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A yellow-tinted background image showing a laptop, a microphone on a stand, and several newspapers. One newspaper has the headline 'L'Italia è un'isola di democrazia' (Italy is an island of democracy).

**Policy report addressing state and non-state  
actors involved in the design and  
implementation of media policies supportive of  
media freedom and independence, the  
European Union and the Council of Europe**

September 2012

## **Project profile**

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

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## Table of contents

Information about the authors .....	4
Introductory note .....	9
I. Policy recommendations addressing state and non-state actors involved in the formulation and implementation of media policies supportive of media freedom and independence .....	10
Policy suggestions for free and independent media in Belgium .....	11
<i>Pierre-François Docquir and Bart Van Besien</i>	
Policy suggestions for free and independent media in Bulgaria .....	19
<i>Ruzha Smilova, Daniel Smilov and Georgy Ganey</i>	
Policy suggestions for free and independent media in Croatia .....	28
<i>Nada Švob-Đokić</i>	
Policy suggestions for free and independent media in Denmark .....	37
<i>Rasmus Helles &amp; Henrik Søndergaard</i>	
Policy suggestions for free and independent media in Estonia .....	43
<i>Halliki Harro-Loit and Urmas Loit</i>	
Policy suggestions for free and independent media in Finland .....	52
<i>Heikki Kuutti and Epp Lauk</i>	
Policy suggestions for free and independent media in Germany .....	62
<i>Sebastian Müller and Christoph Gusy</i>	
Policy suggestions for free and independent media in Greece .....	71
<i>Evangelia Psychogiopoulou and Anna Kandyla</i>	
Policy suggestions for free and independent media in Italy .....	81
<i>Federica Casarosa</i>	
Policy suggestions for free and independent media in Romania .....	89
<i>Ioana Avădani</i>	
Policy suggestions for free and independent media in Slovakia .....	97
<i>Andrej Školkay and Klaudia Lászlóová</i>	
Policy suggestions for free and independent media in Spain .....	102
<i>Juan Luis Manfredi and Ana López Cepeda</i>	
Policy suggestions for free and independent media in Turkey .....	109
<i>Dilek Kurban</i>	
Policy suggestions for free and independent media in the United Kingdom .....	116
<i>Yolande Stolte and Rachael Craufurd Smith</i>	
II. Policy recommendations addressing the European Union and the Council of Europe .....	125
Policy suggestions targeting the EU and the Council of Europe for media freedom and independence .....	126
<i>Fabrizio Cafaggi, Federica Casarosa, Tony Prosser, Andrea Renda and Rosa Castro</i>	
III. Regulatory matrix .....	141
Regulatory matrix .....	142
<i>Fabrizio Cafaggi, Federica Casarosa, Tony Prosser</i>	

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## **Introductory note**

What is the value of research when its results are not reflected into political and societal debates? To bridge this well-known gap the fourteen teams of the MEDIADEM project have reviewed the results of their work in order to provide policy makers and the media policy community more broadly with a condensed version of their findings. The policy papers contained in this collective volume represent the essence of MEDIADEM's output.

Aimed to inform domestic state and non-state actors operating in the field of media policy, the project teams outline in succinct policy papers that exceed no more than ten pages key trends and concerns relating to the performance of free and independent media in their own countries, followed by specific recommendations for the promotion of media freedom and independence. The countries covered are Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Romania, Slovakia, Spain, Turkey and the United Kingdom.

The analysis has shown that media policy is predominantly a national policy domain. However, the Council of Europe and the European Union have increasingly gained policy importance, and their influence might indeed become more pronounced in the years to come. Against this background, this collective volume also covers policy recommendations addressing the Council of Europe and the European Union. Also, it offers a regulatory matrix that provides an overview of the regulatory systems at work in the fourteen countries under study.

September 2012

The MEDIADEM consortium

**I. Policy recommendations addressing state and non-state actors involved in the formulation and implementation of media policies supportive of media freedom and independence**

## **Policy suggestions for free and independent media in Belgium**

*Pierre-François Docquir and Bart Van Besien*

### **Policy summary**

Free and independent media have a crucial role to play in democratic societies. They provide citizens with access to the information they need in order to actively participate in the public debate. They even increasingly provide direct platforms for such participation through their Internet activities. As public ‘watchdogs’, their task is to provide accurate and reliable information to the public on matters of general interest, and to expose the state and other authorities to permanent public scrutiny.

The Belgian media are currently facing numerous challenges. Many of these challenges can be directly attributed to changes affecting the media firstly through the Internet and secondly through the technological convergence. In this climate of change, media actors are looking for ways to respond to these challenges, while state policy actors must consider how to continue to support free and independent media, and also find a way to adapt the legislative and regulatory framework to encompass this new environment. Research carried out in Belgium in the framework of the MEDIADEM research project has produced two reports (both available on the project website), which provide a description and analysis of some of the key issue areas that have a bearing on media freedom and independence in the country. These include: the role of public service media on the Internet, the currency of constitutional safeguards on freedom of the press, how to make these safeguards technology-neutral, the need to block any further significant concentration in the Belgian media market, the stimulation of innovation in the media sector, and the need to support the independence of journalists and the editorial board within media companies.

