not complied with a report may be made to the relevant law enforcement bodies. There is also co-regulation in the form of filtering arrangements operated by the industry, for example the use by ISPs of the 'cleanfeed' system in the UK, where they were told that if they did not adopt the system legislation would be passed to compel them to do so (Daly and Farrand, 2011). A variety of different models has been adopted internationally; given the strong reasons for special protection of minors, they have not given rise to concerns relating to freedom of expression as much as other types of content controls. They may however give rise to issues of accountability and effectiveness of different forms of regulation; for example, overreach in the range of content blocked by filtering. This is an area where the EU institutions have taken an interest through a series of multi-annual action plans and supporting the development of coordinated private regulation, including, for example, Safer Social Networking Principles (Casarosa, 2011:14-26).

4.4. The problem of 'normative confusion' in content regulation

It is very clear from the above discussion that we cannot see any straightforward move to deregulate media content because of the profusion of new means of delivery. Rather we have some important developments of new forms of content regulation administered by courts in the area of privacy and of copyright enforcement, whilst the extensive content requirements applying to broadcasters have largely been left in

[92] See *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch); *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 1152 (Ch).

place. Various forms of self- and co-regulation have developed in relation to the press and the internet; there is currently considerable criticism of their limited effectiveness.

We thus have a variety of different media regulated in different ways and to a radically different extent, with broadcasting still subject to much more extensive controls than the press and the digital media. This has its advantages. Regulating some parts of the media more closely than others may ensure that the media landscape does not become too uniform and that there is access *somewhere* to a range of different viewpoints.[93] Thus for example impartiality requirements applying to the broadcast media may create a very different set of sources of information from those in the partial press and digital media, and thereby increase consumer choice and availability of information needed for effective citizenship. In particular, a crucial requirement for such citizenship is a degree of trust in at least some sources of information, and quality controls, impartiality requirements and professional training are important means of maintaining such trust; it is a worrying aspect of some of the national reports that such trust appears to be absent (De la Sierra and Mantini, 2011: 7-8). It would be a mistake to assume that, because the newer forms of media are subject only to limited content regulation, that model should also be replicated for broadcasting.

The danger, however, is that acceptance of a plurality of different types of regulation for different media may lead to a form of 'normative confusion' as referred to in the Bulgarian case study, or the lack of coordination between regulatory bodies noted in Finland (Smilova, Smilov and Ganev, 2011: 45; Kuutti, Epp and Lindgren, 2011: 7). Because the regulatory landscape is so diverse in these cases it is impossible to extract clear principles from it and it is also difficult to assign a particular area of media to a specific form of regulation. Such an absence of regulatory co-ordination may be particularly problematic where there is a plethora of different self-regulatory bodies. The need, therefore, is not for uniform regulation, either in terms of its substantive requirements or of its institutions, but for the development of a coherent set of regulatory systems, or a coherent regulatory regime (Müller and Gusy, 2011: 49). It is here that constitutional values such as freedom of expression may have value in providing some relevant organising principles. It is also important that clearer criteria be developed for co-operation between different regulatory systems within each state.

[93] For a statement of this case see Lee Bollinger (1976), Lee Bollinger (1990), 355-67.

5. Copyright protection in the media

5.1. Freedom of expression and copyright

In Europe, the conflict between copyright and freedom of expression has entered into the academic and jurisprudential debate only in the last decade,[94] but the need to strike a balance between the two rights has gained increased attention in recent times, also due to the regulatory strategies adopted by Member States to address the problem of the availability of materials infringing copyright in the new media.[95]

The conflict lies on the very basic assumptions of the two rights: copyright grants owners a limited monopoly with respect to the communication of their works; whereas freedom of expression – and the related freedom of information – warrants the freedom to hold opinions and to receive and impart information and ideas (art. 10 ECHR). Although copyright addresses mainly the original literary or artistic form in which ideas and/or information appear,[96] the boundary between the form of expression and the underlying idea is not always so clear.[97] As a matter of fact, original works may indeed be used, without the consent of the author, for certain purposes closely linked to freedom of expression demands, such as limitations and exceptions for quotation, news reporting, archival purposes, scholarly uses, library and museum uses, communication of public debates and, in some countries, the access for the public to documents from public entities or to government information.[98]

A previous approach, adopted mainly by courts, viewed copyright regulation as

[94] Birnhack (2008); see also Hogenholtz (2001), where the author attributes the rational for this late attention, on the one hand, on the theoretical approach to copyright as a natural right, contrasting it with the US approach, where the economic perspective is prominent; on the other hand on the reluctance by European domestic courts to apply fundamental rights and freedoms in so-called 'horizontal' relationships, i.e. in conflicts between citizens, again contrasting it with the US approach where constitutional courts with the power to overturn national legislation that violates provisions of the constitution.

[95] See below sect. 5.3.3.

[96] The idea/expression (or in Europe, the form/content) dichotomy implies that ideas, theories and facts as such remain in the public domain; only 'original' expression/form with 'personal character' is copyright protected. In the US copyright is codified in 1976 Copyright Act §102, and also in Europe in the EU directive on legal protection of computer programs 2009/24/EC (Art 1(2)). Stokes (2001), Cornish (1999: 382).

[97] Moreover, in some cases the dissemination of the idea cannot exclude the exact reproduction of the expression, see below.

[98] The Infosoc directive, 2001/29/EC, which offers a closed, though eventually not mandatory (with one exception), list of limitations. It is interesting to find the reverse situation in US copyright law, where economic rights are narrowly defined whereas exemptions, like fair use, leave ample space for various uses; Strowel (1993: 144 ff).

already reflecting the balance between freedom of expression and property rights.[99] This was based on the internalisation of a set of criteria in copyright legislation, namely the concept of originality of the work, the above-mentioned distinction between idea and form of expression, the limits posed on economic rights,[100] and on the predefined length of time for copyright protection,[101] and the existence of several exceptions.

However, recently European courts have started to interpret copyright law taking into account an additional, i.e. external,[102] limit which would require further *ad hoc* restrictions to copyright protection[103] when conflicting with freedom of expression as enshrined, for instance, in art. 10 ECHR. The most clear example is the Ashdown v Times case where the Court of Appeal observed that "*rare circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression. This will make it necessary for the court to look closely at the facts of individual cases (as indeed it must whenever a 'fair dealing' defence is raised)*".[104] It is important to note that the reasoning was based on the jurisprudence of the ECtHR in case Fressoz v France,[105] which acknowledged that freedom of expression would be relevant in those cases where it is impossible to convey the information or the idea without making substantial use of the author's expression, and the exceptions provided for in the legislation do not allow such activity. [106]

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[99] The most cited examples are the 1985 case "*copyright as an engine of free speech*" and the 2003 case of *Eldred v. Ashcroft*. The U.S. Supreme Court highlighted several important "*built-in-First Amendment accommodations*" in copyright law. See also Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (explaining that First Amendment protections are "*already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas*"); Roy Export Co. v. CBS, Inc., 672 F.2d 1095, 1099 (2d Cir. 1982) ("*No circuit that has considered the question […] has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the "fair use" doctrine*.").

[100] The economic rights protected under copyright normally include the rights of reproduction, adaptation, distribution and communication to the public (in all media), but not the reception or private use of a work.

[101] In the European Union the term of protection has been harmonised; copyright normally expires 70 years after the death of the author. See Article 1(1), Directive 2006/116/EC on the term of protection of copyright and certain related rights.

[102] See the distinction provided by Birnhack (2003) between external and internal mechanism of conflict solving.

[103] See Ashdown v. Telegraph Group Ltd ([2001] E.M.L.R. 44 (CA)) in Birnhack (2003: 34)

[104] Ashdown v. Telegraph Group Ltd, cit., p. 44-45.

[105] ECtHR, Fressoz and Roire v France (App no. 29183/95), 21 January 1999.

[106] "*Fressoz's case was not a copyright case, but it illustrates a general principle. Freedom of expression protects the right both to publish information and to receive it. There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in*

From a different perspective, also in Germany jurisprudence addressed the conflict between copyright and freedom of expression. Both constitutional and civil courts acknowledged that when special circumstances occur, news items, critical analysis and political speech can be subject to a different copyright regime, namely they can be provided to the public as un-authorised broadcasting.[107]

5.2. Copyright and media freedom and independence

Historically, the protection provided through copyright was based on the efforts of government to regulate and control the output of printers, applying an implicit censor on the information distributed to the public. For instance, the privileges and monopolies were awarded by British as a censorship regime;[108] only at the beginning of the eighteen century was the link between copyright and censorship broken, moving copyright protection from a content control to a control over technology (i.e. printing press).[109]

Progressively, copyright law and policy has been developed so as to strike a balance among three different actors, namely the author, who spends time and energy to produce the work, vis-à-vis the intermediary, who invests in the duplication and distribution of the work, and the public at large, who receive the social benefit from the distribution of the work. Copyright, on the one hand, protects the author in relation to his or her creative act of production, attributing him/her moral rights (e.g. the right to be identified as the creator of a work, the right to have the integrity of a work preserved, etc.); on the other, it allows the author to earn a return for his or her work, that could also provide an incentive to further production.[110] As long as the author is sufficiently remunerated the intermediary can exploit the work, through licensing contracts, and the public can profit from its availability on the market.

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them. On occasions, indeed, it is the form and not the content of a document which is of interest". Ashdown v. Telegraph Group Ltd, cit., p. 43.

[107] See German Federal Supreme Court 7 March 1985, [1987] GRUR 34, *Lili Marlene*. The Court did accept in principle that "*under exceptional circumstances, because of an unusually urgent information need, limits to copyright exceeding statutory limitations may be taken into consideration*." Cf. German Federal Supreme Court 16 January 1997, [1997] GRUR 464, *CB-Infobank*. The Court found that the public interest in accessing information did not justify departing from the rule that statutory limitations on copyright, being narrowly construed, should be narrowly interpreted. See more in Rosen (2006).

[108] "*Only members of the company could legally produce books. The only books they would print were approved by the Crown. The company was authorized to confiscate unsanctioned books. It was a sweet deal for the publishers. They got exclusivity - monopoly power to print and distribute specific works- the functional foundation to copyright. The only price they paid was relinquishing the freedom to print disagreeable or dissenting texts*", Easton (2011: 533), citing from Baidhyanathan (2001).

[109] Lee (2007: 196), analysing the UK Statute of Anne of 1706. The author emphasises the start of a historical period in which controls over content were effectuated through control over the technology (printing presses).

[110] MacQueen, et al. (2010) where the distinction between the Anglo-American or Common law approach and the Continental Europe o Civil law approach is widely described.

This framework is clearly applicable to news content as copyright protection enables journalists and media outlets in general to safeguard their investment in the production process, allowing them not only to recover the cost of gathering and transmitting the information, but also to control the possible re-use of such information by third parties. As happened before,[111] technological developments ask for a reframing of copyright protection: nowadays, several new intermediaries have entered into the production chain shifting both revenues and control over news content distribution, hampering the economic viability of traditional news content producers.

In practice, traditional news content producers, such as newspapers, depended on a double form of revenues from sale of news content: the nominal fee for single copies of newspapers charged on readers and the sale of advertisement spaces. Digital media challenged this business model, as the internet made possible to distribute news more quickly and inexpensively than news sources could through print copies. The availability of newspaper content online, hoping to attract wider readership and, by extension, more eyeballs for which to sell advertisements did not result in a success (Leibowitz, 2009). This move had rather opened a new battle ground, between news content producers and the so-called news aggregators, which can analyse multiple newspaper websites, decide which stories will interest readers, and display information about those stories to readers without incurring in any cost of content production but earning the revenues of advertising.[112]

Where traditional news content producers cannot receive sufficient revenues reporting the news, there are two possible future scenarios: either they will reduce investments in news gathering and dissemination, or they will limit access to news through "paywalls".[113] In both cases, the consequence is shrinking the amount of information crucial to everyday life and the democratic process made available to the public. Thus, copyright protection has been viewed, mostly by newspaper industry members, as a lifebuoy so as to retain control over news content, as for instance it would be able to stop news aggregators from providing stories without the permission of the newspapers that produced it (Stucke and Grunes, 2009). However, news aggregation also has positive effects: it affords a convenient and easy tool to allocate all the published news on a specific topic or event, thus avoiding time-consuming and

[111] Brauneis (2009) where the development of US copyright protection for news is attributed to the introduction of telegraph as a means to transmit information.

[112] Yen (2010: 950), explaining that "*Newspapers therefore face declining revenue because fewer readers actually read physical newspapers or browse through newspaper websites. Instead, readers prefer to surf the Internet, visiting news aggregators and clicking only on those stories that readers care to see in full. Doing this eventually takes readers to newspaper websites, but newspaper profits are lost because the reader does not browse the newspaper's entire website. The reader instead views only particular articles of interest and returns to the aggregator's site, thereby eliminating opportunities to see further pages—and the ads they contain—on the newspaper's website. Rather, the reader sees more ads displayed by the aggregator, who profits from selling them*".

[113] See the definition provided in Wikipedia: "*A paywall is a system that prevents Internet users from accessing webpage content (most notably news content and scholarly publications) without a paid subscription*" (http://en.wikipedia.org/wiki/Paywall).

burdensome visits to the multiple news sites; moreover, it brings people broader access to more diverse, complete, richer and comprehensible information, than any newspaper reader could gather at one time using other "traditional" means (Xalabarder, 2011: 116-117). In this sense advocates of freedom of expression claim that the increasing expansion of property rights over information, news and journalistic works accompanied by the development of proprietary technologies and measures directed to enclose information flows over the Internet would lead to a situation which resembles the worst scenario of media concentration before the development of the Internet.[114]

In the online framework, framing copyright protection rules has a very relevant policy objective: it can allow traditional media to retain their economic viability, which is tightly linked to their independence, and consequently to pursue their role of public watchdog. Obviously, any regulatory intervention that entangles an expansion of copyright protection should be balanced with freedom of expression.

5.3. Copyright protection of news

News copyright protection was subject to specific regulations, due to the type of content at stake that has usually been compiled and reused for informative purposes. In recent times, however, the digitalisation of content allows for a peculiar type of re-use, namely aggregation.[115] Online news aggregators[116] are now under strict scrutiny by courts to verify if their role and activity could be deemed lawful under current copyright legislation,[117] due to the fact that they use third-party pre-existing contents, such as newspaper articles, photographs and audiovisual recordings, which are mainly provided by traditional content producers.[118]

News aggregation can be distinguished under three different categories: press summaries, press-clipping and news aggregation *stricto sensu*. The first case refers to the selection, reproduction, display and distribution of relevant parts of previously acquired newspapers; the second case refers to the selection, reproduction (and, sometimes, scanning), display and distribution by digital means, such as emailing lists

[114] Netanel (2008: 241), affirming that "*Traditional media's successful assertion of proprietary control over content and digital communications networks would remake the Internet into something more like cable TV and other traditional media markets. The result would be a significant contraction of the free-flowing expressive diversity and bottom-up speech that the Internet makes possible*".

[115] A wider protection is provided for broadcasting materials, which could include also news content. For a detailed analysis see European Audiovisual Observatory (2010); Casarosa (2012).

[116] Several are the types of news aggregators: Feed aggregators (that display contents from a number of different websites organised in ''feeds'' and usually arranged by topic, source, etc., e.g. Google News); Specialty aggregators (that collect information from a number of sources but only dealing with a particular topic or subject); and Blog aggregators (that use third-party content to create a blog about a specific topic, e.g. Huffington Post). See Isbell (2010).

[117] See the case law below.

[118] However, news aggregation sites allow also the inclusion of blogs and the like within their aggregation activity. See Cafaggi, Casarosa (2012).

or intranet posting (sometimes, the selection is also printed out and circulated in paper format) of indexed information (headline, source and a short abstract), including a website link or attaching a copy of the selected articles; the last case consists of locating, gathering and linking to information contents posted on online sites, enabling users to automatically find, rank and display the information requested (according to their search criteria), among all the news available online. News aggregation services may be offered for free (some include advertising on their sites) or under subscription.

Given that existing statutory limitations providing for exemption or fair uses defences were clearly drafted in a period when digitalisation was not yet so diffuse, in several countries courts are struggling to interpret the existing rules so as to verify the applicability of such limitations to online news aggregation in all the previous forms.

5.3.1. Regulatory framework

The international regulatory framework relies on the Berne convention for the protection of literary and artistic works (1886) that provided for a specific clause applicable to newspaper articles, as it expressly stated that, though the convention is not applicable to "*news of the day or to miscellaneous facts having the character of mere items of press information*" (art. 2(8)), news articles can be subject to the convention as long as they constitute literary or artistic works. In other words, the Convention acknowledges that news articles can constitute original creations as they do not only entail factual reporting.

As regards Europe, Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter InfoSoc directive) provided for an additional layer of regulation. However, it did not expressly define the threshold of originality to be applied to news articles in order to make them subject to the directive. Then, the task of defining this threshold lies on the national legislation that provides for different requirements.[119] However, on this point, a recent ruling of the CJEU could impose negative harmonisation towards the continental approach, as the Infopaq case[120] defined "work" as "*a subject-matter which is original in the sense that it is its author's own intellectual creation*".[121]

A more difficult task is the definition of the regulatory framework for titles and headlines, which are the basis for the functioning of the news aggregators.[122] Here,

[119] The strongest difference lies between the UK, where the level is set upon "labor, skill and effort", vis-à-vis continental Europe, where the creative or intellectual imprint of the author is the criteria: German law refers to "personal intellectual creation"; Italian to "creative character''; Spanish to "original creation"; etc.

[120] CJEU Judgement of 16 July 2009, Infopaq International v. Danske Dagblades Forening, (C-5/08), available at http://curia.europa.eu/.

[121] For the effects toward a UK interpretation of the threshold in the Meltwater case, Rosati (2011).

[122] Similar difficulties arise in the case of summaries or excepts of news articles, as both the Berne Convention (art. 10 (1)) and the Infosoc directive (art. 5(3) (d)) provide for a specific limitation.

neither European nor national legislation provide for specific rules, thus courts are the most relevant actors, adapting the general provisions to the specific cases. Again, the criteria of originality of the work and the extent to which exemptions for non-substantial reproduction of content apply are crucial.[123] However, a different outcome was reached throughout Europe in similar cases, as it will be described in the following section.

5.3.2. Court interpretations – The interplay between European and national courts

The Infopaq case mentioned above is the most recent case in front of the CJEU dealing with the issue of news aggregation. The case addressed the conflict between a media agency providing information services to its customers in the form of a list of references to newspapers articles and the Danish Association of Publishers who claimed the infringement of copyright legislation for such an activity. The media did not only provides the title of the articles, but it also added to each of the selected ones an excerpt of 11 words focused on predefined keywords relevant for each customer. It should be underlined that the case involved the digitalisation of the news articles, but it did not involve any linking activity, and it was strictly limited to customers of the media agency. However, the reasoning of the CJEU could be applicable to all those cases involving public availability of news excerpts online.

The CJEU acknowledged that "*storing an extract of a protected work comprising eleven words and printing out that extract, is such as to come within the concept of reproduction*" (Art 2 Infosoc) as long as "*that extract contains an element of the work which, as such, expresses the author's own intellectual creation*". However, the reproduction of such copyright works could not amount to infringement where transient or incidental reproduction is an integral and essential part of the technological process (art. 5(1) Infosoc).

The Infopaq decision influenced national courts either reinforcing their already existing interpretation of copyright rules, as in the Copiepresse case in Belgium,[124] or changing the traditional interpretation of those rules, as in the Meltwater case in UK.[125] The Belgian case involved the collective management organisation of Belgian newpaper publishers Copiepresse and the news aggregator Google news. The Court of

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However, the wording of those provisions does not perfectly fit for exempting news aggregators' activity from copyright infringements. See for a detailed description, Xalabarder (2011).

[123] See that in case of quotation, European countries' legislation provides for a specific limitation of copyright; however differences exist among the requirements for each country: for instance, the German law provides for quotation limitations which are not restricted to specific purposes; the Belgian and Italian laws restricts quotation to specific purposes such as criticism, review, research, teaching, or alike; the Spanish law expressly permits quotation when used for press summaries. See more in Xalabarder (2011: 138).

[124] Copiepresse SCRL v. Google Inc., Tribunal de Première Instance de Bruxelles, 13 February 2007; confirmed by Cour d'Appel de Bruxelles (9eme Ch.), 5 May 2011.

