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Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries

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mediadem

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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Policy suggestions targeting the EU and the Council of Europe for media freedom and independence

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Introduction

The emerging global framework of media communication calls for an increasingly coordinated approach that links national policies to the transnational perspective, as well as private and public regulatory frameworks that shape market behaviour in this sector of the economy. In the past decades the institutions of the European Union (EU) and the Council of Europe (CoE) have addressed several aspects of media policy based on their respective competences and enforcement powers. In the Mediadem project, the comparative analysis of 14 countries shed light on the growing importance of these supranational actors: evidence collected in the Background Information Reports and the national Case Study Reports indicates that these actors have extensively influenced the development of media policy at national level. This was possible thanks to a variety of concurring factors and a changing technological, legal and economic landscape. In the case of the EU, the Court of Justice of the European Union has increased its interventions in the field of culture and the media over the past two decades, whereas the ongoing convergence of media and new technologies into the Internet ecosystem is now paving the way for a much greater involvement of the EU institutions, also on account of the established competence of the EU legislator in the domain of e-communications and Internet regulation. Inevitably, as the debate on future Internet governance, openness and neutrality rages at the international as well as at the national level, the EU will find new avenues to coordinate, harmonise and shape media policy in its member states, and indirectly also in candidate countries such as Turkey, as well as in neighbouring countries.

The CoE has acknowledged since 1950 the importance of freedom of expression and information by declaring it a fundamental right in article 10 of the European Convention on Human Rights. This article states that 'everyone has the right to freedom of expression', including the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. However, paragraph 2 of the same article establishes certain restrictions to this right related to the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, confidential information, and for maintaining the authority and impartiality of the judiciary. The CoE's Steering Committee on the Media and New Communication Services comprises experts from the Organisation's 47 Member States which formulate the main lines of policy and action needed to protect media freedom.

This policy paper illustrates the main findings of the Mediadem project as regards the impact of the work of the EU and the CoE on the development of national media policies, and explores avenues for further involvement of these supranational actors. Section 2 below briefly takes stock of the key observations of our analysis, whereas section 3 formulates ten policy recommendations addressing the European institutions (collectively or individually) and the Council of Europe, aimed at strengthening the improvement of policies and regulations aimed at protecting media freedom at national and supranational level.

Key Observations

The influence of the EU and the Council of Europe

There is no doubt that the EU and the CoE have strongly influenced the media policy choices taken at national level. However, the Mediadem project has also uncovered areas in which the implementation of legislation and case law is lacking or imperfect, and areas in which countries are still widely divergent in their policy approaches. In the case of the EU, the influence of the Union's legislation and case law has been slowed down by the limited competence enjoyed by the EU institutions over media issues as such: a gradual intervention of the EU in media issues is due to the work of the Court of Justice of the European Union (CJEU) in its jurisdiction over areas that might not have been thought to be included in the original economic scope of the European Economic Community (EEC) Treaty. In particular, the CJEU was able to draw a distinction between the cultural and economic dimension of broadcasting, defined as a tradable service, and thus made subject to the rules on free movement between the Member States. This 'economic approach' was also the underlying rationale used by the European Commission to push for regulatory intervention in the media sector. Freedom of expression as a basis for media regulation has been considered in connection with pluralism. Pluralism was granted a sort of 'indirect' relevance as a possible purpose allowing national rules to restrict the economic freedoms enshrined by the Treaties. Yet, the crystallization of the process that led to the expansion of EU institutions' intervention in the field of media pluralism and freedom of expression, initiated earlier through the culture-related provisions in the Television Without Frontiers Directive, was the inclusion of a specific article on culture in the Maastricht Treaty. Today, the policy framework recognises both the cultural and the economic dimensions of media regulation, and at the same time fosters the protection of public interest values, such as media pluralism and the protection of human dignity in the media sectors.

Against this background, the involvement of the CoE in media policy has significantly changed over time. Initially, media issues were approached as a piece of a much larger puzzle, comprising culture, human rights and technology. Over time, an autonomous policy for the media sector was perceived as necessary to cope with political and technological developments. Undoubtedly, the inclusion of article 10 on freedom of expression and information in the text of the European Convention on Human Rights (ECHR) was a crucial step in the development of this new approach to media policy. The importance attributed to freedom of expression triggered much greater attention towards media regulation at national level: the underlying analysis hinges on the evolving relationship between media independence and democracy. Article 10 ECHR has then become the basis for the protection of freedom of expression by the European Court of Human Rights (ECtHR), and also for the adoption of several guidelines, recommendations and other documents by the CoE. The CoE has observed that freedom of expression and information today face new challenges due to the 'global development of the information society and the new providers of media-like mass-communication services, such as news portals, content aggregators, blogs and social networking sites, as well as by the resurgence of terrorism' (CoE, Freedom of expression and information factsheet, available at www.coe.int). Still, however, the Mediadem countries diverge enormously when it comes to the regulatory and policy approaches to blogs and other new media (see Školkay and Manfredi Sánchez in the Comparative Report).

The role of the Court of Justice of the EU and the European Court of Human Rights

Both the CJEU and the ECtHR have contributed extensively to the shaping of media policy in the 14 Mediadem countries. As a preliminary observation, the two courts seem to have pursued slightly divergent goals over time, with the ECtHR being more focused on media freedom as a driver for democracy, and the CJEU more oriented towards an economic approach, and thus towards the liberalisation of media industries and the avoidance of concentration of ownership. The ECtHR, in particular, has developed over the decades a comprehensive European legal framework pertaining to media freedom and independence. This accounts, for example, for the clear prerequisites in relation to the protection of sources, the understanding of the role of the media as a public watchdog in modern democracies, and the legal distinction between facts and value judgments in defamation cases. The ECtHR case law has developed important concepts such as the 'argument for democracy' (stressing the role of the media as a source of information and as a venue for the presentation of different political positions, with the consequent empowerment of citizens); the 'public watchdog' function of media outlets (which focuses on their role as monitors of government activity (see *i.a. Goodwin v the United Kingdom*, n. 28957/95, judgment of March 27 1996, Reports 1997-II); and the 'press as agent of the people' argument, related to the public's 'right to know'. Another relevant stream of case law has focused on broadcasting, strongly affecting national media regulation, both regarding the opportunity to keep national public monopolies, and regarding the national licensing systems.