This policy report is based on MEDIADEM’s research findings for Belgium. It consists of ten specific policy recommendations that address a broad range of state actors (such as the French-language Community, the Flemish Community and the Federal State) and non-state actors (such as private corporations, media associations and civil society organisations) that are active in the field of media policy, with a view to improving local media policies for the support of free and independent media in Belgium. These are:

- 1. Ensure a better coordination of media policy among state policy actors**
- 2. Ensure that the legal and constitutional rules on freedom of the press are technology-neutral**
- 3. Guarantee journalists' freedom and independence**
- 4. Support self-regulation in journalism ethics**
- 5. Support innovation and creativity in the media sector**
- 6. Ensure a fair and well-balanced relationship between news content producers and distributors**
- 7. Support the implementation and update of the Media Pluralism Monitor**
- 8. Guarantee a level playing field for private and public media**
- 9. Ensure the independence of public service media through increased transparency and public participation**

## 10. Support media literacy projects

### Key observations

In Belgium, there is a general acknowledgment of the importance of media freedom and independence, and of freedom of expression in general. These principles are relatively well protected by Belgium's legislative, regulatory and judicial systems. Nevertheless, the following key observations can be made with regard to the future development of media policy on the protection of media freedom and independence in Belgium.

The first key observation that we can make on the basis of the research conducted for the MEDIADEM project is that Belgium has a complicated organisational structure and that **the competences to deal with media policy are scattered between different levels of state**, i.e. mainly the French-language Community, the Flemish Community and the Federal State (in addition, media policy is to a large degree influenced by the European Union and the Council of Europe). This separation of competences sometimes significantly slows down effective media policy in Belgium (as well as the effective transposition of EU law). The interviews conducted for the preparation of the MEDIADEM case study report 'Does media policy promote media freedom and independence? The case of Belgium' have revealed that various actors involved in Belgian media policy are disappointed with the unsatisfying cooperation between the different state actors for the formulation and execution of meaningful media policies (in particular in light of technological convergence). On the other hand, this separation of competences enables state actors to adapt their media policy to specific concerns and preferences of the local population. This is because the separation of competences in media policy mirrors, to a large degree, the division of the country's populace, and of its media along language lines. The division of powers also has the positive side effect that in practice, self-regulation is often favoured over state regulation. This is because of the absence of a single competent state actor to regulate issues that are common to different forms of media. Finally, some levels of cooperation exist between particular state actors (such as the 'Conference of Regulators for the sector of Electronic Communications', where the Flemish and the French-language audiovisual media regulators are meeting on a regular basis with the federal telecommunications regulator to coordinate certain of their regulatory initiatives).

The second key observation is that Belgian **media policy actors have difficulties in finding solutions to the continuous technological evolution, the increasing role of the Internet and the blurring of the borders between different forms of media that used to be distinct (i.e. convergence)**. These phenomena have not yet seriously affected the institutional structures of the Belgian media policy. Legislation still makes a basic distinction between the written press and the audiovisual media (with different state actors being competent to regulate these media), and without a clear policy view on how to regulate Internet-based media. Policy makers tend to respond to the various problems and challenges on a case by case basis.

Technological evolution has caused in particular, **controversy over which activities public service media are allowed to develop on the Internet**. On the one hand, there is a growing acceptance of public service media developing audiovisual activities on the Internet, as an extension to their traditional broadcasting activities. On the other hand, private media players are questioning whether public service media should be allowed to offer additional activities online (such as providing free 'written press' activities), and in particular whether they should be allowed to attract advertisement revenues from their online activities. State actors appear to be evolving towards a broad definition of the public remit of the public service media, allowing them to develop their online activities to quite an extensive degree.

However, this happens without the broad approval of the private media groups (although the latter are not questioning the online presence of public service media as such, but rather the extent to which they are active online).

The stampede of the different media groups towards the Internet has left some of them in a difficult economic (or financial) situation. Some media outlets - in particular traditional media such as newspapers - are struggling with decreasing sales figures, which are to some degree related to the wide availability of free news online. At the same time, the economic crisis is negatively affecting advertisement incomes. Private media actors are struggling to find new business models to make the production and dissemination of online news a profitable and sustainable business. In addition, state actors have not yet succeeded in developing ground breaking policy schemes to help private media actors in their efforts, and, by doing so, assure the conversion of free and independent media from their traditional fields of operation to the online world.

These technological changes and the economic uncertainty for the media outlets affect the work of journalists. The Internet and the increasing technological convergence have some clear positive influences on journalistic work. For instance, they broaden the plurality of sources, they expand the accessibility and public impact of the journalistic work, and they offer platforms for direct communication with the public. However, the velocity of news circulation also adds a substantial amount of pressure for journalists (for instance it can mean less time to properly check their sources). Most of the journalists seem to agree that the economic uncertainty and the increasing workload negatively affect their working conditions and the quality of their journalistic output.