[125] Newspaper Licensing Agency, Ltd. & Others v. Meltwater Holding & Others'', [2010] EWHC 3099, 26 Nov. 2010); confirmed [2011] EWCA Civ 890 (27 July 2011)

Appeal in 2011 confirmed the first instance decision, affirming that Google news acted as a competitor of tradition news content producers, and its service providing headlines and short extracts without the copyright owners' consent, infringed the right of reproduction and public communication of the copyright owners, since no statutory limitation was applicable to allow such an activity (neither quotations nor use by the press). Similarly, the Meltwater case involved a Dutch multi-national group which offered an online media monitoring service to business customers, providing them reports of articles each of them composed by title (with direct link), its opening words and a short extract. The claimant, the Newspaper Licensing Agency (NLA), was a company formed to manage the intellectual property rights of its members by licensing and collecting the licensing fees for making copies of newspaper content. It sued Meltwater for copyright infringement as Meltwater's end-users should subscribe to NLA for a licence from newspaper publishers in order to receive and use Meltwater news. Although the court addressed mostly the aggregated results of the media monitoring service rather than examining whether a headline or an extract was original or a substantial copy, Proudman J. held that, in some cases, headlines can be considered as independent literary works and those which are not form part of the articles to which they relate.[126]

By contrast, in Slovakia the Bratislava Regional Court ruled that newspaper articles constitute "mere information" and therefore are excluded from the scope of the Slovak Copyright Act. As a matter of fact, the case resembled the Meltwater one as it involved press publishers and the media monitoring agencies in Slovakia, asking the court whether media monitoring agencies should conclude a licensing agreement with publishers in order to use their works (or extracts from them) when the content was already publicly available on the Internet.[127] Under a different ground, a Danish court found infringement of copyright by deep linking to newspaper articles in a case involving the Danish Newspaper Publisher Association and Newsbooster, a search engine for news articles.[128]

5.3.3. Proposed and adopted legislative interventions

At the same time regulatory interventions have taken place at national level in order to tackle the problem of copyright infringements online. In some cases the intervention addressed any kind of copyright infringements regardless the type of content, while in others, the scope of the legislative intervention was focused on news content.

In the first cases, the type of regulation is a so-called graduated response regulation. This concept refers to the possibility to allocate to specific regulatory agencies the power to administer and decide on a "three-strikes" procedure that may end up in the

[126] See at para. (71) and (72) of the first instance decision. The reasoning of Proudman J. was confirmed in the appeal decision.

[127] Rozhodnutie OS BA III. Ecopress v. Storin.

[128] Dagblades Forening v Newsbooster (Copenhagen Bailiff's Court, 5 July 2002), Judgment (English translation), summarised at [2002] EBL (Oct) 14.

interruption of user's Internet service in case of repeated copyright infringements. At the current stage, mandatory graduated responses have been adopted in France[129] and in the UK.[130] Similar proposals were instead rejected in Italy, Germany, Spain, Belgium and Sweden (Yu, 2011). Nonetheless, the rejection of a mandatory graduated response does not preclude that a similar proposal might be discussed a later time. For instance, in Spain,[131] a new version of the so-called Sinde law was discussed again and ultimately approved, whereas a similar proposal was abandoned by its own promoters in Belgium.[132]

Thus, on this point, the regulatory landscape remains highly fragmented in Europe; however, it should be acknowledged that the latest reform of the Telecoms package enshrined the obligation for Member States to guarantee that Internet access would not be affected through the use of measures such as a graduated response unless such measures were appropriate, proportionate and necessary and included adequate safeguards to guarantee the principles of judicial protection, due process, presumption of innocence and the right to privacy.[133]

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[129] Loi n°2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet. The law introduced a "three strikes" procedure, by which ISPs should monitor and eventually punish infringing conduct by their subscribers. HADOPI monitors the web searching and upon the finding of potentially illegal activity it requests the ISP to send a first warning email. The ISP is then required to monitor while the subscriber is invited to install a filter on her internet connection. During the following six months, the authority continues to monitor and if any similar illegal activity takes place, a second warning may be issued through a certified letter. After the second warning, any eventual continuation of the infringing activity in the form of "repeated offences" requires that the ISP suspends internet access from two months to one year. The subscriber is put in a "black list" so to prevent that other ISPs provide an alternative internet connection. The "three- strikers" would, by the way, continue to pay while being disconnected. In this procedure, the appeal before a court was only possible after a decision blocking internet access. The burden of proof was on the appellant to prove that she did not engage into copyright infringement. See Castro and Renda, (2012)

[130] UK Digital Economy Act 2010.

[131] See the Spain Law of Sustainable Economy, Ley de Economia Sostenible 2/2011, 4 March 2011 (named Sinde Law in its section dealing with copyrights and the internet), which modifies in its Final Section 43, Law 34/2002, 11 July, Services of the Information Society and the Real Decree 1/1996, 12 April, approving the Consolidated Text of Intellectual Property Law and the Law 29/1998, 13 July, regulating the Administrative Jurisdiction for the protection of intellectual property in the context of the Information Society and Electronic Commerce.

[132] Werkers (2011) mentioning the Law Proposal for a better protection of cultural creation on the internet 4-1748/1, 21 April 2010 and 5-741, 28 January 2011, submitted by Senator Monfils in 2010 and Miller in 2011 (Liberal Party) which were later abandoned by their proponents and the Law Proposal to adjust copyright collection to the technological developments while protecting the privacy of internet users, 4-1686/1, 2 March 2010, submitted by the Green Party.

[133] See the Agreement between the Council and the European Parliament on Amendment 138 of Article 1(3)a of Directive 2009/136/EC, stating that: "Measures taken by Member States regarding end-users' access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms (…)". "Any of these measures regarding end-users' access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms *may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards* in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law, *including*

Regarding the specific case of news, two interesting cases in the countries covered by the MEDIADEM project should be mentioned, both of them dealing with proposals of legislation to be adopted at national level: one in Germany and the other in Italy.

The German case concerns the decision adopted in March 2012 by the coalition committee to prepare a bill complementing copyright law.[134] Although the decision has no binding effects the content is worth mentioning. The decision is the background for a legislative proposal to introduce a new neighbouring right for newspaper publishers: commercial Internet service providers, like search engines and news aggregators, shall be required to pay an equitable remuneration for disseminating "press products", within the time limit of one year after the publication. This move aims to ensure that publishers receive a share of the advertising revenues of ISPs, and consequently that authors shall also partake in the benefits of the new right. However, this provision would not be applicable to private individuals or companies reading articles online.

The Italian case concerns the proposal for an amendment to the Italian Law on Copyright Protection (Law n. 633/1941) introducing a new paragraph into art. 65 of the law.[135] The added provision was intended to provide stronger protection of copyright for newspaper publishers vis-à-vis search engines and news aggregators, as it would impose the prohibition of use and reproduction of news content where no preliminary consent of the copyright owner (publisher) was provided, eventually achieved through an economic agreement with the publisher.

Although it seems improbable that the two proposals will be adopted in practice either because of strong opposition in Germany or the subsequent fall of the government in Italy, they show a set of interesting issues. First, they both focus on the economic perspective, addressing only the economic rights of publishers and authors, rather than striking a balance with press freedom, the right to criticise or the right to education. Secondly, as for as the Italian case is concerned, the terminology of the proposed amendment would still be ambiguous as it only refers to "use and reproduction" of editorial content, thus, the typical linking activity of news aggregators could be difficult to fall into that category.

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effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an effective and timely judicial review shall be guaranteed."

[134] The text is available at http://docs.dpaq.de/353-koalitionsrundenergebnisse.pdf.

[135] The text is available at http://parlamento.openpolis.it/emendamento/175685.

5.3.4. Private agreements

An important element to underline is the increasing number of privately regulated agreements between ISPs and right holders in order to control online copyright infringements.[136] Through private agreements, content owners avoid litigation costs and privacy concerns associated with asking ISPs to disclose the identity of users. Nonetheless, such arrangements might still affect users' rights, including privacy, personal data, freedom of expression and access to the internet. Given these concerns, the content of such agreements is not available to the public, having both parties interests in restraining users and public actors' reactions.[137]

Though there is a lack of specific evidence, it should be underlined that this trend could clearly affect freedom of expression, as this kind of private regulation through contract could end up in a form of "privatised censorship" (Tambini, Leonardi, Marsden, 2008: 413). Thus, additional efforts to analyse and evaluate whether parties suppress or limit speech to an excessive degree are needed, and this may provide an indication that not enough safeguards are in place and the discretion of the private actors in question may need to be reviewed and brought back to margins that are acceptable.

[136] Interactions are an ongoing trend towards the alignment between the incentives of ISPs and right holders, such as in the case of the integration between different content owners and ISPs, e.g. the merger between Comcast and NBC Universal. See Hamill (2011) and all the transaction related documents at: http://transition.fcc.gov/transaction/comcast-nbcu.html.

[137] See that it would be difficult for ISPs to plainly announce to customers that they plan to actively monitor their online activity; whereas content owners move away from their concurrent activity of lobbying for more protective legislation that might be perceived again not positively by public opinion.

6. Media Professionals

6.1. Journalists' freedom of expression

The connection between freedom of expression and journalistic activity has been characterised as the latter being an "instrumental good" that allows to achieve the values that are at the core of freedom of expression (Lichtenberg, 1990). The definition of journalism results in the delimitation of a protected area characterised by privileges and responsibilities associated to the activity. In this sense, journalists can claim special privileges and/or immunities, which "*should only be recognised insofar as they promote the values of freedom of speech, in particular the public interest in pluralism of its source of information*" (Barendt, 2005: 422). The jurisprudence of the ECtHR underlines this connection between freedom of expression and journalistic activity, allocating to the press the task to "*impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them*".[138] In a more recent judgement, the Strasbourg Court is even clearer in this regard, imposing a negative obligation on states so as to allow the press to pursue its "public watchdog" role: "[t]*he national authorities' margin of appreciation is thus circumscribed by the interest of democratic society in enabling the press to play its vital role of 'public watchdog'*".[139]

However, the European Court of Human Rights does not treat the exercise of freedom of expression by journalists as an absolute right, without any limit or obligation. Instead, every time the Court affirms the application of the freedom of expression principle, it always links it with duties and responsibilities that flow from that privileged position, and among them the Court lists also ethics of journalism.[140]

Although differently expressed in wording,[141] national constitutions also acknowledge the close and immediate connection between freedom of expression, freedom of the press and journalism.[142] This is also reflected in the case law of domestic courts. In particular, courts share a common interpretation concerning the link between the need

[138] ECtHR, Lingens v Austria, 1986, par. 41.

[139] ECtHR, Radio France and others v. France, 2004, par. 33. See also Bladet Tromsø and Stensaas v. Norway, 1993.

[140] ECtHR, Campana and Mazare v Romania, 2004, par. 104.

[141] Verpeaux, (2010: 12) affirming that "*The different wordings have led to uncertainty about the nature of freedom of expression, which can be classed among the freedoms commonly referred to as "freedom of thought", although the means of expressing that though is an external process more akin to the freedom to inform. Interpreted thus, freedom of expression covers several notions such as freedom of assembly, research, opinion, the press communication and so on*."

[142] For instance, the German constitution (Basic Law) in art. 5 (1) affirms that "*everyone is entitled to express and distribute freely his opinion in word, writing and image and to obtain unhampered information from sources accessible to all. Freedom of the press and freedom to inform by radio, television and cinema are guaranteed. There is no censorship*."

for information and the need for respectful debate based on accurate information, contributing to public debate. Like the Strasbourg court, national supreme courts consider cases involving the press or controversial expressions of opinion in terms of their contribution to public debate.[143] Similarly they also associate to the freedom duties and responsibilities in particular when other potentially conflicting fundamental rights are at stake.

As a matter of fact, national courts often refer to ECtHR jurisprudence to support their reasoning.[144] In some cases, domestic courts and the Constitutional Courts have also referred to ECHR case law as an interpretive tool for internal rules, in particular for setting the limits of freedom of expression and balancing freedom of expression with other liberties. References do not necessarily imply uniformity. In general, the effects of ECtHR jurisprudence on national courts are affected, on the one hand, by the way in which the ECHR is applied in national legal systems,[145] and on the other, by the way in which judges have considered ECtHR case law as their guidance.[146] Otherwise, courts implicitly refer to the jurisprudence of the ECtHR as part of their reasoning by deploying the same terminology of the Strasbourg Court.[147]

6.2. Regulation of the journalistic profession

Historically, after a first round of legislation concerning freedom of the press in the xviii and xix centuries, journalism has been primarily self-regulated by the profession, as it fell into the press regulation category (Tambini, Leonardi, Marsden, 2008: 64; Kevin et al., 204: 212). This is mainly due to constitutional principles of freedom of

[143] See the Danish Supreme Court that decided a case regarding a sub-editor accused of defamation as a result of articles in his newspaper relating to a case of sexual violence inflicted on children. The Danish Supreme Court found it questionable to hold that the defendant was guilty of defamation as the national rules were interpreted in the light of art. 10 of the Convention (Decision 15 April 2004, Ugeskrift for Retsvaesen, 2004, 1773).

[144] In Italy, the Constitutional Court has acknowledged that "*that freedom of expression is the foundation of democracy and that the press, seen as an essential tool of such freedom, must be safeguarded against any threat or coercion, whether direct and indirect*" (Constitutional Court, decision n. 172/1972). See also the recent case in front of the Supreme Court, where the court not only affirmed the coordination between Article 21 Const. and Article 10 ECHR so as to protect the freedom to seek, impart, and receive information without interference from public authorities, but also acknowledged in relation to the press and media in general the role of privileged fora to disseminate information about public interest issues (such as fairness and impartiality of judiciary, in the specific case).

[145] In the UK, the passing of the Human Rights Act (HRA) 1998 gave domestic effect to almost all the rights contained in the European Convention on Human Rights. The HRA requires courts to 'take into account' ECtHR case law, without imposing them to actually follow them. However, if a conflict between a Supreme court decision and an ECtHR decision raises, English courts have to follow the decision of the Supreme Court; Pinnock v Manchester City Council [2010] UKSC 45.

[146] For a detailed analysis of the relationship between European and national courts, Van Besien et al., (2012).

[147] In Germany, the Federal Constitutional Court apply the same reasoning of the ECtHR, regarding freedom of the press as an essential element in the system of check and balances which is vital to a democratic society. Decision 27 February 2007, Cicero case, 1 BvR 538/06 – 1 BrV 2045/06.

expression, which have limited the role of legislation and that of public regulation. With the appearance of broadcasting, things have changed. Legislative intervention at national level has become more intrusive on the assumption that the impact of broadcasters is much stronger and therefore likely to influence public opinion on a larger scale. The definition of audiovisual media service and the notion of editorial responsibility have gained growing relevance in driving private regulatory regimes at EU level, influencing the principles and the instruments of professional regulation. Despite the increasing importance of general constitutional principles articulated by the ECHR and to a limited extent by the CJEU and by European legislation, regulatory models across Member States in Europe differ. In some instances, activity regulation has primarily remained a task of the profession (e.g. Italy and Greece), in other instances it stays in the private remit, but it is the result of the activity of multi-stakeholder bodies, where also the industry is highly involved (e.g. Germany). Both the composition and the regulatory outputs are the products of different regulatory cultures which only partly reflect the partition of European regulatory models in other areas.

As mentioned above, freedom of expression is defined as freedom to seek, impart, and receive information.[148] It has both an institutional and a substantive dimension (Cafaggi and Casarosa, 2012). From the institutional perspective it contributes to the choice among regulatory instruments, e.g. competition and regulation; from the substantive perspective, it allocates entitlements to the producers and users of information, when that distinction still holds (for a critical assessment, Benkler, 2006). In exercising their freedom of expression, journalists have to comply with principles of editorial responsibility concerning respect for the sources, accuracy in collecting information, respect for fundamental rights of individuals and legal entities. The principles of editorial responsibility have been operationalised in private regulatory instruments taking the form of either self or co-regulation, depending on the medium and the legal system's approach.[149] Even more importantly, the allocation of editorial control is often dependent upon distribution of ownership and contractual arrangements along the supply chain.

Within the "traditional" media the role of professional private regulation varies rather significantly. While in the press the role of professional self-regulation has been predominant, in broadcasting co-regulatory models have emerged[150] due to the higher

[148] See art. 10 ECHR. Recently, article 11 of the EU Charter of Fundamental Rights has stated, that everyone has the right to freedom of expression and that 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.

[149] The link between editorial responsibility and respect for fundamental rights is clearly articulated in the recommendations by the Council of Europe (2011).

[150] In the UK this has occurred primarily in relation to the regulation of broadcast advertising, which has been delegated by Ofcom, the statutory media regulator, to the Advertising Standards Authority set up by the industry itself. Substantial safeguards have however, been retained by Ofcom, including the right to require changes in the Authority's codes and to veto amendments to them. See also the failed experience of co-regulation in Greece, where ethics committees in national broadcasting media (both public and private) were required to be established, but never developed. In order to receive the licence for broadcasting by the national broadcasting authority, any radio or TV channel should enter into

level of content regulation and the presence of public service broadcasting which have also influenced commercial media. There is now consensus over the fact that the AVMS Directive has promoted the introduction of co-regulatory models at Member State level.[151]

Even within this general trend, defined by European legislation, differences across Member States remain remarkable. In some cases integrated models across media regulate journalistic activity. Even in relation to press co-regulatory models emerge due to legislative intervention or, more recently to developments of legislation (Belgium, Denmark) which have expanded the scope of activity regulation to electronic media. In other cases, regulation is fragmented and the press remains separated from broadcast and electronic media with the exception of online newspapers regulated within the press (UK).

6.3. Definition of "journalist"

Providing a legal definition of who is a professional journalist is not an easy task, and in several countries the legislator has not even tried to propose a solution to this issue. However, where no specific legal provisions address the point directly, alternative sources, and in particular private regulation, try to fill this gap.

It should be underlined that any definition of journalism and/or journalist plays a major role in determining who can deserve special privileges, such as access to sources or events, or the statutory right to protect their sources, or constitutional protection from claims of libel or privacy invasion. If the professional journalist status is to be applied without specific criteria, the previous "privileges" can no longer be so special (Black, 2010: 105; Sadursky, 2011). Now, the quest for a definition is even more challenging: the journalistic landscape is currently undergoing a deep transformation as new media allow the appearance and diffusion of news content producers that blur the boundaries between professional and non professional journalists.

Both public and private regulation struggle to find criteria that allow (or hinder) the inclusion, within the definition of journalism of Internet bloggers, desktop publishers, freelancers, a host of "public communicators" who disseminate newsworthy information to others, etc. (Jurrat, 2011). However, the forerunner in addressing these issues providing for – still not homogeneous – results is case law, as in several

multi-party self-regulatory agreements, aimed at defining and adopting codes of conduct and ethics regarding media content. Not only were these committees mostly inactive where created, but also in several cases they have not even be created (Psychogiopoulou, Anagnostou, Kandyla, 2011).

[151] Once more, the UK case provides a useful example. The legislation implementing the Directive gives Ofcom the function of regulating on demand programme services, with power to delegate these to an appropriate authority. The delegation was made to the Association for Television on Demand (ATVOD), a self-regulatory body created by the industry. To secure independence from the industry, ATVOD was restructured to include a majority of members independent from the industry and an independent chair.

occasions courts at supranational and national level have been asked to verify if and how privileges should be applied to these newcomers (Cafaggi and Casarosa, 2012).

The analysis of the data available from the Mediadem project countries shows the emergence of two models: the status based definition and the activity based definition.[152] The status based definition is generally associated with a strong professional association based on membership, which defines who is a journalist and the applicable rules for journalistic conduct. Activity based self-regulatory regimes are developed where no professional associations exist; the scope of the rules is therein defined on the basis of the definition of what is journalism rather than who is a journalist.

A preliminary distinction should be made on the public versus private features of professional regulation. As regards public regulation, the cases are few in which legislation provides for specific definitions, and only Italy and Belgium qualify journalism as a professional activity indicating the criteria to identify it. In both cases, professional activity is characterised by the exercise of journalistic activity as a primary activity, the existence of a working relationship with a media outlet and the continuity of the activity.[153] Moreover, the qualification of journalistic activity as a regulated profession is also matched with a criminal offence in the case of deceitful claims to be a journalist.[154] In other cases, such as Greece, a legal definition was

[152] See that a different distinction has been put forward by other scholars, namely between an egalitarian v experts model approach. The "egalitarian model" holds that journalists are uniquely qualified and clearly identified professionals who serve as agents of the public in the procurement and dissemination of news; whereas the "expert model" is seen in the issuance of press passes (special seating at governmental venues), access to newsworthy events or records (prisons, crime scenes, war zones, official records, etc.), special tax and antitrust exemptions (e.g. favourable postal rates) - all privileges not granted to people who do not qualify as journalists. Ugland and Henderson, (2007: 246–47).

[153] For instance, in the Italian case, the regulation provided by the Journalists Association is based on the legislative act delegating the regulatory power, however neither private regulation nor legislation provided for a clear definition of who is a journalist. Law n. 69/1963 only defines that professional and semi-professional journalists are those who are members of the Journalist Association (art. 1). The definition of professional journalist is based on the type of working conditions, as professional journalists are those who exercise the profession on a continuous and exclusive basis; these should be distinguished from semi-professional journalists (*pubblicisti*) that exercise such activity on a non-occasional basis, though they can at the same time have a different working position. In Belgium, it is the law that defined professional journalists, namely Law 30 December 1963 "*relative à la reconnaissance et à la protection du titre de journaliste professionnel*". A journalist to be recognised as professional should comply with the following requirements: work as journalist as 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; exercise this activity during the last two years at the minimum.