Overall, the Case Study Reports disclose the influence of ECtHR case law on national media policies, whereas the CJEU appears to have played only a minor role with regard to a limited set of mainly structural questions such as broadcasting licences. However, as evidenced by the recent CJEU case law on the liability of hosting providers, the CJEU is in the process of broadening its approach. This might be explained by the potential offered by the EU Charter of Fundamental Rights.

A number of Case Study Reports have mentioned that the ECtHR jurisprudence and the ECHR have had a positive overall influence on media freedom and independence, especially with regard to libel and defamation cases, restrictions on publishing, protection of private life and protection of sources. This positive influence is most obvious in those countries where the ECtHR case law has direct effect in the national legal order. In other countries this positive influence often depends on the willingness of individual policy makers to adhere effectively to ECtHR decisions and ECHR standards. Progress in this regard is often made on a case-by-case basis and in incremental steps. As a rule, individual measures indicated in the ECtHR decisions are usually taken into account by states found in breach, whereas general measures pose more problems, especially when confronted with well-established national traditions. Where ineffective implementation of ECtHR case law is systematic, other initiatives are needed to bring domestic case law or legislation in line with European standards. A reference can be made in this regard to the recent 'Human Rights Trust Fund 22' initiative of the CoE, which seeks to develop closer cooperation with the Turkish authorities in order to enhance implementation of the ECHR in the field of freedom of expression and the media.

According to the Case Study Reports, all 14 countries have had problems and tensions as regards the effective implementation of ECtHR case law. The reasons for these tensions vary and can be found in the problematic relationship that has developed between domestic courts and the European courts in relation to sensitive national issues which affect media legislation and domestic judicial reasoning or when long-standing legal domestic traditions have been questioned. Problems of execution occur in aligning domestic judicial practice to

European standards, and are often related to divergences between European courts and national higher courts such as supreme courts or constitutional courts on the position of the ECHR (and to a lesser degree the EU Treaties) in the national legal order. Where tensions occur between national courts or legislatures and European courts (especially the ECtHR), these are often related to specific national concerns on sensitive socio-cultural topics (such as the Kurdish and Armenian questions in Turkey, the Basque question and the role of the monarchy in Spain or the high importance of privacy protection in the Finnish legal system). Tensions also arise regarding specific legal interpretations, as evidenced in cases related to the protection of privacy and the protection of honour or reputation, which are essentially libel and defamation cases. The ECtHR case law on privacy protection has been influential on media policy in the 14 countries studied mainly as regards the balancing of privacy rights (in particular of public figures such as politicians and public servants) with the right to freedom of expression of the media (especially in cases on matters of public concern). For instance, as regards the protection of honour and reputation in libel and defamation cases, the ECtHR's case law has proved to be both controversial and influential in imposing a distinction between facts and value judgments in national legal orders.

Based on the evidence collected within the Mediadem project, it is possible to conclude that the effective impact of European case law on national media policy and the protection of media freedom and independence, and thus the role of European courts in shaping media policy, differ strongly from country to country. This is especially so with the case law of the ECtHR, and less so with the case law of the CJEU. Against this background, action will be needed in the future to facilitate cooperation between courts, both through direct judicial cooperation and through a more comprehensive elaboration of common concepts and principles at the European level, as will be advocated in section 3 below.

Recommendations to the EU and the Council of Europe for the promotion of media freedom and independence

1. Foster a more integrated approach to media policy

The Comparative Reports have highlighted that preserving a 'silos' approach to media regulation is unlikely to reflect the complexity and heterogeneity of information sources. The ongoing blurring of the boundaries between press and broadcasting, growing technological convergence on IP-based platforms and vertical integration between content and service providers are paving the way for a gradual shift towards a more integrated approach to media policy. This development is stronger in those integrated supply chains where content production serves multiple media outlets. An integrated notion of media implies that new and conventional media should be considered as part of the same regulatory field. This does not necessarily translate into uniform regulation across media: to the contrary, room for territorial and functional regulatory differentiation remains and should be rationalised, taking into account the development of the linear/non-linear divide. Currently, an integrated notion of media has already emerged in the case law at European and national level, and courts have in most cases extended the regulation in place for traditional media also to 'new' media. However, there is still a significant degree of misalignment in the approach adopted by different EU institutions, and also by non-EU institutions: part of this lack of consistency is due to the difficulty of grounding the regulatory approach on the online/offline distinction, which creates significant problems of interpretation and also opportunities for arbitrage. At the same time, other issues should disappear from the regulatory map. For example, the role of public regulation in broadcasting, insofar as it is associated with resource scarcity (e.g.

spectrum), does not pose problems any longer. This could be replaced by questions of platform regulation and must-carry rules in a connected TV environment. The adoption of a notion of integrated media implies that rationales for public regulation have to be rethought, redefining the place of public service.

An integrated notion of media can be more easily adopted at national level under the aegis of the **Council of Europe**, with due respect for article 10 ECHR. The CoE should pursue its efforts in the definition of a 'new notion of media' by addressing, through recommendations and guidelines, the legal consequences that flow from the adoption of an integrated approach to media, and by providing benchmarking cases where different regulatory strategies are adopted.

At the same time, the **European Commission** should lay the foundations for a revised approach to media regulation, by clarifying the policy issues that are likely to remain important in the age of convergence, and those that are not likely to raise concerns in the future. Some of the areas within EU competence should subscribe to the integrated notion, like the notion of editorial control and responsibility.

The **European Parliament** should host a fruitful debate on the meaning of an 'integrated approach' to media and its consequences for freedom of expression and pluralism as well as on the viability of the industry players involved.