## **Policy recommendations**

### **1. Ensure a better coordination of media policy among state policy actors**

Research has revealed that there is often a lack of coordination of media policies in Belgium, due to the different levels of state that are competent for dealing with media policies. Given the separation of the Belgian media along language lines and the separation of competences in media policy between the Communities and the Federal State, there is a need for a better coordination of media policy by the different state actors. Such coordination would help to develop sound media policies for each of the communities, and the whole country, especially in light of technological convergence.

Currently, the different regulators for the audiovisual media and the telecommunications regulator are consulting one another in the 'Conference of Regulators for the sector of Electronic Communications' (CRC) (for instance, through the CRC, the regulators coordinated their decisions regulating triple play services), but only started doing so after a decision of the Belgian Constitutional Court was rendered which forced them to do so. There is a need for similar procedures to be developed to ensure that all state actors involved meet on a regular basis, and in an institutionalised context, in order to exchange information on current policy issues, compare best practices in the field of media policy, and coordinate policy initiatives whenever it is necessary in order to achieve efficiency.

**In an excessively complicated institutional landscape, Belgian state actors dealing with media policy need to better coordinate their actions to achieve efficiency in media**

**regulation, especially in light of technological convergence. An institutional platform for the exchange of information and good practices on a regular basis should be established.**

## **2. Ensure that the legal and constitutional rules on freedom of the press are technology-neutral**

With the continuous development of new technologies, and with media actors being increasingly active in media forms outside their traditional fields of action, the legal and constitutional safeguards for the freedom and independence of the media should be updated in order to become technology-neutral (and thus have their scope broadened). Given the recent decision of the European Court of Human Rights (ECtHR) in the case of *RTBF v Belgium*, it makes particular sense to update the constitution regarding the prohibition of prior censorship. This will ensure that the prohibition is no longer limited to print media alone, but applies to other types of media such as audiovisual broadcasts and Internet-based media. As the case law of the Constitutional Court (on the protection of journalists' sources) and of the ECtHR has established, the public watchdog function of the media is implemented not only by traditional forms of journalism, but also through other actors and platforms. Given the importance of the Internet in the current media landscape, it furthermore makes sense to include a right of access to the Internet, as part of the constitutionally protected freedom of expression.

**In a continuously more converged technological environment, state actors should ensure that the legal and constitutional rules on freedom of the press are technology-neutral in order to guarantee the freedom and independence of media on all existing and future platforms.**

## **3. Guarantee journalists' freedom and independence**

Given the essential role played by journalists for the freedom and independence of the press (and for democracy as such), it is of utmost importance to guarantee an adequate level of the freedom and independence of the journalists working for media companies. This becomes all the more important in light of the economic downturn, decreasing readership, decreasing advertisement incomes (especially for the written press) and deteriorating working conditions for journalists. This often goes together with an increasing commercial pressure on the production of news.

To counter these pressures, it is of vital importance that the freedom and independence of journalists is properly guaranteed, in particular as regards their own management. Currently, this is to some degree covered by internal or external documents such as codes of journalism ethics and editorial statutes (mostly for radio and television broadcasters). The codes of journalism ethics for the self-regulatory organisations CDJ and RVDJ have been widely adopted. Although the law sometimes imposes the adoption of editorial statutes guaranteeing the independence of journalists, and respect for the editorial line of a particular news outlet, this obligation does not apply to all media outlets and is not always complied with. In practice, the impact of the editorial statutes is rather limited. The same is true for consultative organisations such as the committees of journalists that exist within some media outlets, or for the foundations that look after the editorial principles. Nevertheless, these internal documents and internal organisations could help in fostering the journalists' independence from their own management.

It is particularly important to safeguard the role of editors-in-chief and the editorial boards. It is essential that these should serve as a true barrier between the journalists and the management, and not be involved in commercial decisions. Above all, the salaries of the editor-in-chief and the other members of the editorial board should not be dependent on sales figures or revenues from their media outlet or the media group (as is the situation in a number of cases).

It makes particular sense that state actors further render financial support to independent organisations stimulating the local production of investigative journalism projects. Applications for funding should be open to all media players (for both public and private media; and regardless of whether they are paper-based, broadcast or Internet-media) and should be reviewed on an anonymous basis by a committee of independent experts, where no representatives of the state should take seat.

**We recommend that state actors and non-state actors develop media policies that effectively stimulate the independence of journalists and of the editorial board. State actors should make any public support, direct or indirect, to the press dependent upon the condition that true safeguards exist (and are effectively applied) for the freedom and independence of the journalists and the editorial board within the media companies.**

#### **4. Support self-regulation in journalism ethics**

In practice, self-regulation has often proved to be a good tool for stimulating respect for journalism ethics and journalistic independence. The different levels of state and the private media players should continue to stimulate self-regulation, especially by providing a framework of support for self-regulatory initiatives. This should translate into a continued offering of financial support by state actors and non-state actors, so that self-regulatory organisations have the means to do their job. Sufficient guarantees should remain in place so that the financial support does not include any intervention in the content of the advice given by self-regulatory organisations, or any other type of interference with the working of these organisations.