[154] See in Belgium, the cited Law 30 December 1963 that provided "*Quiconque s'attribue publiquement sans y être admis le titre de journaliste professionnel sera puni d'une amende de 200 à 1.000 francs. L'article 85, alinéa 1er, du Code pénal est applicable à cette infraction."*

In Italy, a general provision applies, namely art. 348 Criminal code. See in the Italian jurisprudence, the decision of the Highest Court, Criminal Sect., providing that "*Il compimento, da parte di un non iscritto in un albo, di prestazioni caratteristiche di una professione regolamentata, purché non esclusive o riservate, è lecito solo se occasionale e gratuito, mentre costituisce il reato dell'articolo*

envisaged by the Constitution, but this remained a dead letter (Psychogiopoulou, Anagnostou and Kandyla, 2011). Similarly, the proposal to adopt legislation on professional regulation was withdrawn also in Romania (Ghinea and Avădani, 2011).

The reason for refraining from legislative intervention in journalistic activity lies in the libertarian assumption that society is best served by permitting only minimal interference with the media's right to gather and report information (Black, 2010).

Neither does private regulation provide for detailed definitions of journalistic activity. In most of the cases, the definition can be indirectly found in the role of journalists as providers of current news information to the public, meeting the right of citizens to be informed. Here, the emphasis is on the importance that journalists have in gathering, organising and disseminating information to citizens in order to make them available sufficient material to make informed choices and participate in the democratic process (Barendt, 2005: 24).

Depending on the type of actors that drafted the code of conduct, namely professional associations only or these in collaboration with industry representative organisations, the definition moves from journalist *per se* to a more general one regarding what is press or media. Again the focal point is the provision of current information to the public that encompasses right and obligations not only for the professional journalists but also for media outlets. The definition of journalism goes beyond the boundaries issue which has gained importance due to technological developments. Rules defining the activity including the ethical dimensions affect the independence and reflect on the nature of pluralism our societies aspire to. Clearly the composition of the private body, and its orientation towards defending labour and employment conditions might affect the regulatory output. To understand professional regulation not only the relationship between public and private but also who does what in the professional field affects the choice of instruments and the definition of rights and responsibility thereof.

Table 6.1. Definition of professional journalist

	Definition by law	**Definition by private regulation**
Belgium	Law 30 December 1963, art. 1 (3) : "*A titre de profession principale et moyennant rémunération, participer à la rédaction de journaux quotidiens ou périodiques, d'émissions d'information radiodiffusées ou télévisées, d'actualités filmées ou d'agences de presse consacrées à l'information générale*"	Press collects and publishes information and commentaries without hindrance, to ensure the forming of the public opinion.

348 C.p. se ha carattere di onerosità e di continuità, integrante un esercizio professionale" (Cassazione, Sezione VI penale, 8 gennaio 2003; see also Cassazione civile, decision n. 1806/1973).

	Decree 30 April 2009 "*réglant les conditions de reconnaissance et de subventionnement d'une instance d'autorégulation de la déontologie journalistique*", providing the legal basis, acknowledges as definition for journalist the following: "*toute personne physique qui, dans le cadre d'un travail indépendant ou salarié, contribue régulièrement et directement à la collecte, la rédaction, la production ou la diffusion d'informations, par le biais d'un média, au profit du public*" (art. 1(1)).	
Bulgaria	None	Indirect definition of journalist (within media in general) as who disseminates information through print and electronic media.
Croatia	Media Act art. 2: "*A journalist is a person who is engaged in collecting, processing, sorting or formatting information for publication in the media, and is employed by publishers or conducting journalistic activity as a self-employed or under contract.*"	Indirect definition of journalist as who provides facts and opinions to the public.
Denmark	None	No reference to journalist as such.
Estonia	None	Indirect definition of *press* (and other media) as who provides for true, fair and comprehensive information to the public.
Finland	None	Indirect definition of journalists as who provides for "*what is happening in society*" to the public.
Germany	None	Indirect definition of *press* as who provides accurate information to the public, respecting the truth and preserving human dignity.
Greece	Required by Constitution art. 14(8): "*The conditions and qualifications requisite for the practice of the profession of journalist shall be specified by law*" (This provision, however, has never been implemented).	No definition in code but only through membership to trade union.
Italy	Law n. 69/1967, art. 2: "*freedom of expression and critics is a fundamental right of journalists*".	Journalist is who "*researches and diffuses every piece of information that he considers of public interest in observance of truth and with a wide accuracy of it.*" It is implied that the journalist is member of the Journalists Association.
Romania	None	"*A journalist is that person who exercises the right to free speech and whose primary source of income is obtained by developing journalistic products – either as an employee*

		or as a freelancer – no matter what the field (written, broadcast, online, press etc.)."
Slovakia	None	Indirect definition of journalist as who provides facts and opinions to the public.
Spain	None	"*journalism is the basis from which public opinion manifests itself freely in the pluralism of a democratic state governed by the rule of law*."
Turkey	None	"*The main function of journalism is to discover the facts and communicate them to the public without distortion or exaggerating*".
UK	None	No definition in code of conduct [155]

6.4. Regulatory bodies

In terms of regulatory bodies in charge of drafting and monitoring journalists' behaviour, a distinction should be made between the cases in which the regulatory power is allocated to professional associations and those in which regulatory power is allocated to press councils. The analysis of the data available from the Mediadem project countries shows that journalists' associations are present in all of them or, when associations are lacking, trade unions protect the interests of journalists.[156]

Table 6.2. Presence of professional associations

	Association of (professional) journalists	**Trade unions**
Belgium	General Association of Belgian professional journalists (AGJPB/AVBB): consists of a French-language wing (AJP) and a Dutch-language wing (VVJ); Association of Journalists of the Periodic Press (AJPP/VJPP)	Apart from the journalists' associations (see at the left), journalists can also become a member of the (general) trade unions.
Bulgaria	No	Union of Bulgarian Journalists

[155] See that also the code of conduct of the National Union of journalists does not provide any definition, but it relies on the membership to trade union: anyone who works in editorial, design or photography in newspapers, magazines, books, TV, radio, public relations or new media as an employee or as a freelancer.

[156] See that a distinction among the type of journalist associations can be drawn. Associations can be representative (assuming a high rate of membership, a distinct social status in a given society, and direct influence on journalistic fields), decentralised (organisations mainly at lower level imposing an indirect influence on journalistic fields), divided (unions pulled by political or sectarian divisions and imposing influence mainly to their particular enclave in journalistic fields), and exclusive (confined access to membership, and thus often co-opted by forces external to journalism).

Croatia	Croatian Journalist Association	Croatian Journalist Union: it 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.
Denmark	No	Danish union of journalists (membership requires education in journalism studies and at least 3 months of working activity)
Estonia	No	Estonian Journalist Union
Finland	No	Union of Journalists in Finland
Germany	Netzwerk recherche (network research)	German Journalists Union (dju) and German Journalists Association (DJV)
Greece	No.	Five trade unions grouped in the Pan-Hellenic Federation of Journalists Unions (POESY)
Italy	Journalists association	National Federation of Press (FNSI)
Romania	No	Mediasind Union
Slovakia	No	Slovak Syndicate of Journalists (SSJ)[157] and APPP
Spain	Federation of Press Associations in Spain (FAPE) with 48 member associations and 13 others linked to it	Regional Trade Associations
Turkey	Journalists Association of Turkey, Federation of Journalists, Progressive Journalists Association, Foundation of Journalists and Writers, Association of the Media, etc.	Union of Journalists in Turkey-(TGS) and MEDYASEN (DİSK) but their prominence is low.
UK	No	National Journalist Union

The two models can also co-exist. In most of the countries analysed journalists associations are not the sole private actors in charge of regulating journalistic activity, rather they share this power with industry representatives that are part of press councils. Here, a first element that characterises the model is the coordination between the journalist associations or trade unions, which are members of the press councils, and the industry associations, which can also include broadcasting ones.[158]

This shows a shift from the pure corporatist model, characterised by associations and trade unions regulating and protecting the interest of their members vis-à-vis any third party, to a multi-stakeholder model, where professional organisations cooperate with

[157] Slovak Syndicate of Journalists is somewhere between a professional association and a trade union. Also, there are two other more professionally oriented but marginal, either in influence or membership, journalistic organisations.

[158] Note that in the UK the journalist's union is not a member of the Press Complaints Commission, nor are journalists represented directly in it.

industry representative organisations, i.e. employees, in order to limit state interference and define duties and responsibilities.

In some cases the creation of the press council was triggered by the (threat of) state intervention in the field, and in a few cases the justification was found in the inability of the professional regulation to achieve the expected results of monitoring and enforcement of ethical rules among journalists. The involvement of industry associations, namely publishers (and in few cases broadcasters' associations), in private regulation was mostly appreciated by public actors and by journalists associations as it would be the way in which ethical codes and codes of conduct could be implemented in signatory media outlets.

Table 6.3. Type of regulators (professional association/press council)

	Professional association	**Press council**
Belgium	General Association of Belgian professional journalists (AGJPB/AVBB): consists of a French-language wing (AJP) and a Dutch-language wing (VVJ); Association of Journalists of the Periodic Press (AJPP/VJPP)	Conseil de Déontologie journalistique (CDJ) [2011] for French- and German-language media and Raad voor de Journalistiek (RVDJ) [2002] for Dutch-language media
Bulgaria		National Council for Journalistic Ethics (with two complaints commissions) [2004]
Croatia	Croatian Journalist Association	Newly established Croatian Media Council [2012, still not functioning]
Denmark		Press Council (Pressenævnet) [2004]
Estonia		1991 Press Council and 2002 Newspapers association Press Council
Finland		Council of Mass Media [1968]
Germany		German Press Council [1956]
Greece	Journalist unions [self-regulatory code adopted in 1998]	
Italy	Journalist association [1963]	
Romania		Proposal to have a multi-stakeholder organisation failed
Slovakia		Press Council (PrC) [self-regulatory code adopted in 1990]
Spain		Commission de queja y deontologia [2011]
Turkey		Turkish Press Council [1988]
UK		Press Complaint Commission [1998]

In order to guarantee the accountability of the press council towards its members and to the general public, the rules regarding the composition of the board provide for the involvement of third parties, such as lay members coming from different sectors or from civil society. Except for Germany, where the press council is entirely composed of members from the sector itself, all the other countries include public members. In most of the cases the percentage within the whole board number is limited and requires that such lay members should not have previous involvement with media

profession. This choice is based on the fact that the lay members should both represent the interests of the general public, but also be able to mediate between the interests of the stakeholders that are members.

Table 6.4. Press council board

	Multi-stakeholder	**Public members participation**
Belgium		Conseil de Déontologie Journalistique (CDJ): 6 journalist representatives, 6 publisher representatives, 2 editors-in-chief and 6 representatives of the civil society. Raad Voor de Journalistiek (RVDJ): 6 journalist representatives, 6 representatives of media companies and 6 representatives of the civil society.
Bulgaria		1/3 journalist representatives, 1/3 representatives of media outlets, 1/3 audience representatives.
~~*Croatia*~~		
Denmark		Chair (member of Supreme Court) and vice-chair (lawyer), 2 journalists, 2 editorial management representatives, 2 public members
Estonia		1991 Press Council: 1/3 journalist representatives, 1/3 media training association, 1/3 NGO representatives 2002 Press Council: 5 members of the press and 4 public members
Finland		Chair, 7 experts in media field, 4 public members (not employees or board members of any media entity).
Germany	Deutscher Presserat - 28 members (14 from publishers, 14 from journalist associations)	
~~*Greece*~~		
~~*Italy*~~		
Romania		
Slovakia		7 public members (no current activity as journalists or editors)
Spain		9-15 members: at least 2 are lawyers and 2 are journalists; the remaining are public members.
Turkey		8 journalists and 10 lay members and 18 representatives of media (radio, print and broadcast)
UK		Independent Chairman appointed by industry, lay members and industry members

Rule-making is not always associated to enforcement. In terms of allocation of regulatory powers, it should be underlined that the regulatory body is not always in charge of enforcing private regulation by using sanctioning power towards its members let alone third parties. In some countries, no enforcement powers are attributed to associations or to the press council; whereas in most of the cases, at least the publication of a decision can be required by the regulatory body. An interesting case is the Bulgarian one, where there is a collaboration between independent and private regulatory bodies, as the latter is in charge of deciding the case regarding the breach of ethical rules and, when electronic media are involved, can also impose

pecuniary sanctions through the involvement of the Council of Electronic Media, which supervises the electronic media sector regarding licensing obligations and the implementation of the Radio and Television Act. Here, the private regulatory body exploits the enforcement power of a different authority, as where print media are involved, no pecuniary sanction can be issued.

Table 6.5. Enforcement powers

	No enforcement powers	**Publication of decisions**	**Reprimands**	**Fines and penalties**	**Suspension or expulsion**
Belgium		(RVDJ and CDJ) X			
Bulgaria			(press) X	(electronic media) X	
Croatia	X				
Denmark		X			
Estonia		X			
Finland	X				
Germany		X			
Greece			X		X
Italy		X			X
Romania					
Slovakia		X (limited compliance)			
Spain		X			
Turkey		X			
UK		X			

Although the press council model has been pushed as the best option to guarantee the accountability of the media system (Kevin et al., 2004), yet also this model could have flaws as shown by the Estonian and the UK case. In the first case, the current situation shows a duplication of regulatory bodies: the 'older' Press Council (1991) and the 'new' Press council (2002). The new Press council is the result of the withdrawal of the Newspapers organisation from the older one: in order not to be monitored and sanctioned by the old Press Council, the Newspapers organisation created its own monitoring body (Loit, 2002; Lauk, 2008; and Lauk, 2009). Now the two bodies coexist, share the same ethical rules,[159] but their jurisdiction is different depending on the members that are part of each of them: journalist association, consumer organisations, lawyers organisation and other NGOs for the old press

[159] See that the Estonian Press Ethics code dates back to 1997, and it was drafted by the Estonian Newspaper Association, the Association of Estonian Broadcasters and the old Press Council.

council; whereas newspapers association, broadcasting and radio association, and some online news portal companies in the new press council. Here, it is clear that the conflict between stakeholders' interests was not overcome through cooperative behaviour. Instead it resulted in a clear divergence between two different approaches, namely the media oriented one and the publicly oriented one (Loit, 2002).

The UK case shows a collapse of a pure self-regulatory model, where the 2011 phone hacking scandal showed the failure of the UK Press Complaint Commission to deal with ethical newsgathering activity by its own members. A new approach is likely to be taken in by the new body currently proposed to replace the current one, though the precise model will not be clear until the report of the Leveson Inquiry into the press is published in autumn 2012. Here, one relevant issue was the limited enforcement power enjoyed by the Press Complaint Commission vis-à-vis its members,[160] which resulted in a limited capacity to deter members from infringing the code of conduct's rules. The proposal currently put forward to regulate the new body should solve in part this problem as it will be based on commercial contracts between the new body and newspaper publishers providing contractual, rather than statutory sanctions against defaulting newspapers.[161]

6.5. Scope of private regulation

Another interesting feature that may distinguish different models of private regulation in journalistic profession is related to the remit and scope of codes of conduct, namely single or multiple media. Different regulatory models in press, TV and digital media may affect uniformity of professional regulation. Journalists may be subject to different rules depending on the media they work for or collaborate with. The analysis of the data available from the Mediadem project countries shows that all countries

[160] See that the effectiveness of enforcement is one of the most critical issues for self-regulation.

[161] In March 2012, the PCC announced that it will transfer its assets, liabilities and staff to the new regulatory body that will be defined after the results of the Leveson inquiry. In particular, the proposal of new governance of the self-regulatory body includes the conclusion of commercial contracts between each member and the self-regulatory body:

"*The new system will be legally underpinned though a system of enforceable commercial contracts. Each publisher would sign a contract with the regulator, which would be enforceable through the civil law. This would bind publications into the system, equipping the new regulator with powers of enforcement, effectively compelling cooperation with the regulator, by enabling it to sue for any contractual breaches. This is another power that may – indeed should – never have to be used. The contracts might include the following commitments:*

- *To fund the regulator according to an agreed formula*
- *Undertaking to abide by the Code and relevant laws*
- *Responding positively to individual complaints that have been handled by the complaints arm*
- *Support for clearly defined compliance and standards mechanisms which could be audited by the regulator*
- *Accepting proportionate financial sanctions via the funding formula should serious standards breaches be found*", PCC (2011: 2).

provide for multimedia codes of conduct; however, the codes can be internally distinguished among sector-based codes (press and broadcasting versus new media), content-based codes (written versus audiovisual and other), and all media codes.

(1) **Sector-based codes**: In this case, professional regulation was historically focused on the press, and then extended through legislation to broadcasting media. Although the current analysis only refers to Italy and Turkey, it is true also for other European countries (Cafaggi and Casarosa, 2012). However, this approach clearly fails to account for integration of the new media.

(2) **Content-based codes**: This category includes Bulgaria, Germany and the UK. Here, the distinction depends on the type of content distributed on any type of medium, namely written content (including photographs and the like) versus audiovisual content. For instance, the rules of the UK PCC Editors Code apply only to the online version of newspapers and magazines,[162] but where the latter include materials such as audiovisual material, and user-generated blogs and chat rooms, the applicability of the PCC code is possible only for those materials that meet two key requirements: *"(1) that the editor of the newspaper or magazine is responsible for it and could reasonably have been expected both to exercise editorial control over it and apply the terms of the Code. (2) That it was not pre-edited to conform to the on-line or off-line standards of another media regulatory body.*" (Press Standards Board of Finance, 2007). There are two consequences of this rule; on the one hand, the journalist within a broadcasting company should not comply with the PCC code but with the Ofcom Broadcasting Code, which applies to any video-based news whether aired on television or published online.[163] On the other hand, the scope of application of the PCC code does include only the electronic version of traditional media, and in particular the "editorial materials" published online, excluding a wide part of the materials that fall in the wide category of user-generated content.

(3) **Codes applicable to all media**: In these cases the codes of conduct apply to any content available on any media; however, inclusion of bloggers, social networks and user-generated content platforms is not always guaranteed. For instance, in the Danish case, the jurisdiction is based on the membership of the Press council, thus also digital media are covered by the code insofar as they register; however, private websites are not allowed to register, as only "*texts, images and sound programmes that are periodically imparted to the public, provided that they have the form of news presentation which can be equated with the kind of presentation to* [press and broadcasting]"[164] can be registered to the Press Council. The Belgian press councils

[162] For instance Ofcom has recently upheld an appeal against a decision of the Authority for Television On Demand (ATVOD) concerning the treatment of a newspaper website as an "on-demand programme service", Ofcom decision, 21 December 2011, available at http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf.

[163] And this code is applicable to any video that is available on online versions of newspapers and magazines.

[164] art. 1 (3) Media Liability Act. See that the law requires the registered undertakings to be subject to the provisions regarding radio and television, namely the obligation to provide a responsible editor,

have addressed more fully the new media related issues, though without achieving a forward-looking perspective. In 2009, the Flemish Press council published a recommendation on how the traditional media should handle user-generated content: the media should always clearly distinguish user-generated content from its own content and limit the publication of anonymous contributions to exceptional circumstances.[165] Thus, in this case a clear distinction between professional (editorial) and non-professional (user-generated) content is available, applying the code of conduct only to the former. A similar approach has been taken by the Finnish Council of Mass Media, which in its last revision of the guidelines for journalistic activity in 2011 added a specific appendix dedicated to user-generated content available "on websites maintained by the media". The rules allocate the monitoring function on the media outlet providing the online discussion forum, requiring the editorial office to verify and eventually delete the content that could violate privacy or human dignity. In this case also, a neat distinction between the professional and non-professional content is required.

Social media have been also addressed by codes of conduct, as in the recent intervention of the Belgian French-German Press Council, which published an opinion on rules of journalistic ethics applying to Twitter and Facebook.[166] Again the distinction is not based on the media as such, but on the fact that social media are used by journalists to express their opinions and disseminating news content to the public. This implies that is the fact that professional journalists use social networks that make them subject to journalistic ethics, whereas the same rules are not applicable where an individual produces the same news content on social networks. Also in the UK, the Press Complaint Commission proposed a working group analysing under which conditions Twitter could be introduced in their jurisdiction. [167]

One single exception should be acknowledged: in the revised version of the Slovakian ethical code for journalist in 2011, the code is applicable to "*professional and amateur editors, columnists, editors, cameramen, photographers, graphic designers, bloggers and other writers who are involved in creating media content on TV, radio, print, or on the Internet*" where they decide to adopt it. In this case, it is up to the decision of the blogger or online news content provider to implement the code, and in case of breach be subject to the decisions of the Press Council.

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which is in charge of ensuring that a copy of all programmes is kept for three months in a proper manner.

[165] Richtlijn over de omgang van de pers met gebruikersinhoud, available at www.rvdj.be/node/52.

[166] Avis du Conseil de déontologie journalistique du 13 octobre 2010 sur l'application de la déontologie journalistique aux réseaux sociaux, available at http://www.deontologiejournalistique.be/telechargements/10%2010%2013%20Avis%20sur%20la%20deontologie%20et%20les%20reseaux%20sociaux.pdf.