2. Adopt a technology-neutral approach to media regulation

Technological neutrality is already embedded in the EU regulatory framework for electronic communications, but when extended to media policy, it should take into account three main issues: the distinction between forms of transmission, the duties and obligations imposed on the media, and the public service definition. First, on the basis of an integrated media notion, the media should include both one-to-many communication (the traditional broadcasting form of transmission) and the many-to-many communication, which introduces a two-way form of communication where citizens/users are able to interact and steer the agenda of news content producers. Second, the principle of technological neutrality affects the allocation of duties and obligations on media outlets, as the inclusion of information service providers in the category of media depends also on the approach taken to define the media. This is of utmost importance in the current debate regarding the qualification of search engines and news aggregators as media outlets and their responsibility to promote pluralism; if the activity they carry out is a mere reproduction and syndication of information, their responsibility for copyright infringement, defamation, etc. should be limited but their gatekeeper function should be fully recognised. Here, the feature that is able to frame the distinction between mere communication and media service provision is that of editorial control over the content distributed: whoever is – technically and substantially – in charge of the editorial control should be consequently responsible for possible legal breaches. Control and responsibility should go together, which is often not the case in the current regulatory framework. Ongoing technological developments that shift the boundaries between 'mere transmission' and content provision should be taken into account in order to qualify a technology sensitive definition of editorial control. Finally, public service activity is no longer linked only to broadcasting media. The development of technology already envisages the possibility of accessing public service TV through a mix of different technologies, which would make unfit for purpose any regulation that adopts a single technology perspective.

It is important that the **EU institutions, and primarily the European Commission**, promote and operationalise the principle of technological neutrality in all media policy interventions, from regulation to competition policy, regardless of the type of legal instrument used (soft or hard law). This can be achieved through the adoption of the following underlying features:

- the definition of 'media' should refer to the aggregation and provision of information to a generalised audience, coupled with editorial control.
- the allocation of duties and obligations to media outlets should not depend on the technology used to provide information.
- public service privileges should be applied regardless of the type of technology used to provide information.

3. Accelerate the shift from public service broadcasting to public service media

The rapid development of online communications has enabled the development of new forms of direct participation of citizens in public debates through different kinds of media able to support, but not substitute for, the pre-existing ones realised through public service broadcasting. Whereas before public service obligations included the duty to make space accessible to different civil society groups in order to guarantee pluralism, today technology offers many more opportunities for civil society to participate in the process of content production in the media, thereby expanding pluralism. The remarkable development of user-generated content poses daunting challenges to the scope of freedom of expression and its impact on regulatory strategies redefining the right to inform/right to be informed distinction since the former passive recipients have become producers themselves. Thus, user-generated content needs active and affirmative regulatory action to ensure that it stays alive and continues to foster 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.

In some of the Mediadem countries, incumbent public service broadcasters are already allowed to use new forms of delivery to abide by their public service obligations. However, the shift towards a more flexible approach to public service media could also entail the possibility for new entrants (in particular, new media actors) to compete for the provision of public service content. While the former issue has been already endorsed by the Council of Europe, by the EU, and also by UNESCO (not without eliciting major critiques), the latter issue deserves a comprehensive and cautious treatment, as 'full contestability' could entail negative effects over public service provision, due to difficulties in attributing responsibilities, as well as monitoring and evaluating the quality of public service provision. As a matter of fact, some Mediadem countries (e.g. Denmark, Croatia) supplement the core provision of public service content by dominant public service broadcasters by allowing the provision of public service content by private operators; however, these countries do not allow contestability of public service provision.

The Mediadem reports suggest that 'full contestability' through liberalisation of public service provision would not be the most appropriate avenue for the time being, given the difficulty of monitoring the way in which new entrants and innovative media outlets would abide by their obligations. Rather than advocating full contestability, it is important that policy makers mandate that public service media (PSM) use new technologies to engage audiences and enable their participation in content creation and distribution. In this respect it

is important to go beyond the mere notion of 'access to media content' and aim at stimulating the active production of user-generated content as a form of promotion of freedom of expression in the era of end-to-end communications (see also below, on net neutrality). In this respect, the promotion of user-generated content should increasingly become a key element of public service obligations across media, covering audience content and comment, collaborative content, networked journalism, etc. In line with this view, there may also be room for support of user-generated content, for example through the provision of public funds to support the organisation of user-driven communities, based on a clear, transparent and non-discriminatory tendering procedure.

The EU and the Council of Europe should interpret user-generated content within the realm of the principle of freedom of expression, supporting its blossom and development.

In particular, the **EU institutions** should adopt a clear regulatory strategy regarding the need to safeguard user-generated content from forms of propertisation. Consideration could be given to the following measures: promoting user-generated content in the key elements of public service across media; granting civil society access to public service media in terms of time, space, and visibility; providing funding schemes to support user-generated content, based on a clear and transparent awarding procedure.

4. Revise the relationship between ex ante regulation and ex post competition policy taking into account new technological developments and update competition policy

Competition policy, through flexible tools such as the definition of relevant markets, is potentially more technology-neutral than sectoral regulation, and can be adapted to solve most of the concerns that characterise so-called '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.

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 co-exists along with more managed, secure services that require minimum Quality of Service (e.g. bandwidth-intensive and some cloud-enabled services). The current fragmentation of the legal landscape across countries, both for net neutrality and copyright enforcement online, makes very little sense compared to the global nature of cyberspace.

The **European Commission** and the **European Parliament** should lead the work on updating the application of competition policy in the media sector. Given the difficulty of capturing anticompetitive behaviour in a timely manner in the fast-evolving media ecosystem, it is important that pluralism is promoted through a combination of ex ante regulation containing structural remedies, and detailed guidance on conduct that would be challenged through ex post antitrust scrutiny. More in detail:

- For what concerns ex ante policy actions, EU institutions should ensure the availability of a robust, 'best effort', end-to-end Internet in which pluralism and the diversification of free sources of information can flourish. Two avenues can be envisaged in this respect. First, pursuant to article 19(1) of Directive 2002/21 of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), the European Commission could adopt guidelines on electronic communication networks and services vis-à-vis new actors involved in the communication system so as to avoid any discrimination in the treatment of undertakings providing equal services; and on the criteria to achieve interoperability of pan-European services and end-to-end connectivity. Second, this approach should be extended also to merger policy, which should be coupled with more detailed guidance on possible pluralism-oriented commitments that can be imposed by antitrust authorities in order to preserve the availability of an affordable, best effort, end-to-end Internet connection.
- A sound approach to ex post competition policy in this field requires: (i) market definition tools inspired by an integrated notion of media markets, which incorporates demand-side and supply-side substitution, as well as multi-sided platform competition; (ii) a medium- to long-term view of emerging new media, especially when it comes to assessing supply-side substitution; and (iii) more sophisticated guidance for dominant media outlets on interoperability obligations, obligations to deal, and also non-price discrimination, which in the media environment take new forms compared to traditional markets (as is being discussed in the current Google investigation by the European Commission).