**State actors and private media players should provide balanced financial support for the continuation and development of self-regulation in journalism ethics, and its evolution towards Internet-based media (in order to ensure the quality of both the content created by professional journalists online and of user generated content).**

#### **5. Support innovation and creativity in the media sector**

There are numerous developments in the media sector that should urge media actors to invest more in innovation and creativity. Among these developments are the decreasing revenue streams from subscribers and advertisers and the wide availability of free news on the Internet. On the other hand, technological developments also provide opportunities for the development of new forms of journalism and of a more direct relationship with the public.

The interviews done for the MEDIADEM case study report revealed the concern of policy makers for the various challenges posed by global developments (almost always linked to the increasing role of the Internet) on local media players. Some of the interviews also revealed a lack of power of local policy makers to respond to these challenges (or a lack of

confidence in their own powers to formulate adequate responses). We consider it important that local content creators can continue to produce and communicate news that is relevant for the local media market in an Internet-dominated environment.

This means in the first place that media players have to develop new business models that benefit from the openness of the Internet, and simultaneously ensure sufficient income for the media to continue to operate and generate profits. At the same time, the Internet offers private media players the opportunity to develop new forms of journalism and a more direct relationship with their public. State actors can support the development of such practices by providing financial support (subsidies) for concrete projects that are developed and executed by the media sector. Such financial support should be available to all media players (i.e. the state should not be able to pick and choose its interlocutors; the concrete initiative and execution of the projects should always come from the sector itself), and its institutionalised management should be operated in cooperation with the media sector.

We believe that there is a need for Belgian state actors to promote the development of media policies at EU level on the effective roll-out of EU-wide high-speed Internet access networks and on the alignment of value added tax (VAT) rates for online media to the lower rates applying to the printed press.

In short, non-state actors should consider how to adapt their business to the challenges posed by the Internet, and state actors should consider how media policies can be developed to guarantee both the openness of the local media market to new technological developments and the independence of local content creators.

**State actors and non-state actors should better coordinate their efforts to support innovation and creativity in the media sector.**

## **6. Ensure a fair and well-balanced relationship between news content producers and distributors**

The continuous development of new technologies and the success of Internet-based media have brought about an increasing influence of Internet companies and telecommunications companies on the local media market. One of the risks involved is that the distribution of local news content becomes too much dependent on a limited number of corporations that handle the distribution of news, with increasingly unequal bargaining positions between content producers and distributors. This risk, together with a shift in advertising budgets from content producers to online distributors, potentially endangers the future of local news production. Nevertheless, we believe that, in the end, content creators and distributors depend on each other and that distributors have a clear interest in ensuring the fair remuneration and further existence of news creators.

**We recommend that state policy actors develop media policies that ensure a fair and well-balanced relationship between news content creators (traditional and Internet-based media) and distributors (Internet companies and telecommunications companies).**

This could be achieved in the following ways:



- Set-up a system of fair compensation for the distribution of news content, for instance via compulsory licences for the re-use of copyrighted material.
- Bring concrete policy proposals to the EU level on a reform of the copyright system, so that news content creators are fairly compensated for the distribution of their content by third players, such as news aggregators and social networks.

## **7. Support the implementation and update of the Media Pluralism Monitor**

Belgium has quite a high concentration of media players in both the French- and Dutch-language media markets. It is yet unclear how the digital switchover will influence concentration and pluralism (on the one hand, it creates room for new players to enter the market; on the other hand, Internet media in Belgium are still dominated by traditional content providers). In light of the current high level of concentration and of the opportunities offered by digital and Internet media, it seems a good moment to take steps to guarantee a sufficient level of pluralism in the Belgian media sector.

A first step to safeguard an adequate level of media pluralism could be the effective implementation of the Media Pluralism Monitor, designed in 2010 by ICRI, CMCS, MMTC and E&Y as a tool for assessing the risks for media pluralism in the EU Member States and identifying possible threats to pluralism based on a set of indicators.

**We recommend that Belgian state actors provide financial support for the implementation and regular update of the Media Pluralism Monitor, the public dissemination and discussion of its results, as well as for further research, publications and dissemination in the field of media pluralism.**

## **8. Guarantee a level playing field for private and public media**

Presently, there is much discussion on the role of public service media on new platforms such as Internet-based media. We believe that state actors should safeguard a level playing field for private and public media outlets to operate and compete with one another. This means in the first place a continuation of support to public service media, based on a clear description of the public service remit. In practice, this means that public service media should be allowed to develop their activities within new forms of media, in particular, the Internet. Public service media should comply with the relevant European state aid assessment rules, and Belgian state actors should ensure that the necessary procedures are installed and complied with. Furthermore, state actors should consult with the entire media sector on the question of whether, and how far public service media should be able to resort to advertising to finance their public remit activities.