[167] See also the UK jurisprudence on interim injunctions granted to protect the privacy of claimants vis-à-vis tabloids and other newspapers. Here, courts affirmed that the use of Twitter by journalists – either directly or through fake usernames – is to be assessed as a publication on the online newspaper and, consequently, would have the same effect of breaching the injunctive order. Cafaggi and Casarosa, (2012)

Table 6.6. Scope of private regulation

	Single media	Multi-media	Multi-media (sector-based)	Multi-media (content-based)
Belgium		X		
Bulgaria				X (electronic and print media)
Croatia		X		
Denmark		X		
Estonia		X		
Finland		X		
Germany				X (print and electronic version of newspapers)
Greece		X		
Italy			X (print and broadcast)	
Romania				
Slovakia		X		
Spain		X		
Turkey			X (print and broadcast)	
UK				X (print and electronic version of newspapers)

The previous analysis of the subcategories shows that, also when codes of conduct address the different media, the picture regarding new media is neither clear nor homogeneous. Technological developments have challenged the traditional boundaries, having as a reaction a pure extension of the rules to new media, looking only at the subject providing the content (i.e. journalist); or an update of the rule to new forms of communication, but again clearly distinguishing between editorial content and user-generated one, thus excluding from this part the so-called blogging and citizen journalism. Here, when new media have been taken into account, the approach by private regulation was corporative: new media are interpreted as added instruments for professional journalists' communication to the public, without addressing the issue of new models of news production available.

6.6. Content of self-regulation

When looking at the content of private regulation a distinction should be made between rules addressing content and conduct of journalists. Conduct rules refer to how the news is produced by each journalist and/or along the supply chain (for instance, who has editorial control and what are the relationships between the sources and the publishing media). These rules address mainly behaviour, ranging from pure ethical matters to copyright, to privacy, to rights to information. Content rules, instead, refer to what can be published and what cannot be published: for instance, hate speech or pornographic materials are the most common content prohibition rules. Clearly, there is a link between what can be published and how it is published so that the boundaries between conduct and content regulation are not always clear-cut; they represent a continuum rather than two separate domains.

A preliminary account should be given to the allocation of regulatory power regarding content rules between public and private actors. As section 4 on content regulation shows, positive and negative obligations regarding content that is distributed to the public is also an issue dealt by the national legislation, in particular with regards to broadcasting. The rational for such intervention is found in most of the cases in the freedom of expression principle, allowing for self-regulation in the press, whereas broadcasting is interpreted to be under scrutiny by state regulation. One specific case is the Belgian one, where the fragmentation of competences among state and communities pushed for private regulation allowing an initiative that could cover the entire media sector, rather than being media based (Van Besien, 2011).

Although the comparison among the content of ethical codes is necessarily limited by the different forms in which the codes are drafted, namely principle based or rule based, and by the different legal and social background they refer to,[168] a brief analysis of the way in which conduct and content are regulated within each of the countries analysed is still feasible (Laitila, 2005: 91).

Content rules can address specific issues such as children protection,[169] privacy, advertising activity,[170] and in few cases also how sources should be reported.[171] In these cases, the codes expressly set a boundary of what can and cannot be included in the content of news, providing a preliminary balance between the public interest and the conflicting interests at stake. However, the presence of this type of rules is very limited and does not allow for any generalisation among the different cases. Instead, ethical codes share the general principles regarding the way in which journalists should behave, providing more or less detailed rules on accuracy and truthfulness, the right of reply, protection of sources, equality, fairness in information gathering, and independence (Laitila, 2005; Kunzik, 1999: 19).

[168] See that opposite approaches can be found in the countries analysed. For instance, the Finnish self-regulation acknowledges a more detailed set of rules if compared to public regulation setting very concrete rules for journalists concerning their responsibilities and rights when gathering or disseminating information. Whereas, in the UK the code of conduct provides only guidelines, rather than setting clear prohibitions on specific types of content.

[169] See UK PCC code, "*Children in sex cases: 1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences. 2. In any press report of a case involving a sexual offence against a child - i) The child must not be identified. ii) The adult may be identified. iii) The word "incest" must not be used where a child victim might be identified. iv)Care must be taken that nothing in the report implies the relationship between the accused and the child.*" A similar provision can be found in the Italian code: "*A journalist respects all principles confirmed in the ONU Convention dated 1989 on the right of children and their rules undersigned by the "Treviso Ethic Code" (Carta di Treviso) to protect children, their character and their personality, both as an active protagonist as a victim of a common-law offence and particularly: a) a journalist does not publish the name or any other element that can lead to the identification of people involved in daily episodes or events*".

[170] See the Belgian Code: "*12. Advertisement. Advertisements must be presented in such a way that they cannot be confused with factual information*".

[171] See the German ethical code: "*Unconfirmed reports, rumours or assumptions must be quoted as such*."

7. Regulatory instruments and regulatory institutions

It will already be apparent that there is a very wide range of different institutional arrangements in the regulation of the media in the countries studied in this project. Nevertheless, a number of common issues can be identified, and these will be examined in this section.

It is apparent from the national reports that a wide range of different regulatory instruments have been employed in the media area. There is some use of traditional 'command and control' techniques in relation to the broadcasting sector, through the extensive use of licensing and administrative, civil or criminal penalties for breach of licensing requirements appear in all national case studies. However, there are also clear examples of its ineffectiveness, with unlicensed broadcasters able to undertake illegal activities with impunity due to lack of regulatory effectiveness and enforcement; for example, this was historically a problem in Italy and still a problem in Greece, whilst licensing problems have been serious in, for example, Bulgaria and Romania. As discussed in section 3 of this report, competition law may also apply both structural and behavioural remedies in the media sector but the effects vary significantly across countries.

However, regulation has extended far beyond command and control techniques and beyond the public remit. There has been an extensive use of private forms of regulation, mainly in relation to the press and professional regulation, but also in the new digital media. This includes contractual instruments, as discussed in connection with professional regulation in section 6 above. One possibility discussed before the Leveson inquiry in the UK is the use of a form of private regulation based on contracts to provide a new form of press self-regulation. There is also a substantial use of soft law mechanisms, in particular in relation to the press and in professional regulation.

Regulatory enforcement has also proved to be a difficult problem. This has been a characteristic weakness of private regulation, but also of more formal public regulation, for example when attempts have been made to ensure that the requirements of licences are complied with. Examples of such difficulties can be found in a particularly striking way in Greece, where, in the context of media ownership restrictions, 'no effective action is taken to verify whether the rules are respected' (Psychogiopoulou, Anagnostou, Kandyla, 2011: 17). Other countries also seem to suffer from similar problems of regulatory capture by private interests (De la Sierra and Mantini, 2011: 26-27).

These various enforcement problems give rise to one important conclusion. The likelihood of regulatory failure, whether due to capture or simple regulatory ineffectiveness, does not depend on whether the regulatory regime is characterised as private or public, as both are prone to suffer from these problems. Rather than concentrating on whether regulation can be characterised as public or private, the two major issues for examination should be those of regulatory design of mixed regimes

including both public and private elements, and the coordination and openness of these systems. These will be covered in the following two sections.

7.1. Regulatory institutions

7.1.1. Independent authorities and governments

It is obvious that the independent regulatory authority has assumed the most important role in the regulation of electronic communications and of broadcast media (see table 1.1.). In the case of electronic communications, the allocation of regulatory powers to such bodies is a requirement of EU market liberalisation, however, in the case of broadcast media no such requirement exists, yet this model has been widely adopted. It is also striking that few nations have adopted a single authority covering broadcast media and other forms of electronic communications; this approach has been adopted only in Finland, Italy and the UK.

Table 7.1. Media regulatory authority – convergent v sectorial regulators

	Regulatory authority – convergent regulators	**Regulatory authority – sectorial regulators**
Belgium		CSA and VRM, CRC
Bulgaria		CEM
Croatia		Agency for Market Competition Protection and Electronic Media Council, Croatian Chamber of Economy (CCE), EMC and CPECA
Denmark		Danish Competition and Consumer Authority, RTC, Telecom Regulator
Estonia		Ministry of Culture and Public Broadcasting Council
Finland	FICORA	
Germany		Commission on the Concentration in Media (KEK) and the Federal Cartel, Regulierungsbehoerde für Telekommunikation und Post, SMAs
Greece		NCRT, Hellenic Competition Committee, NTPC
Italy	AGCOM	
Romania		CNA, Competition Council, ANCOM
Slovakia		BRB and Council of RTVS
Spain		CEMA, National Competition Commission and CMT
Turkey		Information and Communication Technologies Authority and the Radio and Television Supreme Council, national competition authority
UK	OFCOM	BBC Trust for BBC, ASA for advertising, ATVOD for video on demand services, PCC for the press

However, the importance of such authorities has to be qualified in important ways. In some countries studied government departments rather than independent authorities take key decisions; a striking example is that of Spain where recent legislation provides for the creation of a State Council on Audiovisual Media, but this has not yet

been created due to political and financial difficulties. In other cases, independent authorities may have very limited powers so leaving the major decisions to the political authorities; see for example the case of Greece.

Secondly, the notion of 'independence' is itself a relative and controversial one; there are complex networks of relationships between regulatory bodies and other actors, notably government. Indeed, in a number of case-studies there is a considerable distrust of regulatory bodies as essentially political animals, see for example the cases of Bulgaria, Romania, Slovakia and Turkey. This suggests that a working independence will be much more difficult to achieve in countries with a recent tradition of authoritarian government where the cultural conditions for such independence will not have taken root.

In other countries, the national reports point to a more effective independence of regulatory authorities; examples where such independence is identified in national reports include Belgium, Denmark, Finland, Germany and the UK. Even in these cases, however, relations with government and with other institutions may be complex. There is a wide variety of different forms of appointment procedure and of security of tenure of member of such authorities. These have given particular concern in Greece, Italy (Psychogiopoulou, Anagnostou, Kandyla, 2011; Casarosa and Brogi, 2011) and in particular Bulgaria, where the authorities are highly politicised (Smilova, Smilov and Ganev, 2011: 12). There is also considerable variation in the degree to which major powers such as licensing are fully delegated to independent bodies.

Table 7.2. Allocation of rulemaking power – political v independent authority

	Regulatory authority	**Responsibilities**
Belgium	CSA and VRM largely independent from government.	The responsibilities of the regulators are mainly to monitor compliance with audiovisual media regulations, especially related to the rules on advertising, the protection of minors, the protection of consumers and the impartiality of information. The VRM and the CSA are especially responsible for making decisions in cases of conflicts and claims related to compliance with audiovisual media regulations. The CSA and the VRM also play a major role in monitoring the competition in the Belgian media market, for instance by publishing information on the ownership and the degree of concentration of the media.
Bulgaria	CEM and CRC appear to be political (and highly politicised) authorities	CEM handles monitoring of compliance with the requirements of the RTA in general, but also the (content) licensing of the TV and radio operators and the appointment of the directors and the approval of the governing bodies of the PBM, CRC handles granting individual technical licences for the use of the radio spectrum.
Croatia	EMC is an independent regulatory body	EMC monitors the electronic media ownership structure and operates the Fund for the

	CPECA is an independent regulatory body Agency for Market Competition Protection (AMCP) and Chamber of Commerce are independent bodies	Promotion of Pluralism and Diversity of Electronic Media. It decides on the allocation, transfer and withdrawal of broadcasting licences, and reports directly to the government and the parliament. CPECA regulates electronic communications (post, internet, mobile telephone networks, etc.) and the electronic media market. Council for Market Competition Protection operates within the AMCP. Through the Croatian Chamber of Economy it monitors ownership shares in the print media companies with the aim of preventing monopolies and controlling ownership concentration in the media market
Denmark	Radio and Television Council and Public service broadcasting regulators exercise authority without political control	The Council has a number of assignments including to comment on how the PSBs fulfil their obligations and decide whether new services proposed by DR and the TV 2 regional stations can be accepted on the basis of a public value and market impact test. The Council handles tenders and issues licences for the distribution of digital programmes, licences for digital terrestrial television, for nationwide radio channels and for local radio channels, and permits for satellite or cable television channels. The Council also grants subsidies for non-commercial local radio and non-commercial television in MUX 1. Moreover, the Council takes decisions on questions regarding the placement, identification and number of commercials and in cases regarding sponsorship and product placement.
Estonia	Ministry of Culture and the Public Broadcasting Council – although formally not an independent body, runs its operations without political bias.	Ministry carries out licencing and monitoring. The latter is sporadic and poor. Monitoring covers also the PSB with regard to general provisions of the Media Services Act. The public broadcasting council is a body appointed by the parliament and carries its duties according to the law.
Finland	FICORA appears to be an independent regulatory authority	FICORA ensures structural diversity by granting broadcasting licences and monitoring adherence to the licensing terms and regulations (including content)
Germany	German bodies are independent	SMAs vested with power based on statutory law, to assess private broadcasters' licence procedures and programme performance
Greece	Political body responsible for the electronic communications policy in general: the Ministry of Infrastructure, Transport and Networks (MITN) plays an important role in media policy-making as it shapes and implements electronic communications policy. The MITN is also in charge of all	NCRT has the mandate to guarantee that public and private broadcasters comply with domestic legislation, and can impose administrative sanctions in case of violations. It is responsible for the supervision of broadcast content regulation and is assigned with the task of licensing the radio and television channels transmitted by terrestrial and satellite networks in line with pre-defined criteria. As such, the role of

	the technical matters related to broadcasting networks, such as spectrum management and supervision. The wish of successive governments to retain control over the shaping of media policy is also mirrored in the limited delegation of agenda-setting and regulatory powers to independent authorities, most notably to the NCRT. NCRT, an independent body since the constitutional revision of 2001, is the authority which has exclusive responsibility for the control of the broadcast media. Set up in 1989, at the onset of the broadcast market deregulation, the NCRT was not entrusted with substantial autonomy and its role remained mainly consultative until 2000.	the NCRT remains limited to ensuring compliance with domestic provisions. The NCRT can also draft codes of conduct for advertising and news and entertainment programmes, and has from time to time provided policy-makers with recommendations, which have occasionally been taken into account. On the whole however, its involvement in the formulation of normative rules has been marginal or non-existent.
Italy	AGCOM is the independent body created by Law 249/1997	Competence to monitor the press, broadcasting, electronic media and telecommunications. It is one of the most important bodies in the implementation of media policy since as well as introducing detailed regulation through delegated power, it can also enforce and eventually sanction any breaches.
Romania	The National Broadcasting Council (CNA) is the regulatory autonomous body. However, there is a certain amount of political interference as government selects some members of the Council. PBS regulator largely under state control.	grants licences and oversees the TV and radio content. It is vouched to be the warrantor of the public interest in issues pertaining to audiovisual content and market, but no definition of what public interest is was provided either in the Broadcast law or any other legislation. The basic values of the CNA functioning, as per law, are, on one hand, the freedom of all programmes to be broadcast and reach their intended audience and, on the other hand, the freedom of all citizens to receive any programme of their choice, without interference and in a private manner. Freedom of the content providers and their editorial independence is also mentioned, including a specific prohibition of all acts of censorship.
Slovakia	The RVR is a (semi-) state regulatory body responsible for digital/electronic media, the most important media segment in Slovakia - RVR members (in contrast to the recently established Council of the RTVS) still primarily represent the interests of political parties.	Regulation of content and licences in Slovakian broadcast media.

Spain	Of the various independent bodies relevant for media policies, two are of particular interest: the Commission for the Telecommunications Market (CMT) and the National Competition Authority (NCA). They are both linked to the Ministry of Industry, but retain their independence.	CMT regulates telecommunications market, NCA competition. As CEMA doesn't technically exist, it appears that content regulation is largely a matter of self-regulation by professional organisations, with support of courts.
Turkey	Policy making in the media in Turkey is a centralized and bureaucratic process where values and priorities are set by the executive. The independence and impartiality of bureaucratic regulatory agencies RTÜK and BTK have been contested all along in Turkey.	RTÜK is tasked with allocating licences and permits for terrestrial, satellite and cable broadcasting; supervising broadcasting content; responding to audience complaints; and imposing sanctions in cases of non-compliance, RTÜK's mandate extends to both radios and televisions. Appears to lack mandate however. BTK is tasked with the supervision and sanctioning of the Internet. It enjoys administrative and financial autonomy. The Telecommunications Communication Presidency is a part of BTK. Tasked with the centralized administration of telecommunication wiretapping in Turkey, TİB is required to share the information it gathers with the intelligence, the police and the gendarmerie and, upon request, with the courts and prosecutors.
UK	All regulatory bodies are considered to be independent, including PBS regulator. There are concerns however over government influence on the key appointments to BBC Trust and Ofcom. PCC is seen as unduly close to press interests.	Includes Ofcom for broadcasting, PCC for press, BBC Trust for public broadcaster, ASA for advertising, ATVOD for video on demand services, and the BBFC for content regulation. However, Competition Commission also has competence over competition issues, and issues can be referred to it by Ofcom.

This suggests that an important development will be the clarification of the criteria to be adopted in assessing independence, and the use of clearer guidelines for such assessment (Hans Bredow Institute et al., 2011). In the case of EU electronic communications, this has been accomplished as part of regulatory reform through the liberalisation process. In the field of competition law, once more the effects of EU law have been important in creating a network of independent national authorities. In relation to broadcasting, an important starting point for this is the Council of Europe Recommendation on the independence and functioning of regulatory authorities in the broadcasting sector (Council of Europe, 2000) and the 2008 Declaration of the Committee of Ministers on the Independence and Functions of Broadcasting Authorities for the Broadcasting Sector (Council of Europe, 2008). These measures are based in part on art. 10 ECHR and emphasise the importance of independent regulation for a free and democratic society; they also provide guidelines for the assessment of such independence. These could form the basis for a more developed set of criteria in EU law, perhaps taking the form of 'soft law' or linked to the 'Amsterdam test' (see above).

7.1.2. The courts

A further important finding, which has been discussed above in section 2, is that of the growing relevant role of courts, both national and the ECtHR, in acting in effect as regulatory bodies in relation to media content. This occurs through the balancing of rights to freedom of expression under Art 10 ECHR with the right to respect for private and family life under Art 8, or through the application of equivalent provisions in national constitutions. It has been important not just in relation to the broadcast media, where independent authorities often exist, but also in relation to the press and to the digital media, where there are no such authorities. Indeed, in the latter field, the role of courts has also become important in relation to the enforcement of intellectual property rights, especially in the context of internet piracy. This also involves the balancing of freedom of expression with other considerations.

This role of the courts may have one important advantage; they are more likely to be independent than other regulatory bodies, and in many of the countries studied there is a developed tradition of judicial independence. Indeed, this is required under art. 6 of the ECHR where civil rights and obligations are being determined. However, courts on their own have serious limitations as regulators. Access may be limited by financial considerations, by issues of standing and of needing to find a justiciable dispute. The case-by-case nature of their jurisdiction may make it difficult to develop general, forward-looking rules. This suggests that the courts work best in conjunction with other regulatory bodies, and indeed we described in section 4 of this report how in some cases content regulation is undertaken both by courts and by other regulatory bodies. Indeed, as we shall mention in a moment, private regulation and the courts also have a potentially cooperative role. However, the danger is that the regulatory regime becomes uncoordinated, with different and inconsistent interventions by courts and other bodies, a problem discussed under the handling of ‘normative confusion’ in section 4.4. above. Thus, it is important to acknowledge that rights are not simply found, created and applied by courts but also by other regulatory authorities, and that these latter will have a central role in interpreting and applying judicial decisions. There may also be potential for a system under which regulatory bodies can seek interpretative decisions from the courts through some form of preliminary ruling on a question relating to the balancing of fundamental rights.

7.1.3. Private regulation

One of the most striking features of the experience of the countries examined in the case studies is the pervasiveness of private regulation. Here private regulation protects fundamental rights and contributes to solving conflicts among them. Private regulation is a very diverse and multifaceted world reflecting different approaches to the relationship between media and the public. It is remarkable how many different forms it takes and how differentiated it is across countries reflecting different regulatory cultures similarly to what happens in the public domain.

Private regulation can be sub-divided into a number of different categories. The first of that is ‘professional regulation’ which is found in relation to the journalistic

profession. This was present in all the nations examined, and has been discussed in section 6 of this report (for details of the role of this regulation in the MEDIADEM countries see tables 6.1-6.6). Such regulation is administered through a professional association or through a Press Council.

Secondly, private regulation may take a broader form, concerned not only with regulation of the journalistic profession but also with the maintenance of broader media standards, notably in relation to privacy and ethics. In this case it is likely to be administered by a Press Council with a broader range of members, including some from outside the profession (table 6.4). This seems to be the trend that is adopted in countries where private regulation was previously administered by journalists associations. For example, the Council for the French-speaking community in Belgium includes 6 journalist representatives, 6 publisher representatives, 2 representatives of editorial management and 6 public members, and that for Bulgaria is composed of a third each of journalist representatives, media outlets and audience representatives. This form of private regulation, indeed, often cannot be characterised as 'self- regulation' in any simple sense, as it also involves a public element, for example through public authorities requiring a form of private regulation with the input of a wider range of interests as a condition of refraining from imposing public regulation by statutory authorities. The UK has been a major example of this system, and it is likely to be continued in a much strong form with an increased public element after the report of the current Leveson Inquiry into press standards. As described in section 4 of this report, such an approach is particularly characteristic of the press in order to avoid accusations of government intervention restricting freedom of expression.