5. Improve governance and provide for sound institutional arrangements at national and EU level

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

- *Promote regulatory independence from political power.* In many countries media regulation is still within the direct or indirect control of political power. The European institutions can monitor and police independence and respect of freedom of expression but they need new instruments to achieve this goal effectively. The shift towards formally independent regulatory agencies is a necessary yet not sufficient condition.
- *There is too much detailed regulation that becomes outdated very quickly. There is a need for more outcome-based as well as principles-based regulation*, rather than 'command and control' regulation. This is necessary due to the fast-changing dynamics of the sector, which calls for a greater role of de-ossified regulation and private regulation.

- *The need for openness, transparency and accountability in all aspects of media policy*. From the supplying of reasons for public policy decisions such as the appointment of key representatives in media regulatory authorities, to the transparency of private agreements between ISPs and content providers, these principles should be the guiding light of media policy both in relation to public and private regulation.
- *The need to keep respect and promotion of pluralism and freedom of expression always on the radar of policy makers*. This can be achieved at the EU level, for example, by improving the current guidance on assessing the impact of regulatory proposals on fundamental rights, developed by the European Commission within its *ex ante* impact assessment system. However, currently the EU impact assessment system falls short of helping policy makers identify policy areas in which action is required to protect fundamental rights; thus, they do not really achieve the goal of 'mainstreaming' fundamental rights in EU policies in a proactive manner. To the contrary, the impact assessment system so far only tries to ensure that fundamental rights are not undermined. Moreover, the European institutions (European Commission, European Parliament and the Council) conduct independent assessments of the impact of regulatory proposals on fundamental rights (with the European Parliament and the Council often failing to perform a detailed impact assessment of their own substantive amendments). They act in an autonomous manner and there is no coordination. The European Commission and the Council of Europe should also facilitate the promotion of pluralism and freedom of expression among private regulators increasing the horizontal effects of the impact of fundamental rights on policy-making.
- *Improvements in the editorial independence and institutional/operational autonomy of public service media.* The Council of Europe considers that the 'first priority' for PSBs/PSM must be to ensure that their 'culture, policies, processes and programming reflect and ensure' editorial independence and operational autonomy. The Council of Europe has, over time, established detailed standards and guidelines relating to the governance, practices and funding of PSM: today, implementation of these guidelines seems to be lacking in many of the Mediadem countries.

The **Council of Europe** should take action to stimulate more direct uptake of its guidelines on the editorial independence and operational autonomy of PSB/PSM. The guidelines should provide a set of options regarding forms of monitoring independence and identify the effects of different combinations of legal and non-legal sanctions in case of breach.

The **European Commission** should revise its guidelines on assessing the impact of regulatory proposals on fundamental rights to include detailed guidance on the policy areas where legislative action might be required to ensure protection of fundamental rights. Moreover, EU institutions should coordinate on their own assessments of the impact of proposals on fundamental rights, in order to reach a joint and coordinated policy strategy.

Both the **ECtHR** and **CJEU** should devise more effective remedies in case of violation of freedom of expression by public and private actors. These could include remedies aimed at preserving pluralism in the media market (e.g. by avoiding excessive media concentration or placing additional obligations on prominent media outlets to ensure that content is not unduly discriminated); or remedies aimed at challenging practices that negatively affect the end-to-end architecture of the Internet.

The **European Commission** and the **European Parliament** should lead a reflection on the independence and autonomy of public and private media regulators, to promote effective

and accountable regulation at national level.

6. Strengthen institutional and governance arrangements at pan-European level

The Comparative Reports highlighted a significant degree of fragmentation in the formulation and implementation of media policies, including where common rules are available through EU legislation or the case law of the CJEU and ECtHR. Pan-European coordination of regulatory approaches, use of soft law and exchange of best practices is key to a more integrated Single Market for media services. 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 European Commission to specify the requirements of independence for regulators in the electronic communications field. However, the full potential of the existing public regulatory authorities is not yet exploited as coordination among them and also between the supranational and national level is limited, or in few cases completely lacking. One of the Comparative Reports analyses this issue in depth and suggests that this goal could and should be achieved through a stronger role of the European Platform of Regulatory Authorities (EPRA), which could play a pivotal role in coordinating horizontally with the Contact Committee established under the Audiovisual Media Services (AVMS) Directive and the Body of European Regulators on Electronic Communications (BEREC).

EU institutions should aim to develop pan-European coordination of regulatory approaches, use of soft law, promotion of private regulation, where appropriate, and effective exchange of best practices. Suggested ways to achieve this goal include:

- Promoting the 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. One of the proposals to achieve this goal would be the modification of the EPRA statute to enable it to submit common guidelines for implementing media policies.
- Fostering coordination between BEREC and EPRA and also between BEREC and the Contact Committee established under the AVMS Directive in order to improve policy implementation in the field of the media.
- Introducing general principles for private media regulators with due account of the need to respect and promote freedom of expression.
- Increasing and strengthening communication with the national coordination bodies and media policy actors in order to root the institutional and governance arrangements in the real contexts of media functioning.

7. Refine and strengthen the evaluation of private regulation in the media domain

Both at European and national level different forms of private regulation have been adopted. In the field of the press, private regulation is the rule with some degree of co-regulation. Private regulation is faced with major challenges: fragmentation, accountability and enforcement deficits. There is lack of coherence among the approaches adopted by private regulators across countries and across media: private regulation may mean self-regulation of, and by, professional journalists or it may refer to different forms of co-regulation, including the use of press councils in which a broader range of interests is represented. In order to achieve a greater degree of coherence in private regulation, a significant effort should be devoted towards the development of common criteria and methodologies to assess its legitimacy and effectiveness. The best option would be the adoption of guidelines, which set out the key characteristics of private regulation, including regulatory independence, the means by which different stakeholders can be represented or participate in decision-making, and the adoption of fair enforcement procedures, for example procedures for internal appeals.