**State policy actors should continue to support a ‘dual media market’ with a fair and stable balance between public and private media.**

## **9. Ensure the independence of public service media through increased transparency and public participation**

In order to properly play their role in providing unbiased information and a diverse source of public opinions in a media environment that becomes more and more focused on the Internet, public service media should remain independent from any political and economic influences. Public service media should demonstrate this to the public through enhanced transparency in their decision-making. The organisational structure of the public service media should reflect this independence as much as possible. Public service media should furthermore engage in meaningful dialogue with the public on their impartiality, their quality and their achievement of the public remit goals. This could be done via public Internet forums (i.e. open consultation of the audience on a continuous basis), via the establishment of an advisory body consisting of representatives of the public, or via a reinforcement of the system of ombudsmen (at the level of the public service media organisation) whose task should become broader than dealing with complaints from the public, and should include a proactive reaching out to the public. Public service media should develop a culture of openness and participation as an essential dimension of their public remit.

**Given the democratic and participatory culture of Internet-based media, public service media should become more transparent in their decision-making and more open to public participation.**

## **10. Support media literacy projects**

As fast changing technologies are a major factor in the current media landscape, media literacy in a digital environment seems an increasingly important skill that citizens should develop. Thus, state and non-state actors should work more closely together in configuring and executing media literacy initiatives, especially with regard to Internet media (including social networks and sharing platforms). Such initiatives should focus on lifelong media education, and not only on media literacy education in schools. Such projects should trigger the public's abilities to access, understand and critically judge news brought by the media and to actively participate in (online) media debates. Such projects should also improve the overall transparency of the ownership of media outlets and of the potential political and economic influences on the production of news.

**State actors and private actors should increase their financial support to media literacy projects. They should furthermore include lifelong media literacy in their policy goals, and in general improve the coordination of media literacy projects (in particular by attributing a more prominent role to public service media).**

## **Policy suggestions for free and independent media in Bulgaria**

*Ruzha Smilova, Daniel Smilov and Georgy Ganev*

### **Policy summary**

This policy paper is based on research on media policy-making and media regulations (with a special focus on the policy processes and tools aimed to support free and independent media) in Bulgaria, carried out within the framework of the MEDIADEM project. Our main conclusions are that in the rapid transition to liberal democracy/market economy in Bulgaria in the 1990s, **media policy** was not among the explicit priorities of the main political and other players. Developments followed the drive for liberalisation and less regulation, which was considered to be the proper way for realizing the values of freedom of expression and access to information, crucial for building a democratic society. At the same time, however, **media regulation** in Bulgaria was at the centre of politics during the early transition period: it was part of the struggle for domination of the main political actors. The crisis of political parties in Bulgaria (since 2001), nevertheless, led to a marked relaxation of the political pressure on the media. Open partisanship disappeared and was replaced by more subtle ways of political influence. The private media market was already quite developed, thus other concerns took centre stage: the conflict between the corporate interests and the quality of journalism. At present, the Bulgarian media regulation is at a loss of guiding principles: all agree on the importance of the freedom of speech and media independence, yet there are strikingly different visions of what these abstract concepts mean. The group of the commercial media presses either for less regulation, or for regulation maximising their profits, a top priority being the reduction of public support for the public media – like a reduction of state subsidy or a blanket prohibition on commercial ads for public broadcast media (PBM). Politicians/political parties still maintain close links with the media, yet the direction of the influence is changing: there is a growing trend of mediatisation of Bulgarian politics, with PR and media presentation replacing extensive party membership/local structures of the parties.

Based on MEDIADEM's research findings, this policy brief puts forward the following policy recommendations for the promotion of media freedom and independence in Bulgaria:

- 1. Ensure transparency of media ownership and prevent excessive commercial media concentration**
- 2. Guarantee transparent financing in support of plural independent media**
- 3. Regulate political advertising in the media and guarantee fair media coverage during election campaigns**
- 4. Improve the ethical integrity of the journalistic profession**
- 5. Enhance the independence and effectiveness of the media regulatory bodies**

## Key observations

The account of the early developments of media regulation in Bulgaria suggests that throughout the 1990s media regulation was a part of the struggle for domination of political actors: the ex-communists and the pro-reform democrats. Yet while being at the centre of politics during this period, it never became its exclusive, dominant focus. The media, and especially the PBM, was a powerful instrument for voter mobilisation and all ruling parties made consistent attempts to secure control over it. Since the beginning of the new century, however, political parties in Bulgaria went through a process of crisis, which led to a marked relaxation of the political pressure on the media. ***Open partisanship disappeared and was replaced by more subtle ways of political influence.*** Politicians and political parties tried to maintain their close links with the media, yet instead of directly controlling the PBM they sought different channels of influence – mainly through financing and granting licences to politically connected businessmen. By that time the commercial media was itself already stronger and started to develop its own channels of influence on the political processes. The result of these simultaneous processes was a quite dramatic mediatisation of Bulgarian politics over the last ten years. It will be fair to say that PR and media presentation has to a large extent replaced the need for extensive party membership or local structures for the parties. Without the media-savvy nature of their leaders or without their personal charisma, political success at present is hardly possible. Yet, in contrast to the 1990s when political actors did try to dominate the media, the close relationship between the two in the new century happens mostly through mutual luring, complex corporate-political enticement, and even sometimes open mergers between political actors and media outlets (as shown by the Ataka party -TV programme hybrid).