A third form of private regulation is very different. This is characteristic of the digital media, and involves the use of private companies as 'gatekeepers' through regulating different forms of media access. One important example is in relation to media content, where filtering systems have been used to restrict access to content which is likely to be harmful to minors (Casarosa, 2011). A second relates to the 'net neutrality' debate, where there are fears that limiting current principles of net neutrality will permit companies to act in a discriminatory fashion in the making available of content (BEREC, 2012; European Parliament, 2011- net neutrality).[172] This of course raises competition law issues, but also wider problems relating to the role of private companies in shaping freedom of expression. The third example, discussed in section 4 above, is the role of private companies in the form of Internet service providers (ISP) in policing copyrights infringement by their clients. This has given rise to constitutional issues in a number of countries (the UK, France, Italy) which have concerned the relationship between ISPs, the courts and regulatory authorities in restrictions on freedom of expression.

A fourth and final category of private regulation is less controversial, and relates to the standard setting process, on which there is already a substantial literature (Cafaggi, 2011). This is often seen as technical and so less subject to legitimacy

[172] See also above par. 5.3.3.

concerns. However, the role of open standards may also be important in relation to freedom of expression through raising access concerns, for example in relation to the development of standards for internet protocol tv and the role of public service broadcasters.

The importance, and the variety, of forms of private regulation, gives rise to two important lessons. The first is the need for clearer classification of the different types of system, as suggested above. The tendency to fit them all together within the category of 'self-regulation' is profoundly misleading, ignoring both the variations in the degree of involvement of public and private stakeholders in the regulatory process, and also the different functions which private regulation may perform. This qualification problem not only influences legitimacy and accountability but it has important implications related to judicial review at both national and European level. It is quite clear from the national reports that these extend far beyond internal regulation of professions or the setting of technological standards to encompass wider considerations of privacy rights and of freedom of expression. The apparently more sophisticated concept of co-regulation is also inadequate as a means of conceiving of mixed regulatory systems which may be characterised by major tensions rather than by cooperation. This is clear from the Greek case where the incentives to introduce a form of co-regulation regularly fail: the requirement to establish ethics committees in national broadcasting media through the communication and approval of the NCRT in order to receive the licence to broadcast has not been implemented. However, some positive examples exist such as in the Romanian case where the CAN negotiated with the broadcasters and the civil society a collection of more specific norms to complement national legislation, leading to the adoption of the so called Code on the Broadcast Content, in the form of secondary legislation.

The second issue is one of legitimacy. In the case of the regulatory authorities referred to above, there is normally some acknowledgement of legitimacy issues relating to the exercise of power by non-elected bodies, and some attempt to resolve these through appointments procedures, provision for Parliamentary scrutiny, or by other means. In the case of private regulation, these questions are relatively neglected, despite the development of a considerable body of academic literature on these legitimacy issues (Cafaggi, 2010; Scott, Cafaggi and Senden, 2011). The question of legitimacy has also played a major role in causing crises in some private regulatory regimes which are seen as unaccountable to interests outside the profession; the example of the now discredited Press Complaints Commission in the UK is a striking one where lack of legitimacy was combined with lack of effectiveness. Similarly in Romania, for a long time the Press club "*claimed to be the only legitimate representative of the Romanian press, although it showed no interest in opening a debate on self-regulation*" (Ghinea and Avădani, 2011). Legitimacy is a particular problem where the private regulatory bodies have an important role in rule-making, and so responsiveness to wider interests will be of particular importance.

As a result of these concerns, one major finding from the research is that there needs to be a rethinking of the meaning and role of private regulation, and of the mechanisms for its legitimacy. In particular, the narrow conceptions of self- and co-

regulation in the 2003 *Interinstitutional Agreement on Better Law Making* (European Parliament, Council and Commission, 2003) are far too restrictive; indeed, a narrow interpretation of them caused unnecessary problems in the initial drafting of the Audio-visual Media Services Directive (Prosser 2008). Who might be responsible for coordinating such a rethinking?

7.2. Coordination and regulatory institutions

One major theme in the national reports has been the lack of coordination of different forms of regulation, public and private, in the media field. Some measures have been taken to provide certain forms of coordination; examples would be the Council of Europe guidelines on the independence and functions of regulatory authorities for the broadcasting sector and the continuing attempts by the Commission to specify the requirements of independence for regulators in the electronic communications field. Which other institutions could provide a degree of coordination, for example by issuing guidelines on requirements for regulatory legitimacy and supervising compliance?

The first possible candidate is the European Platform of Regulatory Authorities (EPRA), established in 1995 to provide a forum for informal discussion and exchange of views between regulatory authorities in the field of the media, for exchange of information and discussion of solutions to legal problems relating to media regulation.[173] EPRA composition goes beyond the EU and even European countries which requires some adaptation when operating as an EU coordinator. However, its powers are seriously limited by its statute which provides that it 'shall exclude the making of common declarations and the pursuit of national goals' (at 1(2)). This would, exclude, for example, the issue of general guidelines on regulatory matters. One possible way forward would be to change the statute enabling EPRA if and when it wishes to issue guidelines and opinions that can contribute to coordination within the EU and between the EU and other European countries. This would enable EPRA to move from a forum to a network of regulators and keeping at the same time the flexibility and informality which has characterised its development. However, we recognise that internal political concerns in EPRA could well make such a move difficult.

The second candidate is the Contact Committee established under art. 29 of the AVMS Directive. This is composed of representatives of the competent authorities of Member States and has the tasks of facilitating effective implementation of the directive through consultation on practical problems, to deliver opinions on the application by Member States of the Directive, to discuss the outcomes of Commission consultations with stakeholders, to facilitate the exchange of information on the development of regulatory activities regarding audiovisual media services and to examine developments on which an exchange of views appears useful. Work which the Committee has undertaken includes examination of the transposition in each

[173] See http://www.epra.org/.

Member State of art. 4(7) of the Directive relating to self- and co-regulation. However, this work has been so far limited to listing the arrangements for transposition rather than providing any normative guidance on what would constitute legitimate implementation or adopting a critical assessment of the arrangements adopted in Member States. A similar approach has been taken in relation to the implementation of other requirements of the Directive. Another possibility would be for the Contact Committee to use the powers conferred by art. 29 to deliver opinions contributing to enhancing coordination among the different regulators including private ones. However, the work of the Contact Committee is also limited to areas falling within the scope of the AVMS Directive, whereas the areas covered by the Mediadem project are much wider, including for example the press.

The third body with potential for coordination is BEREC, the Body of European Regulators for Communications composed of the heads of the 27 national regulatory authorities in the field of electronic communications. Much of BEREC's work is relevant to issues covered in the MEDIADEM project, for example net neutrality. However, its basis in the regulation of electronic communications means that its concerns are considerably narrower than those of MEDIADEM, and, given the limited number of national regulatory bodies which have been organised to reflect a converged approach covering all forms of new media, it is unlikely that an organisation composed of electronic communications NRAs would be adequate to act as a coordinating body for the wider concerns set out in the MEDIADEM reports.

Clearly when some of the media are only privately regulated coordination should include both private and public regulators. We envisage the creation of hybrid networks where both competent public and private regulators can coordinate media policies and implementation of EU and transnational regulations.

This leaves the European Commission itself as a possible coordinating institution through the work of Directorate General (DG) Connect. There is a precedent for work in this area by the European Commission through the work of DG Sanco in developing a strategy on nutrition, overweight and obesity related health issues in marketing of foods to children. This included a series of roundtable meetings with key stakeholders involved in advertising self-regulation, including representatives of the consumer group BEUC. One outcome was the drafting of a best practice model for self-regulation attached to the round table report (Health & Consumer Protection Directorate General, 2006). It set out the basic components for a self-regulatory model for advertising, but elements within it are of wider application. Thus it required;

- the provision of performance objectives by self-regulatory bodies and the recording of performance against them;
- an explicit objective clarifying complaints channels;
- standards for complaints handling;
- a systematic duty to publish decisions;

- clear and effective sanctions for non-compliance with codes;
- effective contributions from stakeholders in the drafting of codes;
- adjudication bodies composed of a substantial proportion of independent members;
- avoidance of conflicts of interests and the requirement of the declaration of interests;
- coverage of a wide range of different types of advertising.

There will of course be reasons why the model developed in this particular context will not be universally applicable to all types of self-regulation. However, it does offer a model which may be of use in the development of guidelines both by the Commission and by the Council of Europe.

Coordination should not only occur among media regulators but also between media and electronic communication regulators. We propose that better coordination between BEREC and EPRA and also between BEREC and the AVMS Directive Contact Committee takes place in order to improve policy implementation in the field of the media.

8. Implications for policy: towards a new architecture of media regulation?

The report is mostly aimed at comparing MEDIADEM countries as regards their media policies. As such its main focus is descriptive, rather than prescriptive. However, from the observation of the common problems and emerging features of national media policies, a number of outstanding open questions for reform can be derived. Below, we distinguish between issues related to the need for a more integrated approach in media policy; questions on technological convergence and the technology neutrality of legislation; the relationship between *ex ante* sectoral regulation and competition policy; and the necessity to introduce governance arrangements and a stronger coordination of media policy in the EU.

8.1. Towards an integrated approach to media policy

Both the blurring of the boundaries between press and broadcasting, and the ongoing technological convergence on IP-based platforms are paving the way for a gradual shift towards a more integrated approach to media policy. An integrated notion of media implies that new and conventional media should be considered as part of the same regulatory field integrating linear and non linear communication systems. This does not necessarily mean uniform regulation across media: to the contrary, room for territorial and functional regulatory differentiation remains and should be rationalized taking also into account the development of the linear/non-linear divide. The rationales for public regulation have to be redefined and within them the role of public service has to be rewritten to fit with an integrated notion of media

A more integrated notion of media should trigger, at the same time, consolidation or at least coordination of regulatory functions between public regulators. In today's competitive landscape, telecom companies are seeking to enter broadcasting, giant application providers (Microsoft), social networks (Facebook, Twitter) and search engines (Google) are turning into media companies, and even some device manufacturers (e.g. Apple, Samsung) are entering media provision. The development of broadband digital platforms is changing the distribution of market power along the layered architecture of the Internet, making it unfortunate to operate with fragmented regulatory powers and approaches. This also relates to the Telecom Package at the EU level, which is still based on the separation between telecom and other services, as well as between fixed and mobile. Problems of access to infrastructure, network neutrality, search and application neutrality and ISP-enabled copyright enforcement, normally dealt with by regulators other than media authorities, have now entered the stage of media regulation in a way that cannot be ignored.

8.2. Towards technology neutrality

A related aspect is the need for technology-neutral regulation, especially for what concerns the public policy goals to be typically pursued in media policy. A concept traditionally embedded in the EU regulatory framework for e-communications, its extension to media policy entails at least three main changes, as described below.

First, the notion of media should not rely on any specific form of transmission, and should thus include both one-way and two-way forms of communications. In line with technology-neutrality, the definition of "media" should refer to the aggregation and provision of information to a generalized audience, coupled with editorial control.

Second, duties and obligations that apply to media outlets should be clarified for all players that fit the technology-neutral definition, regardless of the technology they use. It is important to distinguish which types of information providers can fit the definition of *media*, as this will help distinguish them from mere news aggregators and search engines that reproduce and syndicate information but should bear no direct responsibility for copyright infringement, defamation problems etc.

Third, the future of public service (and related privileges and obligations) should not be linked to any specific technology. It might very well be that in the future, access to public service TV will be organized around a mix of technologies. This, at the same time, also means that regulation should aim at eliminating differential treatment of some technologies – subject to what will be said below about the need for end-to-end communications to preserve pluralism.

8.3. Ex ante regulation v. ex post competition policy

The adoption of an integrated notion of media grounded on net neutrality above bear significant consequences for the relationship between regulation and competition policy. The latter, through flexible tools such as the definition of relevant markets, is potentially more technology-neutral than the former, and can be adapted to solve most of the concerns that characterize external pluralism in modern society. However, a number of concerns must be spelled out: (i) the tools of competition policy should be revisited to capture the complex dynamics of new media, which run over multi-sided platforms that compete across layers of the IP architecture, for the same "eyeballs" and with alternative, articulated business models; (ii) the *ex post* nature of antitrust scrutiny hardly fits the fast pace of change of new media markets, and as such players might find it more convenient to "infringe, then pay", given the importance of securing first-mover advantages in emerging markets; (iii) finally, the existing difference between the application of competition rules in media markets as opposed to other neighbouring markets (e-communications, online broadband-enabled platforms) should be harmonized.

At the same time, the debates on network neutrality and copyright enforcement in

cyberspace have shed light on the risk that new business models sacrifice the end-to-end architecture of the Internet on the altar of other policy goals such as protection of property and incentives to invest. It is important to keep in mind that the most important feature that enables freedom of expression on the Internet is the end-to-end architecture. As such, *ex ante* regulation should seek to at least impose on all market players the duty to ensure that a robust, best effort, unmanaged and unfiltered Internet can co-exist along with more managed, secure services that require minimum QoS (e.g. bandwidth-intensive and some cloud-enabled services). The use of copyright protection should be grounded, in this instance, on liability rather than property rules in order to minimize the impact on freedom of expression.

8.4. Towards better regulatory governance and sound institutional arrangements

Some of the most important questions triggered by the analysis of media policy in the fourteen MEDIADEM countries are related to the need for more responsive and accountable regulation in this field. The most important variables in this respect are the following:

- *Regulatory "styles"*. In order to preserve the integrated and technology-neutral approach to media pluralism and freedom of expression, public and private regulation should rely more on outcome-based as well as principles-based regulation, rather than engaging in command and control regulation.

- *Openness, transparency and accountability should apply to all aspects of media policy*.

- *Respect for pluralism and freedom of expression should be always kept in the radar by policymakers*. This can be achieved at the EU level, for example, by improving the current guidance on assessing impacts on fundamental rights developed by the European Commission within its *ex ante* impact assessment system, to include guidance on how to ensure new legislation does not negatively affect these principles.

As regards regulatory powers, pan-European coordination of regulatory approaches, use of soft law and exchange of best practices seem key to a more integrated Single Market. Suggested ways to achieve this goal include a strengthening of the role and powers of EPRA, which could play a pivotal role in coordinating horizontally with the Contact Committee established under the AVMS.

The regulatory capacity of both public and private regulators should be strengthened, given the emerging complexity of the value chains that support media production and distribution in the EU and at the global level. Emerging global chains in a world of integrated media call for appropriate regulatory responses that promote and monitor the use of private regulation

Accordingly, a significant effort should be devoted towards the development of criteria and methodologies to assess the legitimacy and effectiveness of private regulation in the field of media. Several examples illustrated in our report testify that private regulation is essential in this field, but could also lead to very undesirable consequences due to lack of adequate governance, accountability, transparency, and also government monitoring. The European Commission should aim at developing concrete guidance for EU and national policymakers on when and how to assess the alignment of private regulatory schemes with public policy goals.

Bibliography

AA.VV. (2008), *Studi in onore di Nicolò Lipari* (Milano: Giuffrè)

Alexander, L. (2005), *Is there a right of freedom of expression?* (Cambridge: Cambridge University Press)

Anagnostou, D., E.Psychogiopoulou, A. Kandyla (2010), 'The case of Greece', in MEDIADEM (2010), p. 237

Ariño, M. (2004), 'Competition law and pluralism in European digital broadcasting: Addressing the gaps', *Communications & Strategies* (54), 97-128

Ariño, M. (2005), *Regulation and competition in European digital broadcasting: A study of pluralism through access*, PhD thesis, European University Institute, Florence

Artymiak, S. (2011), 'Introduction to different forms of on-demand audiovisual services', in European Audiovisual Observatory (2011), 31-34

Baker, E. C. (2007), *Media concentration and democracy – Why ownership matters* (Cambridge: Cambridge University Press)

Balkin, J. (2009), 'The future of free expression in a digital age', 36 *Pepperdine Law Review* 427

Barendt, E. (2005), *Freedom of speech* (2nd ed, Oxford: Oxford University Press)

Barton, M. (2010), 'Pluralism of mass media as a constitutional principle', paper presented at the VIII World Congress of the IACL, available at http://info.juridicas.unam.mx/wccl/ponencias/3/55.pdf, date accessed 25 July 2012

Benkler, Y. (2006), *The wealth of networks* (New Haven, London: Yale University Press)

BEREC (2010), Report on convergent services, BoR (10) 65, available at http://www.irg.eu/streaming/BoR%20(10)%2065%20BEREC%20report%20on%20convergent%20services_final.pdf?contentId=547006&field=ATTACHED_FILE, date accessed 25 July 2012

Birnhack, M. (2003), 'Acknowledging the conflict between copyright law and freedom of expression under Human rights Act', *Ent. L. Rev.* 24

Black, J. (2010), 'Who is a journalist', in Meyers (2010), 103–116

Blauberger, M. (2008), 'From negative to positive integration? - European state aid control through soft and hard law', MPIfG Discussion Paper 08 /4, Max Planck Institute for the Study of Societies, Cologne, available at: http://www.mpifg.de/pu/mpifg_dp/dp08-4.pdf, date accessed 25 July 2012

Bollinger, L. (1976), 'Freedom of the press and public access' 75 *Michigan Law Review* 1

Bollinger, L. 'The rationale of public regulation of the media' in Lichenberg (1990), 355-67.

Bowman S., and C. Willis (2003), 'We Media - How audiences are shaping the future of news and information', The media center at the American Press Institute, Thinking Paper

Brauneis, R. (2009), 'The transformation of originality in the progressive-era debate over copyright in news', The George Washington University Law School, Legal Studies Research Paper n. 463, available at http://ssrn.com/abstract=1365366, date accessed 25 July 2012

Buigues P., and Rabassa V. (2007), 'European perspective on the media sector: competition versus regulation', in Seabright and von Hagen (2007), 280-309

Bundeskartellamt, 'Bundeskartellamt prohibits merger between Springer/ProSiebenSat. 1' available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2006/2006_01_24.php, date accessed 25 July 2012

Cafaggi, F. (2010), 'Private law-making and European integration: Where do they meet, when do they conflict?' in Oliver, Prosser and Rawlings (2010), 201-228

Cafaggi, F. (2011), 'New foundations of transnational private regulation', 38 *Journal of Law and Society*, 20-49

Cafaggi, F. (ed.) (2012), *The enforcement of transnational private regulation* (Cheltenham: Edward Elgar)

Cafaggi, F. (ed.) (2006), *Reframing self-regulation in European private law* (Alphen aan den Rijn, Netherlands: Kluwer Law International)

Cafaggi, F. 'Transnational regulatory contracts and supply chains', unpublished paper on file with the author

Cafaggi, F., and F. Casarosa (2012), 'Private regulation, freedom of expression and journalism: Towards a European approach?', European University Institute, Working Paper, 2012/20

Cafaggi, F., F. Casarosa, and T. Prosser (eds) (2013), *The media, constitutions and regulations* (Oxford University Press - forthcoming)

Casarosa F., and E. Brogi (2011), *Case study report. Does media policy promote media freedom and independence? The case of Italy*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Casarosa, F. (2010), 'Media policies and regulatory practices in a selected set of European countries, the EU and the Council of Europe: The case of the European Union and the Council of Europe', in MEDIADEM (2010), 492-523

Casarosa, F. (2011), 'Protection of minors online: Available regulatory approaches', EUI Working Paper RSCAS 2011/15

Casarosa, F. (2012), 'Copyright infringing content available online - National jurisprudential trends', in Cerrillo i Martínez et al., (2012), 61-76

Castro, R., and A. Renda (2013), 'Cyberspace and cyberpolice: How the copyright and neutrality debates are threatening the Internet', in Cafaggi, Casarosa and Prosser (2013), forthcoming

Catricalà A. (2011), 'Google in Italy', 2(4) *Journal of European Competition Law & Practice*, 293-295

Cerrillo i Martínez, A., M. Peguera, I. Peña-López, M.J.. Pifarré de Moner, and M. Vilasau Solana (eds.) (2012), *Challenges and opportunities of online entertainment*. Proceedings of the 8th International Conference on Internet, Law & Politics. Universitat Oberta de Catalunya, Barcelona 9-10 July, 2012 (Barcelona: UOC-Huygens Editorial)

Chalmers, D., C. Hadjemannuil, G. Monti and A. Tomkins (2006), *European Union law: Text and materials* (Cambridge: Cambridge University Press)

Commissioner for Human Rights, *Media pluralism and human rights*, Issue Discussion Paper, Strasbourg, 6 December 2011, CommDH (2011)43, available at https://wcd.coe.int/ViewDoc.jsp?id=1881589, date accessed 25 July 2012

Cooper Dreyfuss, R. and D. Leenher-Zimmermann (2001), *Expanding the boundaries of intellectual property: Innovation policy for the knowledge society* (Oxford: Oxford University Press)

Cornish, W.R. (1999), *Intellectual property: Patens, copyright, trade marks and allied rights, (*4th ed., London: Sweet & Maxwell)

Council of Europe (2000), Recommendation R(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the Broadcasting sector, 20 December 2000

Council of Europe (2008), Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008

Council of Europe (2011), Recommendation R(2011)7 of the Committee of Ministers on A new notion of media, 21 September 2011