Mainly due to competence reasons, the most appropriate body to issue such guidelines might be the Council of Europe, having as a blueprint the guidelines on the independence and functions of regulatory authorities in the broadcasting sector (see the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies). New guidelines on private regulation would perform an analogous function to these but need to be supplemented by adequate monitoring instruments. The guidelines could take the form of soft law in that they would not have directly binding legal effects on private regulators whose incentives could be shaped by indirect benefits associated with their adoption and compliance with the rules. However, they would have some force through the political process. The degree of compliance could also be a relevant factor in considering the proportionality of restrictions on freedom of expression under article 10 ECHR when action is taken against member states of the Council of Europe before the ECtHR.

The European Commission could also contribute in this process by developing general guidelines concerning the assessment of private regulation within its general smart regulation agenda and in sector specific legislation like the AVMS Directive. Such guidelines, integrated with the more general impact assessment guidelines of the European Commission, can be used also by the European Parliament and the Council of the EU, based on the 2003 Inter-Institutional Agreement on Better Lawmaking and the 2005 Inter-Institutional Common Approach to Impact Assessment.

The **Council of Europe** should adopt general guidelines on developing effective and legitimate private regulation in the media sector combined with direct and peer monitoring. It should promote stronger coordination among national and European private regulators.

The **European Commission** should adopt general guidelines on the ex ante assessment and the ex post evaluation of private regulatory solutions within its overall smart regulation toolkit. It could also adopt sector-specific guidelines for national governments, in cases where the implementation of a given legislative instrument is facilitated by private regulatory bodies, e.g. through privately agreed standards. These guidelines should be periodically reviewed in the light of their effectiveness.

8. Enhance coordination of the journalistic profession at the European level

In the area of journalism, private regulation is still predominant in the countries surveyed, ranging from pure self-regulation to co-regulation, delegated or endorsed ex post by the executive or by independent regulatory agencies. The choice of regulatory form is in part a consequence of the implementation of the principle of freedom of expression enshrined in national constitutions, and in part related to the development of the journalistic profession vis-à-vis public authorities and industry. However, in view of current challenges posed by new technological developments, the adoption of new business models and the broader scope of freedom of expression (extending media privileges also to non-professional journalists), there is a strong need to redefine the legitimacy and accountability of professional regulators and the scope and remit of their regulatory powers. The current fragmentation among national bodies and across media is obsolete and does not reflect the development of professional journalism. New boundaries of the profession have to be designed providing answers to the following questions: what constitutes journalism (i.e. which are the criteria to identify the exercise of professional journalistic activity) and which privileges and corresponding obligations must be applicable to professional journalists vis-à-vis non-professional content producers. A stronger coordination on these issues at European level could guarantee a harmonised level of protection of journalists as a consequence of the freedom of expression. The current weak coordination among professional bodies should be addressed by empowering a European network of private regulators with rule-making and monitoring powers, leaving enforcement to a decentralised level.

EU institutions should ensure that domestic media private regulators strengthen their coordination at EU level and move towards a more integrated structure overcoming the current divisions often based on the press/broadcasting distinction. There are too many associations often based on interest representation rather than promoting a common good and respect of constitutional values. Organisational integration and policy coordination should be at the center of their agenda in the years to come.

EU institutions should foster the coordination of the journalistic profession at the European level. This could be achieved by addressing the multilevel architecture of professional regulation, providing at least a supranational forum that could improve mutual learning and eventually lead to the mutual recognition of rules and enforcement mechanisms.

9. Strike a more even balance between copyright protection, Internet neutrality and freedom of expression, in particular on the Internet

The Internet poses major challenges for policy makers, including the EU institutions and the Council of Europe. Besides coping with a more technology neutral and integrated approach to the media sector (see recommendations 1 and 2 above), these institutions can also provide a major contribution to the ongoing debate on the preservation of a viable balance between important, but sometimes conflicting policy goals such as the neutrality of the Internet (at many layers of the value chain), the protection of copyright and the preservation of freedom of expression. The restructuring of the information supply chains has led to the emergence of innovative forms of news aggregation: this generated a conflict between new intermediaries and incumbent news content producers, which concerns specifically the relationship between copyright and freedom of expression. Recently the conflict has frequently gone to national courts, where freedom of expression has been used in litigation either by content producers or by service providers. The former have referred to it in order to promote some forms of propertisation and protect their incentives by allocating part of the revenues to those who produce innovative content. On the opposite side, large Internet Service Providers (ISPs) have sought to reduce copyright protection and grant open access to information on the web.

The solutions currently proposed at national level lack coordination and are fragile if tested vis-à-vis their compatibility with constitutional principles. Paradoxically localism can be conducive of a strong shift of regulatory power in favour of global non-EU players. The global players may dictate new regulatory regimes without properly taking into account the specificity of local media cultures. At the same time, Internet neutrality and copyright enforcement must be approached consistently and effectively across countries. The Mediadem countries adopt widely diverging policies in these fields, which create diverging conditions for providing media services. In addition, many countries have not defined a precise policy approach to the emerging problems of application neutrality, device neutrality (recently advocated by the European Parliament), search and cloud neutrality. Against this background, increasing attention should be devoted to the private agreements that involve content producers and ISPs, which represent at the same time a promising avenue and a potential source of concern for freedom of expression, due to the burgeoning use of inspection techniques that can, in some cases, also evolve into filtering of content.

EU institutions should foster a consistent approach to Internet neutrality, copyright enforcement and freedom of expression across countries, as well as develop a policy approach which does not negatively affect the open, end-to-end architecture of the Internet and, along with it, access to all content of choice by Internet users.

In order to strike an even balance between copyright protection and access to information in new media, **EU institutions** should integrate a degree of flexibility in the exceptions and limitations applicable to copyright content so as to adapt them to new technical and social circumstances. In particular, the practical benefits of these limitations should be verified in the light of contractual limitations and technical measures that have been adopted so far.