As a result, **media policy formulation and implementation is ever more dependent on politically connected corporate interests** (especially after 2001). This is well illustrated by the licence-related practice of the broadcast media (BM) regulators, the independent Council for Electronic media (CEM) and the governmental Communications Regulation Commission (CRC). This trend of (politically connected) corporate dependence of media policy formulation and implementation has continued and has been strengthened during the very controversial, contested and slow process of digitalisation, analysed in detail in our MEDIADDEM case study.

The process of increased corporate dependence is accompanied by the **growing role of media business associations at the expense of the influence of the associations of journalists and other civil society organisations (CSOs)**. In the late 1990s and early 2000s there was a strong pressure from the latter to adopt legislation that would guarantee the independence of the media, protection of the freedom of expression and free access to information. This pressure from non-special interest CSOs in the post 2001 period has declined, and has visibly dropped after the EU accession of the country.

The major **structural problems** of the media in Bulgaria are connected to the **growing influence of the media business on media policy**. These problems concern the issues of **media ownership, its non-transparency and its excessive horizontal and vertical concentration**. An important feature of the press market in Bulgaria is the lack of special ownership rules and of rules guaranteeing its transparency. With respect to all types of media, there are no special rules against concentration on the media market, nor are there any media pluralism tests introduced in order to determine abuse of dominant market position in the media market. It is entirely at the discretion of the Competition Commission to decide, without any media-specific tests and requirements constraining its decision.

Although the media market in Bulgaria is characterised by the presence of numerous media organisations, there is a **lack of true diversity of media content**. This is only partly caused by the growing concentration of media ownership and the influence of business/political parties on the media. The media itself play a role in this process – pressed by the falling circulations and the competition for market share, the different media outlets started to produce tautological content and identical media formats. The result of the combined forces of the market and political pressure is that although there is an apparent diversity of content, the differences are only apparent, and of marginal importance: the media content is basically the same. More specifically, the media content is not only lacking in true diversity, but is also characterised by a growing tabloidization and the substitution of serious political and analytical problems with infotainment. Coupled with the growing withdrawal of serious investigative journalism and the general pro-governmental positions of the main media outlets, this reduced diversity of media content signals a serious threat to the media's freedom in the country.

Though the different media organisations represent the entire political spectrum, there is a **clear trend in recent years towards governmental favouritism**, that is, of covering the activities of the government favourably. This has traditionally been true for the government-controlled PBM, but it has recently become more pronounced in the commercial media than in the PBM. This conformism of some major commercial media outlets is explained by **the importance of state funding** (through state-sponsored advertising) for the survival of the media in time of economic crisis, during which advertising revenues dropped significantly. Public sector advertising more often than not goes to government-friendly media.

A further source of content-related concern that is directly relevant to the relationship between the media and the quality of democracy is **the regulation of political advertising in the media and the coverage of electoral campaigns**. The role of the media for the quality of the political process is always paramount, yet is probably most pronounced during the election campaigns, when the task of the media is to inform the public, so that it can make better informed choices. There are virtually no restrictions (going beyond the general restrictions in the Penal Code against defamation, libel, hate speech, etc.) on political speech in the press, either during or outside political campaigns. Political speech in the commercial broadcast media is similarly not strictly regulated. Some special rules have been enacted in the recent Electoral Code (like charging all candidates the same amount – which must be made public and announced in advance – for political ads and other paid materials) but these only apply during the electoral campaign period and they are the same as those for the press. The **PBM**, in contrast, are **heavily regulated with respect to coverage of political issues** – they have the obligation to guarantee political pluralism in each and every one of their political and news programmes in non-electoral time. During electoral campaigns, the PBM are under even stricter restrictions – they are not allowed to cover political (i.e. 'partisan') issues at all, the proclaimed aim of these restrictions being to guarantee objective and impartial coverage of all parties and candidates. Consequently, the PBM provide little coverage of the political campaigns, effectively depriving the public from independent, objective, impartial and politically plural information on the political programmes and the candidates (which shows the counter productiveness of the above restrictions). The PBM are thus prevented from fulfilling their central remit of providing plural and impartial information on issues of vital importance for democracy - such as political elections - to the public.

Lastly, the **standards of integrity in the Bulgarian media are low**: this is the lowest scoring indicator in the Media Sustainability Index (MSI) 2010 and MSI 2011, and the trend is downward. This is most apparent in the case of tabloids and some regional and local print media outlets, yet is a general trend. There are a number of explanations for the low ethical

standards in the journalistic profession: the liberal entry into the profession, the huge number of journalists and media outlets, the effects of the economic crisis, etc. The strong competition, paradoxically, has not raised the quality of the journalistic product, nor has it increased the plurality and diversity of the media, because of the **wide-spread and increasing practices of self-censorship and trading-in-influence**. The low standards affect not only the journalists, but also the owners and editors: on account of the falling profits, they often submit to corporate pressures from business circles. A further source of pressure on the journalists is the **unhealthy relationship between Bulgaria's print and broadcast media**, on the one hand, **and the PR and advertising agencies**, on the other.