Craufurd Smith, R. and Y. Stolte (2011), *Case study report. Does media policy promote media freedom and independence? The case of the UK*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Craufurd Smith, R., and Y. Stolte (2010), 'The case of the UK', in MEDIADEM (2010), 445-491

Daly A. and B. Farrand, (2011), 'Report on the regulation of new media in Europe', available at SSRN: http://ssrn.com/abstract=1952052

De la Sierra, S. and M. Mantini (2011), *Case study report. Does media policy promote media freedom and independence? The case of Spain*, report for the

MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

De la Sierra, S., and E. Guichot, M. Mantini, S. Medina and I. Sobrino (2010), 'The case of Spain', in MEDIADEM (2010), 378-411

De Streel, A. and E. Defreyne (2013), 'How the European Union should regulate pluralism in new media', in Cafaggi, Casarosa and Prosser (2013)

Department for Culture, Media and Sport (2006a),' A public service for all: the BBC in the digital age', Available at: http://www.official-documents.gov.uk/document/cm67/6763/6763.pdf, date accessed 25 July 2012

Department for Culture, Media and Sport (2006b), 'Broadcasting: An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation', Cm 6872, available at http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf, date accessed 25 July 2012

Department for Culture, Media and Sport (2006c), 'Broadcasting: Copy of Royal Charter for the Continuance of the British Broadcasting Corporation', Cm 6925 available at http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf, date accessed 25 July 2012

Dixon R., and T. Ginsburg (eds) (2011), *Comparative constitutional law*, (Cheltenham: Edward Elgar)

Donders, K., and C. Pauwels (2010), 'The introduction of an ex ante evaluation for new media services: Europe asks for it or does public service broadcasting needs it?' Available at http://ripeat.org/wp-content/uploads/tdomf/1323/Donders%20&%20Pauwels.pdf, date accessed 25 July 2012

Donnelly, C. M. (2009), *Delegation of governmental power to private parties* (Oxford: Oxford University Press)

European Commission for Democracy through Law (Venice Commission) (2005), 'Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media', opinion 309/2004, Strasbourg, 13 June 2005, CDL-AD(2005)017, www.venice.coe.int (last visited 20 December 2011)

European Audiovisual Observatory (2011), *Limits to the use of personal data*, IRIS plus (Strasbourg: European Audiovisual Observatory)

European Audiovisual Observatory (2011), *The regulation of on-demand audiovisual services: Chaos or coherence?* IRIS special (Strasbourg: European Audiovisual Observatory)

European Commission (2001), Communication 2001/C 320/04 of the European Commission on the Application of the State aid rules to Public Service Broadcasting, OJ 15.11.2001, C320/5

European Commission (2005), Commission State Aid Action Plan 2005, Consultation document COM (2005)107 final

European Commission (2008), MEMO/08/671, available at:http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/671&format=HTML&aged=1&language=EN&guiLanguage=en, date accessed 25 July 2012

European Commission (2009), Communication 2009/C 257/01 of the European Commission on the Application of the State aid rules to Public Service Broadcasting, OJ 27.10.2009, C257/01

European Council (1999), Resolution of the Council and of the Representatives of the Governments of the Member States, Meeting within the Council of 25 January 1999 concerning public service broadcasting, OJ 5.02.1999 C 30/1

European Parliament (2008), Resolution of 25 September 2008 on concentration and pluralism in the media in the European Union, 2007/2253(INI)

European Parliament (2010), Resolution of 25 November 2010 on public service broadcasting in the digital era: the future of the dual system, 2010/2028 (INI)

European Union (2001), Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 22.06.2001, L 167/10

European Union (2006), Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ 27.12.2007, L 372/12

European Union (2010), Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audiovisual media services ('AVMS'), OJ 15.04.2010, L 95/1.

Feintuck, M., and M. Varney (2006), *Media Regulation, public interest and the law* (2nd ed., Edinburg: Edinburg University Press)

Finnish Competition Authority, (2010), 'Yearbook 2009', available at http://www.kilpailuvirasto.fi/tiedostot/vuosikirja-2009-englanti.pdf, date accessed 25 July 2012

Flauss, J.-F. (2009), 'The European Court of Human Rights and the freedom of expression', 84 *Indiana Law Journal* 809

Ghinea, C., and I. Avădani (2011), *Case study report. Does media policy promote media freedom and independence? The case of Romania,* report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Goldberg, D., T. Prosser and S. Verhulst (eds) (1998), *Regulating the changing media: a comparative study* (Oxford: Clarendon)

Grueskin, B., A. Seave and L. Graves, (2010), 'The story so far - What we know about the business of digital journalism', Columbia Journalism School - Tow Center for Digital Journalism, available at

http://www.cjr.org/the_business_of_digital_journalism/the_story_so_far_what_we_know.php, date accessed 25 July 2012

Hamill, K. 'U.S. approves Comcast-NBC merger', CNN Money, January 18, 2011, available at: http://money.cnn.com/2011/01/18/technology/fcc_comcast_nbc/index.htm, date accessed 25 July 2012

Hans Bredow Institute (2006), *Final report study of co-regulation measures in the media Sector* available at http://ec.europa.eu/avpolicy/docs/library/studies/coregul/final_rep_en.pdf, date accessed 25 July 2012

Hans Bredow Institute for Media Research, Interdisciplinary Centre for Law & ICT (ICRI) - Katholieke Universiteit Leuven, Center for Media and Communication Studies (CMCS) - Central European University, Cullen International, Perspective Associates (eds) (2011), *INDIREG. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive.* Study conducted on behalf of the European Commission. Final Report. February 2011

Harris, D., M. O'Boyle, E. Bates and C. Buckley (2009), *Law of the European convention on human rights*, 2° ed. (New York: Oxford University Press)

Harro-Loit, H. and U. Loit (2011), *Case study report. Does media policy promote media freedom and independence? The case of Estonia,* report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Health & Consumer Protection Directorate General (2006), 'Self-Regulation in the EU Advertising Sector: A report of some discussion among Interested parties' available at: http://www.asa.co.nz/pdfs/Madelin%20Report.pdf, date accessed 25 July 2012

Heikkilä, H., D. Domingo, J. Pies, M. Glowacki, M. Kus and O. Baisnée (2012), 'Media Accountability Goes Online - A transnational study on emerging practices and innovations', MediaAct working paper, available at http://www.mediaact.eu/fileadmin/user_upload/WP4_Outcomes/WP4_Report.pdf, date accessed 25 July 2012

Helles, R., H. Søndergaard and I. Toft (2011), *Case study report. Does media policy promote media freedom and independence? The case of Denmark,* report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Hugenholtz, B. (2001), 'Copyright and freedom of expression in Europe', in Cooper Dreyfuss and Leenher-Zimmermann (2001), 223-249

Isbell, K. (2010), 'The rise of news aggregator: legal implication and best practices' available at http://cyber.law.harvard.edu/publications, date accessed 25 July 2012

Jurrat, N. (2011), 'Citizen journalism and the Internet ', Mapping digital media - Open Society Foundation, available at http://www.soros.org/reports/mapping-digital-media-citizen-journalism-and-internet, date accessed 25 July 2012

Katholieke Universiteit Leuven - ICRI (2009), *Independent study on indicators for media pluralism in the Member States - Towards a risk-based approach*, Report for the European Commission, available at http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/study/final_report_09.pdf, date accessed 25 July 2012

KEK, (2007), 'Cross-Media Relations: A Challenge for Media Concentration Control - Summary of the Third Report on the Development of Media Concentration and Measures to Secure Plurality of Opinion in the Private Broadcasting Sector', available at http://www.kek-online.de/Inhalte/summary2007.pdf, date accessed 25 July 2012

Keller P. (2011), *European and International Media Law* (Oxford: Oxford University Press)

Kevin, D., T. Ader, O. Carsten Fueg, E. Pertzinidou and M. Schoenthal (2004), *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"*, Report prepared on behalf of the European Parliament, Available at http://epra3-production.s3.amazonaws.com/attachments/files/1530/original/European%20Citizen%20Information%20Project%20Final%20REPORT.pdf, date accessed 25 July 2012

Koops, E.-J., M. Lips, S. Nouwt, C. Prins and M. Schellekens (2006), 'Should self-regulation be the starting point?' in Koops, Lips, Prins and Schellekens (eds) (2006), 109-151

Koops, E.-J., M. Lips, S. Nouwt, C. Prins and M. Schellekens (2006), *Starting points for ICT regulation: Deconstructing prevalent policy one-liners*, (The Hague: T.M.C. Asser Press)

Kunzik, M. (1999), 'Ethics in journalism: A reader on their perception in the third world' (Bonn, International Development Cooperation of FES)

Kurban, D., and C. Sözeri (2011), *Case study report. Does media policy promote media freedom and Independence? The case of Turkey*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Kuutti, H., E. Lauk and M. Lindgren (2011), *Case study report. Does media policy promote media freedom and independence? The case of Finland*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, *date accessed 25 July 2012*

La Rue, F. (2011), 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', UN A/HRC/17/27, available at http://daccess-ods.un.org/TMP/73846.2153822184.htm, date accessed 25 July 2012

Laitila, T. (2005), 'Journalistic codes of ethics in Europe' in McQuail, Golding, De Bens (2005), 191-204

Lange, Y. (ed.) (2009), *Living together: a handbook on Council of Europe standards on media's contribution to social cohesion, intercultural dialogue, understanding, tolerance and democratic participation* (Strasbourg: Council of Europe Publishing)

Larouche, P. (2013), 'An integrative regulatory paradigm for media regulation', in Cafaggi, Casarosa and Prosser (2013) forthcoming

Lauk, E. (2008), 'Freedom for the media? Issues of journalism ethics in Estonia', *Informacijos Mokslai*, 47, 59-65

Lauk, E. (2009), 'Reflections on Changing Patterns of Journalism in the New EU Countries', *Journalism Studies*, 10, 1, 69-84

Lee, E. (2007), 'Freedom of the Press 2.0', 42 *Georgia Law Review*309

Leibowitz, J. (2009), '"Creative destruction" or just "destruction": How will journalism survive the Internet age?' available at http://www.ftc.gov/speeches/leibowitz/091201newsmedia.pdf, date accessed 25 July 2012

Lichtenberg, J. (ed.) (1990), *Democracy and the Mass Media* (Cambridge: Cambridge University Press).

Lichtenberg, J. 'Foundations and limits of freedom of the press', in Lichtenberg (1990), 102- 135

Lipari, N. (1978), 'Libertà di informare o diritto ad essere informati?', *Diritto radiodiffusione e telecom*, 4-34

Loit, U. (2002), 'Estonia: collapse of media self-regulation', Report on conference "The media in a democratic society: reconciling freedom of expression with the protection of human rights" 30 September - 1 October 2002 in Luxembourg, available at http://www.asn.org.ee/english/related/collapse-of-self-reg.html, date accessed 25 July 2012

Lopez-Tarruella, A. (ed.) (2012), *Google and the law – Empirical approaches to legal aspects of knowledge* (The Hague: T.M.C. Asser Press)

MacQueen, H., G. Laurie, A., Brown and C. Waelde (2010), *Contemporary intellectual property law and policy* (2nd ed., Oxford: Oxford University Press)

Mastroianni, R. (2010), 'I diritti fondamentali dopo Lisbona tra conferme europee e malintesi nazionali', *Diritto pubblico comparato ed europeo*, IV, xxi-xxv

Mastroianni, R. (2013), 'Freedom of expression in ECJ and ECHR case-law', in Cafaggi, Casarosa and Prosser (2013) forthcoming

McQuail, D., P. Golding, and E. De Bens (eds) (2005), *Communication theory and research* (London: Sage)

MEDIADEM (2011), *Case study reports, 'Does media policy promote media freedom and independence? The cases of Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey, and the United Kingdom*, reports for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

MEDIADEM (2012), *Comparative report – Media freedom and independence in 14 European countries: A comparative perspective*, reports for the MEDIADEM project (FP7-SSH-2009-A no. 244365)

Metzger, G. E. (2003), 'Privatization as delegation', *Columbia Law review*, 103, 1367-1502

Meyers C. (ed.) (2010), *Journalism ethics: A philosophical approach*, (Oxford: Oxford University Press)

Mill, J. S. (1909), *On liberty* (New York: P. F. Collier & Son)

Müller, S., and C. Gusy (2011), *Case study report. Does media policy promote media freedom and independence? The case of Germany*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Netanel, N. (2008), 'New media in old bottles? Barron's contextual First Amendment and copyright in the digital age', 76 *George Washington Law Review* 952

Ofcom (2006), *Review of media ownership rules*, available at http://stakeholders.ofcom.org.uk/binaries/consultations/morr/summary/morrcondoc.pdf, date accessed 25 July 2012

Ofcom (2010), *Report on public interest test on the proposed acquisition of BSkyB by News Corporation*, available at http://stakeholders.ofcom.org.uk/binaries/consultations/public-interest-test-nov2010/statement/public-interest-test-report.pdf, date accessed 25 July 2012

Oliver, D., T. Prosser and R. Rawlings (eds) (2010), *The regulatory state: Constitutional implications* (Oxford: Oxford University Press)

Pace, A. (2008), 'Libertà di informare e diritto ad essere informati. Due prospettive a confronto nell'interpretazione e nelle prime applicazioni dell'art. 7, comma 1, T.U. della radiotelevisione' in AA.VV. (2008), II, 1995-2034

Pauwels, C. (2010), 'Television beyond frontiers: reflections on public service broadcasting in a digital Europe', Lecture given at the London School of Economics. London. 22 November, available at http://www.youtube.com/watch?v=8wy1G1aFWnc, date accessed 25 July 2012

Picard, R. (2011), 'Digitization and media business models', Mapping digital media - Open Society Foundation, available at http://www.soros.org/initiatives/media/articles_publications/publications/mapping-digital-media-digitization-media-business-models-20110721, date accessed 25 July 2012

Press Complaints Commission, 'Towards a new system of self-regulation', available at http://www.pcc.org.uk/assets/0/Draft_proposal.pdf, date accessed 25 July 2012

Price, M. E., and S. G. Verhulst (2005), *Self-regulation and the Internet*, (The Hague: Kluwer Law International)

Prosser, T. (2005), *The limits of competition law* (Oxford: Oxford University Press)

Prosser, T. (2006), 'Self-regulation, politics and law: The example of the media', in Cafaggi (2006), 249-271

Prosser, T. (2008), 'Self-regulation, co-regulation and the audio-visual media services directive', *Journal of Consumer Policy*, 31, 99-113

Prosser, T. (2010), *The regulatory enterprise – Government, regulation, and legitimacy* (Oxford: Oxford University Press)

Psychogiopoulou E., D. Anagnostou and A. Kandyla (2011), *Case study report. Does media policy promote media freedom and independence? The case of Greece,* report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Psychogiopoulou, E., D. Anagnostou, R. Craufurd Smith and Y. Stolte (2012), 'A comparative analysis of the freedom and independence of public service broadcasters in fourteen European countries', in MEDIADEM (2012), 9-52

Puppephatt, A. (2011), 'The importance of self-regulation in upholding freedom of expression', UNESCO

Redding, V. (2009), 'Speech at the debate on electronic communications networks, personal data and the protection of privacy', available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN, date accessed 25 July 2012

Rolla, G. (2010), *La tutela costituzionale dei diritti* (Milano: Giuffè)

Rosati, E. (2011), 'Originality in a work or a work of originality – The effects of the Infopaq decision', *Journal of the Copyright of the USA*, 795-817

Rosen, J. (2006), 'Copyright and freedom of expression', Paper presented at the conference Quo vadis, Copyright? Barcelona, 31 March 2006, available at http://ebookbrowse.com/c-1-j-rosen-ebu-060331-tcm6-43829-pdf-d127237779, date accessed 25 July 2012

Rosenfeld, M. (2003), 'Hate speech in comparative perspective: A comparative analysis' 24 *Cardozo Law Review* 1523.

Sadursky, W. (1999), *Freedom of speech and its limits* (Dordrecht: Kluwer Academic)

Salomon, E. (2008), *Guidelines for broadcasting regulation*, (2nd ed., London: Commonwealth Broadcasting Association)

Scheuer, A. (2006), 'Media law reservations about Springer/ProSiebenSat.1 merger', available at http://merlin.obs.coe.int/iris/2006/2/article13.en.htm, date accessed 25 July 2012

Scheuer, A., and S. Schweda (2011), 'The protection of personal data and the media', in European Audiovisual Observatory (2011), 7-27.

Scott, C., F. Cafaggi, and L. Senden (eds) (2011), *The challenge of transnational private regulation: Conceptual and constitutional debates* (Oxford: Wiley-Blackwell)

Seabright P. and J. von Hagen (eds) (2007), *The economic regulation of broadcasting markets*, (Cambridge: Cambridge University Press)

Školkay, A., M. Hong and R. Kutaš (2011), *Case study report. Does media policy promote media freedom and independence? The case of Slovakia*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Smilova, R., D. Smilov and G. Ganev (2011), *Case study report. Does media policy promote media freedom and independence? The case of Bulgaria*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Stokes, S. (2001), *Art & copyright* (Oxford: Hart Publishing)

Stone, A. (2011), 'The comparative constitutional law of freedom of expression', in Dixon and Ginsburg (2011), 406-421

Strowel, A. (1993), *Droit d'auteur et copyright. Divergences et convergences. Étude des droit comparé* (Brussels, Paris: Bruylant and L.G.D.J.)

Stucke, M. E., and A. P. Grunes (2001), 'Antitrust and the marketplace of ideas' in 69 Antitrust Law Journal 249.

Stucke, M. E., and A.P. Grunes (2009), 'Toward a better competition policy for the media: The challenges of developing antitrust policies that support the media sector's unique role in our democracy', 42 *Connelly Law Review* 101

Sustain, C. (2001), *Republic.com* (Princeton: Princeton University Press)

Švob-Đokić, N., and P. Bilić (2011), *Case study report. Does media policy promote media freedom and independence? The case of Croatia*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Tambini, D., D. Leonardi and C. Marsden (2008), 'The privatisation of censorship: self regulation and freedom of expression', in Tambini, Leonardi, and Marsden (2008), 269-289

Tambini, D., D. Leonardi and C. Marsden (2008), *Codyfing cyberspace – Communication self-regulation in the age of Internet convergence* (Abingdon: Routledge/UCL Press)

Ugland E., and J. Henderson (2007), 'Who is a journalist and why does it matter? Disentangling the legal and ethical arguments', *Journal of Mass Media Ethics* 22, 241-261

Vaidhyanathan, S. (2001), *Copyrights and copywrongs – The rise of intellectual property and how it threathens creativity* (New York: New York University Press)

Van Besien, B. (2011), *Case study report. Does media policy promote media freedom and independence? The case of Belgium*, report for the MEDIADEM project (FP7-SSH-2009-A no. 244365), available at: http://www.mediadem.eliamep.gr/findings/, date accessed 25 July 2012

Van Besien, B., P.-F. Docquir, S. Müller and C. Gusy (2012), 'Media freedom and independence. The European judicial approach in fourteen countries', in MEDIADEM (2012), 158-188

Van Dijk, P., Hoof, G.H.J., Heringa, A.W. (eds) (2006), *Theory and practice of the European Convention of Human Rights* , 4° ed, (The Hague: Martin Nijhoof Publishers)

Van Rijn, A. (2006), 'Freedom of expression (Article 10)', in Van Dijk et al. (2006), 773-816

Verpeaux, M. (2010), *Freedom of expression: in constitutional and international case law* (Strasbourg : Council of Europe Publishing)

Voorhoof, D., and H. Cannie (2010), 'Freedom of expression and information in a democratic society: The added but fragile value of the European Convention on Human Rights', in *International Communication Gazette*, vol. 72, p. 407-423

Werkers, E. (2011), 'Intermediaries in the eye of the copyright storm, A comparative analysis of the three strike approach within the European Union', ICRI Working Paper 4/2011, available at: http://ssrn.com/abstract=1920271, date accessed 25 July 2012

Wu, T. (2010), *The master switch – The rise and fall of information empires* (New York: Knopf Doubleday Publishing Group)

Wunsch-Vincent S., and Vickery, G. (2010), 'The evolution of news and the Internet', OECD available at http://www.oecd.org/document/48/0,3343,en_2649_33703_45449136_1_1_1_1,00.html, date accessed 25 July 2012

Xalabarder, R. (2012), 'Google news and copyright' in Lopez-Tarruella (2012), 113-168

Yen, A. (2010), 'A preliminary First Amendment analysis of legislation treating news aggregation as copyright infringement', in *Vanderbilt Journal Of Entertainment And Technology Law*, 12, 4, 950

Yourow, H. C. (1996), *The margin of appreciation doctrine in the dynamics of European Convention of Human Rights jurisprudence*, (The Hague: M. Nijoff Publishing)

Yu, P. (2011), 'The graduated response', *Florida Law Review*, 62, 1373-1430

Zaccaria, R. and A. Valastro (2010), *Il diritto dell'informazione e della comunicazione* (Padova: Cedam)

Annex - Additional comparative tables

Table 1. Competition v. regulation

	Competition authority	***Media authority***
Belgium	Conseil Supérieur de l'Audiovisuel (CSA) and Vlaamse Regulator voor de Media (VRM) play a major role in monitoring the competition, they publishing information on the ownership and the degree of concentration of the media, and as regards written press, they are responsible for reporting on the degree of concentration in the market (incidentally), not for monitoring compliance with the regulations. VRM has limited power to act directly against concentration, whereas CSA is responsible for negotiating with or imposing sanctions on editors with a dominant position that threatens pluralism. Federal Competition Council obliged to approve mergers unless there are serious doubts suggesting that effective competition on the Belgian market or a substantial part thereof will significantly be obstructed.	CSA regulates French Community broadcasts, VRM regulates Flemish Community broadcasts.
Bulgaria	Anti-trust Commission	Council for Electronic Media handles monitoring of compliance with the requirements of the RTA in general, but also the (content) licensing of the TV and radio operators and the appointment of the directors and the approval of the governing bodies of the Public Service Media
Croatia	Agency for Market Competition Protection and Electronic Media Council	Croatian Chamber of Economy (CCE) and Electronic Media Council (EMC)
Denmark	Danish Competition and Consumer Authority	Radio and Television Council
Estonia	Estonian Competition Authority	Ministry of Culture (only for broadcasting) and the public broadcasting council (for PSM)
Finland	Finnish Competition Authority	Finnish Communication Regulation Authority
Germany	Federal Cartel Authority is in charge of monitoring and enforcing antitrust Reg; Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen is in charge of	State Media Authorities (SMA) in charge of monitoring private broadcasters, Commission on the Concentration in Media (KEK) and the Regulierungsbehoerde für Telekommunikation und Post

	monitoring competition regulation	
Greece	Hellenic Competition Committee (HCC) for the media sector National Telecommunications and Post Commission (NTPC), for the electronic communications sector	National Council for Radio and Television (NCRT)
Italy	Italian Authority for Competition and Market (AGCM)	Italian Communication Authority (AGCOM)
Romania	Competition Council	National Broadcasting Council (CNA)
Slovakia	Antimonopoly Office (AMO)	Board for Broadcasting and Retransmission (RVR) Council of RTVS supervises only the activities of PSM.
Spain	National Competition Commission (CNC)	State Council on Audiovisual Media (CEMA) at national level, but not yet established
Turkey	Competition Authority	Information and Communication Technologies Authority, and the Radio and Television Supreme Council
UK	Office of Fair Trading and Competition Commission oversee compliance with general competition law rules, also in the media sector. Ofcom has specific and parallel powers to ensure fair competition in the markets it regulates, notably radio and television broadcasting.	Separate bodies for different media. Ofcom for broadcasting, PCC for press, BBC Trust for BBC, ASA for advertising, ATVOD for VOD and BBFC for film and video classification.