Moreover, contractual agreements that allocate property rights on information within the supply chain should undergo a clear scrutiny as regards the terms and conditions that allow access to information, looking not only at the cost of the service offered but also at conditions upon which content is accessible. Any regulatory intervention on this matter should, on the one hand, ensure right-holders a fair and equitable remuneration, as well as foster the introduction of legal and technical tools that allow the lawful circulation of copyright content, also among different platforms. Contextually, **EU competition bodies** should provide continued vigilance over such contractual agreements due to the risks of distortions on the market for information products and services, potentially resulting in misuse of dominant positions, in particular where global players achieve the position of sole source-databases for information and knowledge.

EU institutions and the **Council of Europe** should pro-actively participate in the international debate on Internet governance in order to ensure that the end-to-end principle is preserved, and that the proposed enhanced government control over the Internet does not negatively affect freedom of expression.

10. Improve the implementation of ECtHR rulings at national level and promote new forms of judicial cooperation

The Mediadem reports raise the issue of the implementation of ECtHR judgments at national level. Generally, national courts refer in their judgments to the ECHR and the ECtHR's findings. As a result, the national judiciary either implements ECtHR's decisions *directly* (for example in the case of an adverse ECtHR judgment which results in changes to the national jurisprudence) or *indirectly*, when applying the legal interpretation of Article 10 from ECtHR case law. Of course, courts can also diverge from the ECtHR's judgments and act to the detriment of freedom of expression, simply ignoring the Strasbourg court. As the latter cannot override national case law or legislation, the correct implementation of ECtHR case law primarily lies in the hands of the domestic judiciary, administration and legislature. Indeed, although the ECtHR might give directions to individual respondent states concerning the implementation measures to adopt in pilot judgments, under Article 46 ECHR the ECtHR's competence in this regard is rather limited: when the ECtHR finds a violation of a state's duty to abide by its judgments, it can refer the case to the Committee of Ministers for further consideration.

One of the Mediadem Comparative Reports shows that countries vary enormously as regards the status of ECtHR case law in the national legal system. Accordingly, action should be taken to ensure that implementation of ECtHR case law is made more consistent and effective, also as a follow-up to the 2010 Interlaken Declaration and Action Plan. The best way to improve implementation under the current legal framework would be to strengthen the accountability of democratic institutions of the member countries. This could be done by the

Council of Europe through its Committee of Ministers, which could develop additional tools to improve the implementation of ECtHR case law, analysing in particular the relationship between domestic courts and the European courts, in order to identify the most sensitive issues that legal domestic traditions are reluctant to leave. Also periodical reports could, through a 'naming and shaming' mechanism, help trigger a better circulation of best practices in this field.

The **Council of Europe** should promote the accountability of institutions in its member countries, giving the Committee of Ministers the task of developing guidelines aimed at improving the implementation of ECtHR case law, as well as enhancing the dialogue between ECtHR judges and national judges by supporting fora where domestic legal traditions can be exchanged and commented.

Regulatory matrix

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1. Introduction

The field covered by media regulation is very wide. It refers to the rules and procedures that are applied by public and private actors to any type of media. Several factors segment media regulation: one first element regards the distinction between media (i.e. service provision) and electronic communication (i.e. technical infrastructures), a second one regards the distinctions across media sectors (press, broadcasting and new media). Although both distinctions are progressively fading out due to technical convergence and market developments, requiring a more integrated approach towards media regulation, these segmentations are still reflected in the type of regulation currently applicable to media vis-à-vis electronic communications, and in each media sector. The existing regulatory framework shows different degrees of intervention of public regulation in some specific areas, whereas private regulation is more developed in those areas left out, such as in the printed press, or those areas where public actors themselves provide direct or indirect incentives to private regulation (as in the case of non-linear audiovisual media services, following the EU directive on this topic).

The boundary between public and private regulation is no neater, as several additional shades between the two extremes exist, depending on the type of actors involved in the regulation and the role they carry out within the regulatory process. This leads to the flourishing of several regulatory cocktails that not only are able to adapt to the existing media sector at national level, but also are capable to shape and modify it depending on the objective pursued by regulators.

An additional element should be added to the picture: the multilevel architecture that characterises media regulation at European level. The important role played by the EU in the media field has introduced an additional layer to national regulatory approaches, steering mainly in the audiovisual media service sector the choices of regulators not only in terms of objectives but also in terms of tools. Indirectly, the approaches adopted in the EU have influenced also other non-EU countries, regardless of their being part of the accession process. It is important to underline that an increasing role will be played by transnational regulation, which will involve national and supranational actors due to the globalisation of communication through online media.

In the following, the document will address the regulatory process that characterises media regulation in the MEDIADEM countries, on the basis of the analysis provided in the Comparative Report 'The regulatory quest for free and independent media', showing the general features of media regulation.

2. Media regulation: general features

The regulatory matrix that addresses media regulation describes the regulatory cocktails currently implemented at national level. Given that differences in the models available are wide depending on the pre-existing regulatory framework, the analysis of the effectiveness of each model is not possible. Rather than providing a single foolproof blueprint, the objective of this paper is to indicate the aspects of private regulation that are more sensitive in terms of freedom and independence of media.

The regulatory matrix is based on the main features that characterise regulation, namely: the type of actors involved in the regulatory process, whether public or private; the role of those actors in the different phases of the regulatory process; the scope of regulation, depending on the sector(s) addressed by regulation; and, finally, the objective pursued.

2.1 Actors involved in media regulation

If the distinction between the two extremes of 'command-and-control' regulation and self-regulation entails the idea that one single actor is in charge of the full regulatory process, reality teaches that several actors participate in this process, in different phases and with different capacities.

Public actors are more easily recognisable, involving public bodies that are part of the government, such as Ministries and other delegated bodies that have political connotations (e.g. the Italian Parliamentary Committee for the general guidance and monitoring of radio and television broadcasting services). Still in this category fall the independent regulatory authorities with a specific remit on the media sector (or in case of convergent regulators covering also electronic communications, as in the UK, Finland and Italy); additionally data protection and competition authorities should also be included as their remit partially overlaps with media specific issues. Finally, courts are to be mentioned as having a fundamental role in the enforcement phase.