## **Policy recommendations**

### **1. Ensure transparency of media ownership and prevent excessive commercial media concentration**

It is indicative of the strong position of the media owners vis-à-vis the government in the post-2001 period, that no mono-media or cross-media ownership restrictions were introduced, despite the trend of building quasi-monopolies and rapidly emerging media empires. The existing anti-trust legislation aims only at the prevention of the monopolisation of the market, and mono- and cross-media ownership are not interpreted as posing such a threat. There are no strict limits on market shares, circulation and audience shares, advertising revenue shares in the media market or on the capital shares in a media company. The unchecked concentration of non-transparent in terms of ownership media is a major threat to the transparency of the media.

A major feature of the press market in Bulgaria is the lack of special ownership rules and of rules guaranteeing the transparency of the press market in general. This has long been perceived as a major problem, yet only in November 2010 with an amendment to the 'Law on mandatory deposition of copies of all printed and other works', a provision requiring editors to publish the names of the physical persons owning the newspapers and magazines was finally introduced. By mid-2012 it is already clear that this provision does not guarantee effectively transparent media ownership. This is because the list of print media included in the Register of press ownership at the website of the Ministry of Culture is not comprehensive and the information submitted is not always exhaustive. Obviously, this Ministry lacks the administrative capacity and the expertise to manage the Register effectively.

Further, a series of scandals in the press market (involving the new owners of the former WAZ newspapers in Bulgaria) indicate that ownership of the press is not transparent. Though the situation is somewhat different with respect to the broadcast media (the Radio and Television Act, RTA, has a provision requesting that information on ownership of BM be submitted to the CEM and made publicly available on the CEM website), it is not dramatically better. For example, ownership of broadcast media by off-shore companies, where the source and the real owner of the capital are far from transparent, is allowed. The remaining media ownership-related provisions in the RTA in essence refer to the general anti-trust legislation. Since the law does not prohibit monopoly, concentration, or dominant market position per se - just *the abuse* of the latter, it is the independent Competition Commission which decides whether such an abuse is in place. The law also does not set strict ceilings above which a dominant position is deemed unacceptable, leaving it to the discretion of the Competition Commission to decide.

**With respect to ensuring *transparency of media ownership*, policy makers should take several concrete measures:**

- Off-shore companies should not be allowed to own media enterprises. The sources of the capital and the physical owners of media should be revealed.
- There should be stricter control over the ownership information submitted annually to the Register of printed editions (in the Ministry of Culture). Graded fines and other administrative measures for not submitting/submitted misleading information should be introduced and enforced.
- Moving the Register from the Ministry of Culture to the Ministry of Justice (where many similar Registers are relatively better managed – with sufficient administrative capacity and expertise) should also be considered.

**With respect to the growing commercial *media concentration* and the negative effect of this process on pluralism and diversity of the media, policy makers should ensure that:**

- Some media-specific provisions (such as clear thresholds on media concentration and on cross-ownership) are introduced in the competition law and are implemented.
- A media pluralism test is also introduced in the anti-trust legislation, to be obligatorily used by the Anti-Trust Commission in determining abuse of dominant market position and in allowing mergers of media companies.

## **2. Guarantee transparent financing in support of plural independent media**

A major source of concern for free and independent media in the country is the funding of the media. With respect to the press, there are no restrictions on the sources or the ownership of the capital invested in media outlets. The non-transparent financing of media outlets opens the sector to shady businesses, which use the media for promoting their other business interests (by engaging in trading-in-influence practices, black PR against their business competitors, etc.). The financial crisis complicated the situation further by bringing down the circulations and profits, which left the press hostage to indirect governmental funding (through state-sponsored advertising) and ‘shady’ money. As a result, trading-in-influence practices and governmental favouritism are becoming wide-spread in the press.

A major opportunity for financing diverse content in the broadcast media was wasted due to lack of political will. The RTA, for example, mandated the creation of ‘the Radio and TV Fund’ to be the main source of funding for the public service media and for publicly important projects of commercial BM (educational, cultural, political programmes, investigative journalism programmes, etc.), as well as for the CEM itself. The fund was never created, leaving state subsidy as the major source of funding for the PBM and the CEM. By keeping the funding of both the PBM and the CEM directly dependent on the state subsidy, the political elite tried to ensure that these bodies remain politically dependent as well.

Currently there are no state subsidies or any other form of state support for publicly-oriented projects of the commercial broadcast media. Nor are there any state funds in support of investigative journalism in the commercial media.