Table 2. Media regulatory authority - Territorial dimension

	Regulatory authority – national level	***Regulatory authority – regional level***
Belgium	Belgian Institute for Postal and Telecommunication Services (BIPT), also works together with CSA and VRM in the Conference of Regulators for the sector of Electronic Communications (CRC)	Conseil Supérieur de l'Audiovisuel (CSA), Vlaamse Regulator voor de Media (VRM)
Bulgaria	Anti-trust Commission, Council for Electronic Media (CEM)	Not present
Croatia	Agency for Market Competition Protection and Electronic Media Council, Croatian Chamber of Economy (CCE) and Electronic Media Council (EMC)	Not present
Denmark	Danish Competition and Consumer Authority, Radio and Television Council, Telecom Regulator	Not present
Estonia	Ministry of Culture and Public Broadcasting Council	Not present
Finland	Finnish Competition Authority (FICORA)	Not present
Germany	Federal Cartel, Regulierungsbehoerde für Telekommunikation und Post	Fourteen independent State Media Authorities (SMA) are vested with the power, based on statutory law, to assess private broadcasters' licence procedures and programme performance
Greece	National Council for Radio and Television, Hellenic Competition Committee, National Telecommunications and Post Commission	Not present
Italy	Italian Communication Authority (AGCOM)	CoReCom, Regional Communication Committees with delegated powers and responsibilities from AGCOM
Romania	National Broadcasting Council (CNA), Competition Council, Telecom regulator	Not present
Slovakia	Board for Broadcasting and Retransmission (RVR), Slovak Television Council (STC) and the Radio Council (RC) supervise the activities of PSM, AMO, telecom regulator	Not present
Spain	State Council on Audiovisual Media (CEMA), National Competition Commission (CNC), National Telecommunication Authority and Commission for the Telecommunication Market (CMT)	Not present
Turkey	Information and Communication Technologies Authority, Radio and Television Supreme Council	Not present

UK	Office of Fair Trading	Not present

Table 3. Case law regarding constitutional dimension

	Constitutional court	***Civil court***
Belgium	Constitutional court extends protection of journalistic sources also to non-professionals	Court of Cassation strictly interpret freedom of the press (art. 25 Const.) only to 'written press'; moreover it strictly interpret 'press offences' only to written press whereas Court of Appeal extends it also to comments on Internet by non-journalists (plus ECtHR jurisprudence) Court of Cassation interprets art. 25 Const. as applying only to prior censorship of press: the prohibition of censorship applies only if there has not yet been any dissemination) possible injunctions regarding newspapers and magazines after distribution. Whereas possible injunctions prohibiting programming for radio and broadcast are possible also beforehand.
Bulgaria	The special status of the press was upheld in a decision of the Bulgarian Constitutional Court (BCC). 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*".	
Croatia	Not mentioned in the report	
Denmark	ECtHR case law has gained importance in relation to national law: rulings of the ECtHR have effectively superseded existing national legislation in terms of their relative weight in rulings on freedom of expression. It thus increased protection of freedom of expression, since Danish courts' interpretation of ECtHR rulings indicates that they prioritise freedom of expression higher, not least in relation to privacy and defamation.	
Estonia		The judiciary plays a very important role although there are relatively few lawsuits against the media: for this case study approximately 40 lawsuits were counted since 2000. Still, the Supreme Court in particular has been increasingly active in creating the elaborated discourse on freedom of expression and its conflicting rights.

		Quite often the Supreme Court has reached very different interpretations of the law concerning the media-related cases in comparison to what has been decided by the first and second degree courts. The tendency is that the first and second degree courts usually protect press freedom without balancing it carefully against the rights of individuals.
Finland	No constitutional court	
Germany	The German Federal Constitutional Court has shaped broadcasting law, the competences to adopt law between federal and state (Länder) level on broadcasting, the role of the press in democratic societies, the dual broadcasting order, protection of privacy, protection of sources for journalists, etc.	ECHR interpretation concerning journalists' protection of source is in contrast with the German Penal Code of Procedure and its interpretation by the courts. However, the German legislation exceeds the protection granted by the ECtHR in general, as it is prohibited in some cases to search the premises at all.
Greece		First instance decision 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. At the same time, 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. Another recent court decision addressed the responsibility of the blogger, who is often an ordinary citizen, in cases of offence or insult: as he is not a powerful media entrepreneur, 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. (This seems to becoming now settled case law)
Italy	The case-law of the Constitutional Court does acknowledge the principle of freedom of information in order to limit the overarching power of media companies, using it as a basis for the justification of the provision of a plurality of voices able to guarantee a 'free public opinion'. In this sense, the decisions of the Constitutional Court progressively defined a distinction between internal and external pluralism, providing regarding the latter the possibility to access the market for any potential competitor; while the former applies, mainly but not exclusively, to the public service broadcaster imposing not only impartiality in the provision of information but also the obligation to allow any political, cultural, social and religious	Domestic courts (civil and criminal) had and have also an important role in defining the balance between freedom of speech and expression and other constitutional freedoms and rights: they have played in several occasions a very proactive role in guaranteeing media freedom and independence as they interpreted the effective balance between freedom of expression and information and other constitutional rights (honour, privacy, public and private secrets) and are progressively building up, sometimes with difficulties and non homogeneous interpretations, a case law on Internet issues. The Supreme Court not only affirmed the coordination between art. 21 Const. and art. 10 ECHR so as to protect the freedom to seek, impart, and receive information without interference from public authorities, but it also acknowledged in relation to the press and media in general the role of

	opinions access to the media In relation to press offences, '*the Court has repeatedly held that freedom of expression is the foundation of democracy and that the press, seen as an essential tool of such freedom, must be safeguarded against any threat or coercion, whether direct and indirect*'.	privileged *fora* to disseminate information about public interest issues (such as fairness and impartiality of judiciary, in the specific case). The Court stated that '*the fundamental role played by press in the democratic debate does not allow to exclude that it could criticise the judiciary, being newspapers "watchdogs" of democracy and institutions, including judiciary, as already affirmed by ECtHR*.'. The Court founded its judgement on the jurisprudence of the Strasbourg court, emphasising that the press is the most important means to guarantee appropriate control over the judges' activity.
Romania	Not mentioned in the report	Not mentioned in the report
Slovakia	the Constitutional court is not fully consistent in its rulings due to the occasionally different rulings of its Senates in identical issues, although it does prefer freedom of speech and the press in relation to rights of public personalities, and demands consistency in the rulings of other courts. Slovakia has polylegal constitutions which means that there are more legal documents (constitutional acts) than just the text of the Constitution. Legal system is based on continental Roman law with historical influence of German (Austrian) tradition of law. Currently there is ongoing slow process of assimilation of continental system of law with Anglo-Saxon system of law in Slovakia. This means that there is some presence of application of system of precedences, at least in decision-making of the Supreme Court and especially of the Constitutional Court. However, officially, judges are independent in their decision-making. There is an explicit duty of general courts to take into account in their decision-making relevant judicature of the ECHR. This duty has been re-affirmed in Finding IV. ÚS 107/2010 of the Constitutional Court. Some even argue that Constitutional Courts decisions are only second - after the Constitution - the most important source of constitutional law.	
Spain	The Constitutional Court has long established the basis for a constitutional understanding of the freedoms of expression and information. Constitutional case law has steadily argued that the	Civil courts have competence for the civil protection of the rights of honour, personal and family privacy, and also the right to personal image. Since the entry of private television into the audiovisual market, they have actively dealt

	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.	with issues related to the protection of those rights vis-à-vis alleged violations by the media. They have not always acted in accordance with the criteria set out by the Constitutional Court, something which has led to judicial controversies between both bodies. Some argue that the recent case law of the civil section of the Supreme Court shows a change of approach, the Court being now less favourable to media and more protective of other fundamental rights.
Turkey	The Turkish Constitutional Court's case law on freedom of the press and expression is also problematic. The Court has declined to review restrictive criminal laws, even when the head of the executive branch has called on it to do so. In a case brought by the former President Ahmet Necdet Sezer on the grounds that the suspension of the future publications and distribution of a periodical infringed upon freedom of the press, the Constitutional Court found Article 6(5) of the Anti-Terror Law to be compatible with the Constitution and rejected the request for annulment (Constitutional Court, 2009). Where the parliament adopted progressive legal reforms in accordance with the ECHR standards, on the other hand, the Constitutional Court overturned such changes. On 2 May 2011, the Constitutional Court invalidated Article 26 of the Press Law, which imposes time limits on prosecutors for launching criminal cases. Once this decision enters into force in July 2012, prosecutors will no longer be bound to certain time restraints if they want to file a case about a publication in a periodical. Currently, the maximum period for filing a case is two months after publication for dailies and four months for weeklies.	In civil cases, high courts tend to go against the established ECtHR case law by ruling in favour of plaintiffs who bring defamation cases against intellectuals and public personalities. In March 2011, the High Court of Appeals sentenced Nobel laureate Orhan Pamuk to pay around a 2,500 Euro fine for having 'violated the personalities' of plaintiffs for having stated in an interview that the Turks 'killed 30,000 Kurds and one million Armenians.' The judgment raised deep concerns that it would open the gate to a flood of defamation cases against Pamuk and any others who express opinions contradicting Turkey's official narrative on the Kurdish question and the Armenian genocide.
UK	no constitutional court	All civil and criminal courts are required by the Human Rights Act 1998 to give effect to 'Convention Rights' wherever possible when interpreting and applying statutes (save where unambiguously prevented by primary legislation). Courts are required to have regard to European Court of Human Rights jurisprudence in the field and thus seek to balance freedom of expression with other Convention rights such as privacy, without giving either any special priority.

Table 4. – Is media ownership covered by both competition law and specific media ownership rules?

Belgium	Distinction between telecommunications (federal law) and broadcasting (communities law). Radio, television and cable distribution all fall under the authority of the Communities. Primarily governed by competition law and in particular Competition Act of 10 June 2006 – in general, no special laws/obligations regarding ownership, except express rules regarding TV and radio. French Community, CSA monitors under French Community Broadcasting Act and seek to ensure plurality of media players – no equivalent in Flemish regulation. Flemish VRM monitors under Flemish Community Broadcasting Act. Specific cross-media ownership focuses on individuals, and interaction between politicians and media. Rules regarding net neutrality currently being developed. No separate or distinct rules for online media, except that public broadcasters in Flemish region must have permission from government for new service or activity that is not yet included in the management contract.
Bulgaria	In transition 'to free market and democracy, private press and commercial cable TV and radio underwent rapid growth under conditions of lack of special media regulation'. Two laws for licensing and registration of radio and TV operators – Radio and Television Act and Electronic Communications Act (repealing the Telecommunications Act). Competition for licenses run by SCT, a government agency, provoking calls of political interference in granting of licenses. Broadcasters regulated by art.18(3) of the Constitution, where it is stated that state has sovereign right over radiofrequency spectrum. Appears to be chaos between 1998 and 2005, when change in governing coalition pledged to 'normalise the licensing of the broadcast media'. However, no advance in openly distributing remaining radio frequencies, and conflict between two regulatory bodies, CEM and CRC. Many operators sidestep onerous and difficult rules, resulting in high level of concentration and cross-media ownership. Move to digitalisation with new rules, including prevention of TV/radio operator running for bid to build multiplex. Reason given to prevent vertical integration of media ownership, but report suggests has been done to give preference to powerful individuals/associations and prevent competition. European Commission has started infringement proceedings against Bulgaria, and is concerned that freedom of the media is declining since accession. Lack of transparency regarding media ownership. Specific media-ownership rules contained in the RTA refer to general anti-trust law, but law does not prohibit monopoly and has no clearly defined rules for determining dominance. No cross-media ownership rules, and there is high level of concentration, with an association owning most major newspapers, several television channels, and a distribution network for print media.
Croatia	Progress reports for 2009 and 2010 stress uncompetitive state support for national audio-visual production and need for competitive environment. Regulation of online media still very limited. Telecommunications market shows new concentration trends, with takeover of B-Net by VIP creating strong national operator in telecommunications market of Internet services, cable television, mobile and fixed telephony. Commercial pressure is significant, advertisers deemed to hold more power and influence over media than politicians can exert. Insufficient ownership transparency. Concentration in field of print media restricted through Media Act, in electronic media in Electronic Media Act and in telecommunications through Electronic Communications Act. Media Act states that all media organisations must register with Croatian Chamber of Economy which keeps register of ownership structure etc. Currently it only registers print media, as Electronic Media Act dictates Electronic Media Council (VEM) must hold data on electronic media. VEM also grants concessions to radio and television publishers. Concentration above 40% of total sales of weeklies and dailies prohibited in print. Horizontal and vertical concentration for television, radio and print prohibited. No explicit rules on determining relevant markets except for Regulation on Determining Relevant Markets, which has no specific media market component. No restrictions on foreign ownership, but owners must be registered in Croatia. Specific ownership rules sectioned under protection

	of pluralism and diversity in electronic media.
Denmark	No ownership rules regarding Danish media, politicians and religious groups can own media. Danish Competition Act 2007 prohibits anti-competitive agreements etc. and the abuse of a dominant position. In general, ownership is subject only to competition regulation.
Estonia	Press market not regulated with specific targeted legislation. General laws regarding ownership, competition, advertising etc apply. There is no specific legislation for launching new publications on or offline, and foreign ownership is not restricted. Estonian media enjoys lightest possible regulation, or no regulation at all. In addition, no specific broadcast media ownership either. Only regulation on media concentration is Media Services Act, which states that license may not be granted in cases where the applicant 'by means of the governing effect over management connected to the undertaking that has been granted the activity license for provision of television and radio service ' may substantially damage competition. Provision appears declarative in nature.
Finland	Competition primary means of regulating media ownership. Foreign ownership permitted, and cross-media ownership common. Minimal regulation achieved through competition regulation.
Germany	State is simultaneously obliged to adopt actively organisational, fiscal and procedural regulations to guarantee free and independent public service *broadcasting*. Strong emphasis on plurality and prevention of dominant voices in the media. Interstate Broadcasting Treaty governs public and private broadcasting. Every state has adopted laws applying to private broadcasting. In comparison, little regulation of print media. Strict rules on ownership or membership of public media broadcast board if a politician. Forbidden in private media. With regard to dominant position, competition law applies. Cross-media ownership limited in order to prevent dominance.
Greece	Strong 'paternalistic' control of media by government. Cross-media ownership, or ownership of more than one media of the same type, appears to be forbidden by Greek law. Various ownership restrictions were erased with Law 3592/2007. So now, cross-ownership is allowed provided that it does not lead to concentration of control. Little regulation of structure of press, but strong control of broadcast media, with strong licensing provisions. Law 3592/2007 seeks to liberalise (or at least legitimise status quo in which these ownership rules were ignored). So it erased ownership restrictions but introduced a media specific-component to competition law concerning the assessment of concentrations between media undertakings. 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. However, focus is strictly economic, and does not take into account issues such as audience share. There are sector-specific regulations dictating assessment of pluralism in competition issues however – I am not sure what you mean by the last phrase – the sector-specific regulation is what is provided by Law 3592/2007. The abuse of a dominant position is also prohibited.
Italy	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. Dominant with more than 20% of national market, or 50% of regional. Law 223/1990 which provided for a single set of rules, applicable regardless of the type of media, which dictates ownership. Includes maximum number of licenses assignable to national broadcaster, prevent cross-media ownership where publisher in control of more than 16% of newspapers, limits on advertisers. Deemed out of line with Court decision, stated that *"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.)"*. Now have laws 249/1997 and 112/2004, which rely on competition principles. Imposition of rule regarding media pluralism, but somewhat criticised.

Romania	Market displaying increased concentration. No legislation which limits concentration of property in print media, and cross-ownership not regulated at all. Broadcasting law 2008 prohibits company holds more than 30% market share. Complicated system, taking into account type of market (local/regional/national), share held by a legal person, audience or market share, composed into weighted average. Dominant once hold 30% of relevant market. Pre-2008, only requirement that could not hold more than 20% share in another television company if one already owned. Limitation forms an attempt to limit influence of a person over public opinion.
Slovakia	Structural regulation largely created 'ad-hoc' rather than on basis of clear strategy. Main factor in structure not legislation, but *'size or affluence of market'*. Laws exist which prevent vertical or horizontal concentration, including Act on Broadcasting and Retransmission art. 43 and Act on Digital Broadcasting art. 51, which prevents concentration between broadcasters, between broadcasters and print media, between independent TV or film producers and broadcasters, etc. According to these acts, mergers in cases of a less than 25% share are deemed irrelevant. Rules on foreign ownership in audiovisual media and radio broadcast. In print sector, publisher must inform about ownership structure during registration and then each year.
Spain	Primarily dictated by competition provisions on basis of constitutional establishment of free market. No general cross-media ownership provision, although there are sector-based rules. In broadcast, Statute 7/2010, which dictates that broadcasters must hold government-issued license. Provisions on social, non-profit media and maximum income. Licensee must be domiciled in EEA or third country with reciprocity, with third country individuals and entities subject to maximum shareholding provisions. In order to ensure pluralism, limits on individual shareholdings within media company, also permissible to have shares in more than one, subject to threshold on audience share.
Turkey	No ownership restriction on the press, pursuant to art. 28 of the Constitution and art. 3 of the Press Law. Subject only to registration requirement, where required to provide basic information about printing facilities to office of local Chief Prosecutor. Broadcasting companies subject to licensing requirement under art. 26 of Constitution, on grounds that they use finite resource (frequencies). However, due to political turbulence, only a limited number of licenses have been given out. Appear to be a significant number of temporary licenses granted. Broadcasting Law (no. 6112), Article 26(4) reassigned task of frequency planning to RTÜK sorting tender – report suggests seeks to protect pre-existing market players. Diversity and competition in market safeguarded by regulatory framework, although 2002 amendment changed ownership criteria. If annual viewing or listening ratio of television or radio enterprise exceeds 20%, then capital share of real or legal person should not exceed 50%. Highest ratio so far 16%, indicating legal limit too difficult to reach. Amendment also removed cross-ownership restriction. Appeared to be little if any legal restrictions on media ownership – high market concentration, with one media company owning 244 local and regional and 30 (medium sized) national stations. After Constitutional Court challenge, now have Broadcasting Law (no. 6112) of 2011, which expressly states that only corporations may establish radio or TV stations – political parties, trade unions, professional organisations, cooperatives, associations and local administration forbidden from owning. Article 19 introduced limitation on media ownership based on terrestrial broadcasting licenses. Share of commercial communication, advertising revenues and other sponsorships considered criteria for protecting competition and preventing monopolisation.
UK	Communications Act 2003 allocates OFCOM over structure and content of communications market. BBC Trust governs BBC, Authority for Video on Demand (ATVOD) governs online media to comply with AVMS. Sector-based regulation as well as competition law provision.