As it will be described in more detail below, the 'private actors' category is wider but the picture is more scattered depending on the national regulatory frameworks. The most common cases are industry associations that can be media-wide or sector-specific or objective-specific organisations (such as in the case, respectively, of broadcasting organisations and advertising organisations); then, journalists' professional associations that are present in all MEDIADEM countries in the form of trade unions, or coupled, in more limited cases with bodies with no political connotations (like the Belgian Press Councils, for the French and Flemish communities). In very few countries, consumer organisations and non governmental organisations also play a limited role. It is interesting to mention that, though at national level their role is very limited, international organisations are gaining an increasing importance both steering the choices of their members at national level and affecting the decisions of regulators at supranational level, in particular vis-à-vis European bodies (e.g. the Association of Commercial Television that provides a forum for almost all European commercial broadcasters).

2.2 The role of public and private actors in the media regulatory process

The view adopted by the MEDIADEM project acknowledges that media regulation is a process that involves the participation of several actors so as to achieve the modification of behaviours. Regulation involves different phases that can be described schematically in rule-making, monitoring and enforcement. Each phase requires specific activities to be carried out by the actors in charge, depending on the power allocated on them. The distinction of the different phases is very relevant as in practice it is very rare that one single actor is in charge of all of them.

Rule-making activity, or standard-setting phase, is the phase in which the regulator(s), whether public or private or a combination of the two, defines the rules of behaviour that will be applicable to regulatees.

Monitoring activity addresses the phase in which a public or private actor or a combination of the two verifies compliance with the rules, potentially also having the power and the tools to enhance their effectiveness through incentives.

Finally, **enforcement** or sanctioning activity refers to the phase in which a public or private body, or a combination of the two, reacts to the breach of rules, with the possibility to impose (pecuniary and/or reputational) sanctions on the regulatees.

From the analysis of the MEDIADEM countries it emerges clearly that the allocation of regulatory powers is different depending on the sector addressed.

Table 1. Role of public and private actors in the regulatory process

Type of activity / type of media		**Rule making**	**Monitoring**	**Enforcement**
Press		Industry associations and professional associations State provides for framework regulation on privacy, libel, etc.	Industry associations and professional associations Little involvement of NGOs	Industry associations and professional associations Courts
Broadcasting		State bodies and media independent regulatory authorities Industry associations (e.g. advertising, children protection) and professional associations	Media independent regulatory authorities Industry associations and professional associations	Media independent regulatory authorities Courts Industry associations and professional associations
New media	***e-versions of traditional media***	State bodies and media independent regulatory authorities Industry associations and professional associations State provides for framework regulation on privacy, libel, etc.	State bodies and media independent regulatory authorities Industry associations and professional associations	Media independent regulatory authorities Industry associations and professional associations Courts
	media with online presence only	Single media company State provides for framework regulation on privacy, libel, etc.	Single media company	Courts

As regards public actors, the research shows the importance of the role of **independent regulatory authorities** (IRAs) in broadcasting media. 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. However, the importance of such authorities has to be qualified as regards their regulatory powers vis-à-vis state bodies. In few countries the allocation of regulatory power has been unevenly balanced towards political bodies (such as in Greece), so as to keep the key decisions within government; whereas in others, though delegation of powers applies, the IRAs themselves do not escape from a political connotation (such as in 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 the members of such authorities.

Here, an additional point should be devoted to the supranational perspective, as the interplay between domestic and European regulation has not yet achieved an even playing field, in particular as regards audiovisual media services. As a matter of fact, the implementation of the Audiovisual Media Service (AVMS) Directive at national level has required an effort by the communication IRAs, so as to adapt the rules and sectoral distinctions previously in force to the modified legislative framework. This triggered different interpretations of the requirements to identify audiovisual media service providers, and in particular of the editorial control criteria. The coordination among the IRAs has not been improved by the work of the institutional body created under article 29 of the AVMS Directive, namely the Contact Committee, though its tasks are facilitating effective implementation of the Directive through consultation on practical problems, delivering opinions on the application by Member States of the Directive, discussing the outcomes of European Commission consultations with stakeholders, facilitating the exchange of information on the development of regulatory activities regarding audiovisual media services and examining developments on which an exchange of views appears useful. Up to now limited normative guidance has been provided on what would constitute legitimate implementation or adopting a critical assessment of the arrangements adopted in Member States, though the issue of private regulation has been addressed looking at the implementation of article 4(7) of the AVMS Directive.

Neither is harmonisation the objective of the other forum where IRAs are involved, namely the European Platform of Regulatory Authorities (EPRA). This institution provides for 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. Differently from the Contact Committee, where one of the limits in the harmonisation of the regulatory framework lies in the scope of the AVMS Directive, here, the substantive competences are media-wide; however, the statute of the EPRA limits the possibility to issue general guidelines on regulatory matters, as it provides that any activity pursued by the EPRA shall exclude the making of common declarations and the pursuit of national goals (1(2) of the EPRA Statute).

The lack of a body that is in charge of achieving a degree of coordination, for example by issuing guidelines on requirements for regulatory legitimacy and supervising compliance, is a relevant issue in the European regulatory framework.

An interesting finding is the growing influence exerted by **courts**. Here, the enforcement activity is not limited to sanctions in case of breach, rather it is coupled with a gap-filling role: courts not only solve conflict between regulatees, but also resolve more sensitive issues such as the allocation of regulatory powers among regulators: either between IRAs (for instance, in the case of conflicts between data protection and media authorities) or between IRAs and private regulators (for instance, in the case of conflicts between media authorities and press councils).

This role of courts has advantages and disadvantages: obviously courts 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, access to courts is limited (by financial considerations, by issues of standing, etc.). Moreover, 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, in particular where they are complemented by private regulation.

Again a reference to the European framework should be paid, as both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) exerted a strong influence over the national interpretation of media regulation. From the national Case Study Reports and the Comparative Reports emerge a positive influence exerted by the ECtHR jurisprudence and the European Convention on Human Rights (ECHR) on media freedom and independence, in particular in libel and defamation cases, restrictions to publishing, protection of private life and protection of sources. The CJEU, instead, appears to play only a different role, mostly focused on the structural questions such as broadcasting licences. However, steps have been made towards a broader approach, as the decisions on the liability of hosting providers of the CJEU showed.

As regards private actors, it is interesting to describe **regulation of journalists** as a specific form of professional regulation, where the overlapping between industry and the profession's interests emerge. Here, the rule-making activity has been historically allocated to professional associations on the basis of the implementation of the principle of freedom of expression. However, a shift towards more representative bodies can be acknowledged in the majority of MEDIADEM countries, where multi-stakeholder bodies such as press councils have been set by industry and professional associations in conjunction, either after the threat of state intervention or after the fall of pure professional models to achieve the expected results of monitoring and enforcing ethical rules among journalists. Although, the involvement of industry associations, that can range from publishers to broadcasters' associations depending on the scope of regulation, was welcomed by public actors and by journalists' associations, so as to improve the level of implementation of private regulation among signatories, the research shows that coordination is not always easily obtained. The Estonian case is a clear example where irreconcilable conflicts brought to a duplication of regulatory bodies, and respective rules creating inconsistencies and overlapping regulation.

2.3 The scope of regulation

In relation to media, there is a relatively consistent pattern that differentiates press from broadcasting, which translates into a much stronger role for private regulation in the press and significant public regulation in the field of broadcasting with some degree of co-regulation.

Models differ importantly across Member States as the report on the implementation of the AVMS Directive also suggests. 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 within 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. 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.

2.4 Different forms of private regulation

One of the most striking features of the experience of the countries examined 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.

If the traditional distinction between self-regulation and co-regulation is the one adopted by many of the legislative interventions either at national or at European level (e.g. in the 2003 *Inter-institutional Agreement on Better Law Making* and in the AVMS Directive), there are several shades between the two extremes, including forms of delegated self-regulation and ex post recognised self-regulation. These two are also general categories, but they are distinguished from self- and co-regulation as ex post recognised private regulation refers to those cases where the regulators and the regulatees may coincide, all the functions of regulation are carried out by private regulators, but subsequently government can give such regulation public status, for example by adopting private decisions and requiring third party compliance; whereas delegated private regulation refers to the cases where the regulators and the regulatees can coincide, the functions of monitoring and enforcement are carried out by private regulators, but government is involved in the definition of the principles that the private regulation should pursue, with delegation of detailed rules to private regulators and sometimes requiring third party compliance.

Table 2. Taxonomy of private regulation initiatives

	Self-regulation	**Delegated self-regulation**	**Ex post recognised 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 decree provides for a co-regulatory regime for short extracts, commercial communications, accessibility issues, respect for human dignity and protection of minors.
Bulgaria		Journalists and industry self-regulation under the auspices of EU		The Media Act introduces a form of co-regulation between the Electronic Media Council and two self-regulatory bodies.
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 the Forum for Responsible Food Marketing Communication	The Media Liability Act 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 Self regulatory code of conduct on responsible	The Media Services Act provides in several aspects for self-regulation as the first choice. In case the self-		Some measure in broadcasting and advertising

	advertising policy in children programmes adopted by media service providers	regulation is not applied, the regulator may set the rules (e.g. as regards advertising addressed to minors).		
Finland	Press Council Self-regulation by main Finish broadcasters			The Finnish Communication Authority applies the self-regulatory code of main Finish broadcasters to all Finish television companies.
Germany	Press Council Advertising Council FSF – self-regulatory body of private broadcasters FSM - self-regulatory body of well-known Internet service providers and Internet companies		Legislative recognition of journalistic standards for broadcasting (also online publishing)	Self-regulation in the area of protection of minors is supervised and accredited by the Commission for the Protection of Minors in the Media of the media authorities of the Länder.
Greece	Journalists' trade unions Code of Advertising Communication enforced by the Council of Communications Standards	Law 2863/2000 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	Most of the principles of the journalists code of conduct are summarised in the code of conduct on news broadcasting and political programmes in the audiovisual sector (both public and private), enacted through law. As implementation	

		required to establish in the form of multi-party self-regulatory agreements that define and adopt rules of conduct and ethics standards concerning media content.	of the AVMS Directive, the law provides that television operators can establish alone or with others self-regulatory contracts to control the content of news and programmes.	
Italy	Self regulation of advertising standards	Law delegates self-regulatory power to the Journalist Association,		Coordination between the Data Protection Authority and the Journalist Association with regard 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 the protection of dignity online
Romania	Press council for industry and journalists Romanian Advertising Council Romanian Audiovisual Communication Association			Complementing and detailing the legal provisions, the Broadcasting Council negotiated with the broadcasters and the civil society a collection of more specific norms: the Code on the Broadcast Content.
Slovakia	Journalist and industry self-regulation			
Spain	Journalists	User's Bill of		The General Statute

	association Agreement Association for Advertising Self-regulation Self-regulatory Code on TV Contents and Children	Rights of electronic communication services providing legal protection for telecommunications' users, coherent with European standards Non-compliance with the self-regulatory codes constitutes an administrative infringement and may be sanctioned.		on Audiovisual Communication acknowledges a 'right to self-regulation', and empowers independent supervisory authorities to verify the legality of a code, and even to impose financial penalties for non-compliance.
Turkey	Journalists association			
UK	Press industry self-regulation			Video on demand is co-regulated by the Authority for Video on Demand (ATVOD) and Ofcom in order to give effect to the AVMS Directive.

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 case study 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.

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 appointment 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. 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.

3. Conclusions and policy recommendations

Different regulatory instruments are employed in the media area. The broadcasting sector is characterised by the use of traditional 'command and control' techniques, through the extensive use of licensing and administrative sanctions. However, in all national case studies there are examples of ineffectiveness, depending on the lack of regulatory effectiveness and enforcement.

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. 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.

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.

The policy recommendations flowing from the previous analysis are the following:

- **Independent regulatory authorities**, regardless of the width of their remit, should be provided with sufficient regulatory powers vis-à-vis state bodies. At the same time, the independence of their members should be ensured.
- The independence of regulatory authorities at national level should be combined with **better coordination at the European level**. The existing fora available for the exchange of views on national experiences should engage in the provision of normative guidance in order to achieve an harmonised legal framework for communications.
- **Domestic media private regulators**, in particular as regards the regulation of professional journalists, should strengthen their coordination through the creation of international/European fora. Their regulatory approach should overcome the traditional distinction between press/broadcasting/new media in order to achieve a more integrated structure. Organisational integration and policy coordination should be at the center of their agenda in the years to come.