Table 5. Is competition law considered to be sufficient to ensure a plurality of opinions in the media?

Belgium	Appears, subject to separate regimes for Flemish and French Communities, Additional rules regarding cross-media ownership and role of politicians in media. No major case law on plurality of opinions. No concrete projects for law reform.
Bulgaria	There are serious concerns regarding media ownership and pluralism in Bulgaria, with pluralism not appearing to be a concern to regulators. The concern is serious enough that the European Commission has begun proceedings against Bulgaria in 2011.
Croatia	Competition law alone does not appear to be considered sufficient for ensuring plurality and diversity, with sector specific laws implemented, and additional competition criteria applied in cases of media ownership (p.18). Competition law expressly seen as an additional tool, rather than the only method of ensuring plurality (p.19).
Denmark	Competition law appears to be largely considered sufficient in Denmark, although *'In its analysis, the Competition and Consumer Authority came to the conclusion that free choice of individual television channels is unlikely to result from the market itself, but requires legislation'* – such legislation has not yet been drafted, according to the report.
Estonia	Competition law is not considered a relevant tool for plurality of opinions in the media
Finland	Competition law appears to be considered sufficient in Finland.
Germany	Deemed insufficient – Federal Constitutional Court reiterates that pluralistic broadcasting necessary for a democracy would be endangered under the sole regime of market forces, and that it recognises indirectly the failure of the market to guarantee a pluralistic media.
Greece	Significant questions raised over media plurality in Greece – competition law deemed ineffective in ensuring plurality of opinions. Some suggestion that this is deliberate. See also my comment above in your previous table
Italy	Competition law combined with media pluralism requirement in order to prevent political pressure in concentrated market, although effectiveness has been criticised.
Romania	Purpose of competition law seen as being to protect pluralism and cultural diversity (p.19), report considers that problem is not due to use of competition law, but limited effectiveness of regulators.
Slovakia	It appears from the report that competition law is largely considered sufficient, subject to express sector-specific legislation in field of competition.
Spain	Can be inferred from report that predominantly relies upon competition law, subject to express rules regarding concentration of ownership.
Turkey	Concerns raised in report that neither sector-specific legislation, nor competition law involvement sufficient to ensure plurality, diversity and freedom of media. Although legislation appears to be in line with AVMS Directive, this not considered enough to ensure that it *'is a democratic piece of legislation'*.
UK	Competition law alone not seen as sufficient by UK government. Relies on combination of competition law and specific media regulation in order to ensure media pluralism.

Table 6. – In the context of competition analysis, are different media (print, broadcast, etc) treated as separate markets?

Belgium	On the basis of information provided regarding cross-media ownership and the specific competences of the audiovisual media regulators, there appears to be a general consideration of different media being considered as forming separate, distinct markets.
Bulgaria	There is no indication from the report how different media are treated in competition evaluation in Bulgaria.
Croatia	Report seems to indicate that an evidence-based approach is used by competition authorities, applying general competition principles, such as degree of substitutability between forms of media. There is a lack of media-specific competition regulations which expressly determine how media market structures are to be considered, and whether different forms of media are considered as forming distinct markets.
Denmark	The competition authority takes a case by case approach.
Estonia	Too little case law to evaluate. Very small market after all.
Finland	Both broadcast and print media are regulated under same competition regime.
Germany	Based on inference from the report, competition analysis appears to treat print, broadcast and online markets as separate and distinct, unless cross-media ownership may lead to the creation of a dominant voice/opinion.
Greece	The scope of application of Law 3592/2007 covers the horizontal and diagonal concentrations between media enterprises that affect the broadcasting market or the circulation markets of newspapers and magazines. Concentrations in other markets that are relevant for the media (i.e. the market of content production, the market of rights acquisition, the market of content distribution or the press printing market) and concentrations that involve media companies operating at different levels of the supply chain (i.e. upstream and downstream markets) are not assessed on the basis of Law 3592/2007. This is also the case regarding concentrations between media enterprises and undertakings in other sectors of the economy, concentrations that implicate media enterprises with an online presence only, and the evaluation of the vertical effects that the concentrations coming under the scope of Law 3592/2007 may produce. General competition law applies in all these cases and hence, standard competition assessment takes place, without taking into account particular pluralism considerations in an explicit manner. Law 3592/2007 law identifies as relevant media markets the following markets: television, radio, newspapers and magazines. This obstructs the determination of smaller media markets or sub-markets that would have facilitated the finding of a dominant position and thus prevent concentration. As a result, concentrations between media undertakings that might have been prohibited under general competition law (or perhaps allowed with remedies) are permitted under Law 3592/2007.
Italy	Appears to be determined by AGCOM based on market investigations.
Romania	It appears from the report that this is determined by case-by-case analysis.
Slovakia	Not immediately clear from the report, although it appears to suggest that the different forms of media are considered to constitute one market. Appears to treat print and broadcast as separate markets, but there is also ban on cross-ownership of print, radio and tv media at the same time.
Spain	Appears to treat print and broadcast as separate markets.
Turkey	This does not appear to be addressed in the report.
UK	OFT adopts an 'evidence-based approach', evaluating the degree of competition and substitutability among different media services on a case-by-case basis.

Table 7. – What objectives does competition law pursue in relation to the media?

Belgium	Mainly economic objectives, although takes into account objectives of independence from state control and some considerations of pluralism in broadcast media (at least for French-language media), although does not appear to hold any concerns with regard to print media.
Bulgaria	It appears the intent of the competition regulation seeks economic aims, i.e. in order to prevent dominance by a particular media entity. The laws appear to have little effect however, according to the report.
Croatia	The role of competition regulation in media is to ensure ownership transparency and concentration restrictions through the Media Act and Electronic Media Act.
Denmark	Seeks to ensure consumer and economic protection.
Estonia	The objectives of competition law are those of competition law more generally, i.e. economic protection.
Finland	Aims to ensure freedom of expression, and access to information, in addition to economic arguments. Diversity and pluralism implicitly taken into consideration
Germany	Economic objectives are the key concern for the competition provisions Federal Cartel Authority implements. The main concerns appear to be for independence and ensuring plurality of opinions when the KEK decides.
Greece	Law 3592/2007 (including provisions on media mergers) is concerned with the issue of pluralism. Although Law 3592/2007 provides no normative definition of pluralism, it has introduced the concept of 'concentration of control in the media market'. This is defined as the percentage at which the public is affected by the media, in combination with ownership of, or participation in media undertakings of any type. Concentration of control, which thus builds on both structural market features (i.e. ownership) and the degree of influence that the media can exert on public opinion, denotes dominant position. A dominant position is established when precise market shares are exceeded. These follow a gradually declining scale from 35% to 25%, depending on the number of the media markets in which an operator is involved. The law prohibits concentration when one or more of the media undertakings concerned enjoy a dominant position or when a dominant position is the result of the concentration itself. Questionable role, explicitly makes mention of pluralism, however effectiveness is strongly debated. Appear to be concerns as to application and enforcement of competition law in regulation of Greek media.
Italy	Appears to be based on a strong concern over market concentration and the explicit objective of ensuring pluralism in the media.
Romania	According to the report, competition policy seeks to *'protect pluralism and cultural diversity, ownership concentration and the extension of the audience in the audio-visual field are limited to dimensions that can secure economic efficiency, but to not generate a dominant position in influencing the public opinion'.*
Slovakia	Competition law, in addition to the sector-specific legislation, appears to be pursuing objectives of pluralism in addition to standard economic objectives.
Spain	Competition provision appears to be based purely on free market principles, rather than having explicit and specific concern for independence, pluralism or democracy. This is especially the case when considering print media.
Turkey	*'The Competition Authority is required to assess whether basic rules of competition have been violated, a dominant position in the market has been created, and, if so, whether such dominant position has been abused'.* Appears the objective of competition regulation is a general economic one, rather than the ensuring of media pluralism or diversity.

UK	Economic and pluralism concerns

Table 8. – Do competition authorities take into account (implicitly or explicitly) considerations about media pluralism when applying competition rules to the media sector?

Belgium	Pluralism appears to be taken into account when making decisions regarding media (at least for French-language media), although competition authority does not take into account specific concerns about plurality of opinions in making decisions
Bulgaria	Competition authority does not apply sector-specific rules in media cases
Croatia	*"Competition law does not have any specific rules on taking into account media diversity nor has it been modified for that purpose."*
Denmark	*"The aim of competition law is, however, not to ensure media pluralism, but to guarantee that the market operates efficiently, to the benefit to society and consumers. There is no notion of freedom of expression in the Competition Act, which underpins how competition is solely perceived as an economic issue"*
Estonia	Not clear from the report, although the minimal interference approach adopted by the Estonians may suggest that diversity or plurality are not taken into account in competition cases.
Finland	*"Although there is no specific definitions or regulations focusing on diversity and pluralism, both are implicitly taken into consideration when regulating competition, providing licences and monitoring the compliance with the regulations."*
Germany	*"The Commission on Concentration in the Media implements the applicable law and deals with concentration developments in Germany by examining what operator draws what percentage of viewers. Concurrently, it assumes an important position within the frame of national media concentration supervision."*. KEK is not a competition authority. This is the Federal Cartel Authority. Both authorities can test one case. For instance, the intended acquisition of the commercial broadcaster ProSiebenSat.1 Media AG by the large publisher Springer AG was prohibited by the KEK on opinion domination considerations and by the Federal Cartel Authority out of competition concerns.
Greece	Competition authorities appear to both implicitly and explicitly consider issues of pluralism in assessing market structures. However, as indicated in table n.8, the effectiveness of competition regulation is heavily contested in Greece.
Italy	It appears that while pluralism issues may be implicitly considered in competition regulation, cases such as Newscorp appear to suggest that it is not particularly effective in ensuring it.
Romania	Based on quote given in table n. 8, does explicitly take pluralism and diversity into account.
Slovakia	There is no explicit consideration for pluralism in competition regulation
Spain	While pluralism may be taken into account in the decisions of CEMA, it does not appear to be the case when considering the actions of the national competition authority.
Turkey	Competition law does not appear in any way to take into account issues of pluralism. A lack of pluralism is seen as a concern in Turkey, according to the report.
UK	Sector-specific regulation relating to competition may be explicitly acted upon and considered in competition evaluation, but only after intervention notice has been given by Secretary of State, under s. 42 of the Enterprise Act 2002.

Table 9. Press council regulatees

	Journalists	**Press**	**Broadcasting**	**New Media**
Belgium[174]	X	X	X	
Bulgaria	X	X	X	
~~Croatia~~				
Denmark	X	X	X	X
Estonia	X	X		
		X	X	X
Finland	X	X	X	X
Germany	X	X		
~~Greece~~				
~~*Italy*~~				
Romania	X	X		
Slovakia	X	X	X	X
Spain	X	X		
Turkey	X	X	X	
UK		X		

[174] Press council also includes members of civil society.

Table 10. What are the rationales for private regulation?

Belgium	Preference to self-regulation in journalistic activity, mainly based on non-interference principle whereby public authorities are expected to not intermingle with the media sector (especially as concerns the written press). Culture of negotiation between journalists and media owners (and financing by the State). Also partly based on the possibility to address all media whereas government regulation would only address on a sectorial basis (no jurisdiction for federal government for audiovisual media)
Bulgaria	EU accession process (Phare project)
Croatia	Not mentioned in the report.
Denmark	In a historical context, the press council is also the result of more than 30 years of negotiation between media owners, journalists and the State, which served both principled (introducing self-regulation in the press), and practical requirements (keeping the caseload following a sharply rising supply of media content away from the courts)
Estonia	Limit intervention by state at the beginning then increasing industry power (in the creation of the 2002 press council)
Finland	Not mentioned in the report.
Germany	German Press Council was established to prevent the legislature from establishing a statutory control mechanism. Publishers and journalist associations feared the installation of control organs under the auspices of the state. The press council's existence was intended to curb state influence.
Greece	Recognition of the fact that freedom of expression comes with responsibilities.
Italy	Revision of previous control by state (Fascist period) providing wider recognition of freedom of expression of journalists and then (when Mani pulite scandal emerged) threat of state regulation This particular protection assigned to the press can be easily referred to as a reaction to the lack of freedom that the Italian press experienced during Fascism: the Constitution wanted to reaffirm first that freedom of the press was a 'liberal' right safeguarded by avoiding public powers to interfere with it. One of the first laws produced by the Constitutional Legislative Assembly was, accordingly, the law on the press, which is the Italian milestone of protection and regulation of the printed media.
Romania	Self-regulation was never a really functional mechanism in Romania. Until present, there have been a number of attempts that emphasised the need to adopt an ethics code, but none was implemented. Romanian newspapers were not fully-fledged press institutions but were seen as institutions centered on some personalities, some "star" columnists. Their will represented the rules and no other rules were needed. Most of the Romanian media outlets, especially the newspapers, never made the transition towards fully-fledged institutions in order to function independently and following predictable rules.
Slovakia	More influential is tradition, foreign examples/directives, and state pressure to regulate. For example, broadcasters claim that they would introduce self-regulation in broadcasting if there was not state (public) regulation. Similarly, publishers introduced self-regulation in the press sector, rather than having state regulation imposed.
Spain	Recent trends toward reform of press regulation: draft legislation proposed by journalist association, Organic Statute on the Guarantees of the Right to Information of Citizens defines professional journalist and includes a system of co-regulation. Traditionally, self-regulation has been the main regulatory instrument in the printed press and, indeed, the draft sets out some deontological principles that should guide journalists'

	activities. But now, according to art. 25 of the draft, a Co-regulatory Council for Journalism should be created. This Council would be in charge of guaranteeing compliance with deontological principles and is comprised of representatives from various sectors: journalists' trade unions, communication companies, lawyers, journalism schools, consumers' associations, human rights NGOs and regional co-regulatory councils, in the event that these are created.
Turkey	Not mentioned in the report.
UK	Limiting state intervention in press regulation

Table 11. How has the definition of journalism and journalists changed in the new media context where new ways of conducting investigative journalism are explored and blogging expands?

Belgium	New legislation enacted in 2005 in order to provide wider protection to those who carry on journalistic activity: Act on the Protection of Journalistic Sources substantially reduces the risk of journalists seeing their sources disclosed. Most importantly the Act gives a broad definition of the journalists and editorial staff who are protected by it, and an equally broad definition of the type of information it protects. Following a decision of the Constitutional Court, the Act covers all individuals who exercise an informative activity, whether or not they are professional journalists.
Bulgaria	Not mentioned in the report.
Croatia	Not mentioned in the report.
Denmark	New media have no access to media support, but easy access to the privileges extended under Media Liability Act (for example the protection of sources). The impact of new media on journalism has so far led to the biggest changes within the existing media system. This is because new ways of organising journalism have operated in a climate where audiences have grown used to high-quality journalistic output, and where regulators have so far only made provision for one of the two key elements that need to be in place for the media to work freely and independently in the Danish media market. The first element is the extension of legal provisions for the press secured under Media Liability Act, and the other element is access to the media support necessary to gain entry to the market, which as yet is unavailable to web-based media.
Estonia	*Liability for defamation by Search engines:* In civil case (Rein Kallaste v. Eesti Päevaleht 3-2-1-83-10) the aim was to refute incorrect data. The National Court ruled that the plaintiff's claim to oblige the defendant to submit a request to the Internet search systems Google, AltaVista and Yahoo to terminate the ongoing publication of defamatory incorrect data can be regarded as met according to Article 1055 section 1 of the Law of Obligations Act by the defendant if the defendant has submitted a signed (either in handwriting or digitally) notification to these systems to remove the incorrect data. The case also is related to wrongful usage of a person's name and of an erroneously incriminating list of offences. It also includes dispute about the impact of geometric dissemination of information in the Internet and the related complicacy of refuting wrongful information. *User genereated content*: The adjudication of the Supreme Court on seventeen pages, for the first time publicly debated the liability of a media organisation for readers' generated comments to online news items. Inter alia, the argumentation was partly based on the economic models of the particular media organisation as the reader-generated comments were considered to be part of the business model. As the Supreme Court stated: the more the news items get comments, the more the media organisation earns a profit. Hence, news organisations shall be liable for comments. The media policy constituting outcome of the Leedo case, a result of proceedings at all three court levels, was to establish whether the comment sections of online publications should be considered as forming part of the journalistic work or not, and whether the media organisation should be considered to be solely an information service provider (as a container) or a content provider to whom liabilities can be applied.
Finland	The Council for Mass Media sees also the consumer-produced content as subject of journalistic self-regulation, and clearly distinguishes between editorial and non-editorial content. The respective amendment to the Guidelines of Journalists came into force on 1.10.2011.

	The Guidelines declare that certain fundamental principles concern public discussions even if they do not contain editorial material and regardless of whether they are moderated before or after publishing. The Guidelines oblige the news media organisations to impede publication of the materials that violate personal privacy or offend human integrity and to immediately remove them if they appear on their web sites. The main purpose of the new amendment is to confirm trustfulness and responsibility of the media regardless of their format and publishing platform.
Germany	In Germany, there is no clear definition of who is a journalist. This is based in the concept of freedom of opinion and the role of journalists as public watchdogs, which could be done, basically, by everybody. But: journalists' unions require that you make your living with journalistic activities, be it traditional or online. Otherwise they won't accept you as member. The Penal Code of Procedure grants right to professional journalists, that means those how make a living as journalist. This can also be in the online sector. Press Council now allows accepts online media to become part of the Press Council System on a voluntary basis.
Greece	*Application of general media law to bloggers:* in the absence of specific legislation to regulate content on the internet and in blogs, greek courts have been at a disagreement as to whether existing provisions against defamation, insult or libel in the press and the audiovisual media (as far as the civil responsibility of the media is concerned) can be applied. Blogs are an interactive medium of communication, the content of which is shaped not only by the owner, editor or journalist, but also by all readers-Internet users themselves. A strong defence of the distinctiveness of blogs as a medium of communication (rendering it incomparable with traditional channels of information like the press and broadcasting) was advanced in a relatively recent court decision. In this decision, the court argued that 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. This seems now to becoming the standardised approach of the Greek courts. *Anonimity:* there has been a great deal of controversy as to whether bloggers should be allowed to retain their anonymity and to what extent. Such a disagreement arose between Greece's highest Court of Cassation and the HACSP: in contrast to the latter, the Court of Cassation has argued that confidentiality applies only to the content of communication between parties and not to their external identifying data (i.e. the name of sender and receiver, the time of communication, etc.) It has also argued that such confidentiality should be lifted also in cases of insult, libel or defamation, and not only for particularly grave crimes as the HACSP argues. This met strong opposition from a large number of blog owners and journalists who publish on the Internet.
Italy	Blogging activity is still not included in private regulation only courts have addressed the point indirectly. As already mentioned, the Corte di Cassazione - in a recent decision (n. 31392/2008) - has clearly indicated that the freedom of the press and the freedom to criticise descends directly and 'without any mediation' from art. 21 of the Constitution and are not therefore reserved to journalists or to those who provide information professionally, but to the individual 'uti civis'. Anyone, then, and 'by any means' (also through the Internet), can report facts and express opinions and everyone - in the limits of the exercise of these rights and according to the respect of some limits (developed by case law) – may 'produce' opinions and critical opinions.
Romania	The advent of the Internet found the traditional media rather unprepared and caught in their own fight over readership and audience shares. For a while, they even refused to see the online media as a threat, therefore they started rather late to provide content specially designed for Internet or mobile consumption. Even to day, some media companies apply a 'print first' policy in order not to cannibalize their own product. This delay of the traditional information providers allowed for a new breed of publications – institutionalized or stemming out of individual efforts – to attract

	the young readership. The new media is neither regulated nor self-regulated in Romania. Any suggestion from outside the "blogosphere" to propose ethical codes for bloggers created open and overwhelming hostility. In fact, new media reproduces the same problems of the old media. But over the last years, as some of the "professional bloggers" established themselves as opinion makers, trendsetters and new media experts or reference point, the ethical conduct became a preoccupation for them. Thus, the most influential bloggers adopted a minimal set of rules of conduct that converge toward the accepted journalistic standards (decent language, no personal attacks, no hate speech, etc.)
Slovakia	The rules and norms applying to 'traditional' journalists (i.e. national codes of conduct) attempt to apply the same rules in the new media environment. For example, the new Code of Ethics of the Journalist mentions bloggers and gives them the ethical-professional rules stated in this Code as an example to follow. Similarly, the PrC (and its funding bodies) has discussed expanding its competencies to include electronic media, including online media in late 2011
Spain	Not mentioned in the report.
Turkey	Not mentioned in the report.
UK	There is no internationally accepted legal definition of a journalist, nor is there a legal definition of journalist in the UK. In general, the courts in the UK have not sought to draw distinctions between professional journalists and private publishers. Both are equally at risk, for example, of actions for defamation and invasion of privacy and both are able to rely on a range of public interest and other defences, including the Reynolds defence.