**Policy makers should reform the current system of providing funding to public service media in order to ensure its political independence and diversity. Also, they should adopt an effective system for monitoring the allocation of state advertising to commercial media – both the press and the broadcast media.** This could be achieved in the following ways:

- Take swift action for the establishment of a state independent Radio and TV Fund, responsible for distributing funds on a competitive basis among all public service oriented programmes – PBM and commercial.
- The general operation of PBM should continue to be funded by (a possibly reduced) state subsidy, yet PBM must compete with commercial BM for the funding of some of their programmes.
- Funds should be earmarked to encourage investigative journalism programmes in all types of media.
- State advertising in commercial BM and the press should be closely monitored (by CSOs in the case of the press and by the CEM with respect to the commercial BM) to avoid financially motivated government favouritism.
- Strict measures for separating media business from other business interests of the media owners should be introduced.

### **3. Regulate political advertising in the media and guarantee fair media coverage during election campaigns**

In Bulgaria, there are virtually no restrictions concerning the access of parties and politicians to the press during but also outside political campaigns. The commercial broadcast media is similarly not regulated: though there are some content-related requirements for the programmes of the BM in the RTA, these do not regulate political speech. Such a task is left to the self-regulatory ethics code. There are some special rules that apply only during election campaigns and they are the same as those for the press: the BM coverage of the campaigns, as well as the air time for the parties and the candidates is sold on equal terms according to rates, which are public and announced in advance.

Importantly, the concept of ‘political ads’ is missing from the relevant regulations, which leaves open the interpretation of whether the so-called ‘political agitation’, as the Electoral Code calls political communication, is part of commercial communication. If it is, it should be subject to the same restrictions (such as the limit of 12 minutes per hour ads time for the BM). In the electoral campaign of 2011, one of the major controversies concerned precisely this issue: whether political ads must be counted within these limits, and if not – what are the time limits of political ads.

A further, again political ads-related problem with the fair media coverage of the political campaigns concerns the growing practice of presenting *paid-for-content* for



*journalistic one*. Prompted by the huge scale of such an abuse, the CEM pledged to introduce a clear definition and clear rules for political advertising as distinct from journalistic content in the long-overdue new media law.

The PBM in the country, on the other hand, are heavily regulated with respect to guaranteeing equal access to parties and politicians to their programmes – they have the positive obligation to guarantee political pluralism in each and every one of their political and news programmes in non-electoral time. The regulations during electoral campaigns are even stricter: the PBM are not allowed to cover political (partisan) issues at all. The journalists in the PBM are not allowed to discuss the party programmes, the candidates, their positions, etc. outside of the strictly-defined formats of ‘election campaign chronicles, (paid) TV clips and disputes’ and the rather limited air time allotted to them. As a result of these restrictions, the PBM have offered limited coverage of recent electoral campaigns – with smaller parties often refusing to pay for their candidates to participate in the planned disputes, which at the end were not held at all. The prohibition imposed on PBM to cover campaigns outside of these paid-for formats effectively deprives the public from objective, impartial, politically plural and independent information on the political programmes and the candidates. Thus the PBM fail to fulfil their central mission of providing plural, impartial and rich information on issues of vital importance (such as the political elections) to the public.

**Policy makers should ensure fair media coverage of election campaigns and regulate political advertising for all types of media, PBM included.** More concretely in this sphere we recommend that:

- Restrictions on the political programmes of PBM during election campaigns (aimed to provide ‘impartial’ coverage, yet effectively blocking any quality coverage) should be removed, or considerably relaxed.
- Political advertising in PBM should be clearly regulated and follow the same general rules that are applicable to all other types of media.
- Political advertising in commercial BM and the press should be clearly regulated and follow the same general rules.
- Measures against presenting PR and political advertising as editorial content should be introduced and enforced.

#### **4. Improve the ethical integrity of the journalistic profession**

The journalistic profession in Bulgaria is in the focus of attention when evaluating the media's freedom and independence in the country. As recent rankings of the MSI show, the standards of integrity in the Bulgarian media are low: this is the lowest scoring indicator in MSI 2010 and MSI 2011, and the trend is downward. Self-censorship is a major and further growing concern not only for the PBM (affecting both the governing bodies and the journalists there), but for the press and the commercial BM as well. A further major concern is the growing practice among Bulgarian journalists of trading-in-influence: up to 50% of the Bulgarian journalists reportedly accept payment 'under the table' for their publications and materials. It is a practice among Bulgarian journalists to accept trips, covered by companies, on whose activities and products they report. Presently, Bulgaria witnesses a media war between media companies, where trading-in-influence, black PR and unfair competition and journalistic practices are the norm rather than the exception. There are numerous explanations for this dire state of the sector: the overly liberal entry into the profession, the huge supply of easily exchangeable journalists, the financial pressures during financial crisis and as a result of the growth of the new media, the practices of subservience of journalists to the powers of the day, inherited from the communist past, etc. An important source of pressure on journalists is the unhealthy relationship between Bulgaria's print and broadcast media, on the one hand, and the PR and advertising agencies, on the other.

**We have the following policy suggestions for addressing these sensitive issues:**

- Current self-regulation mechanisms should be improved – the ethics code should be more widely signed and media councils should start working more effectively.
- The role of editors-in-chiefs as buffers between owners (the financial departments of the media companies) and journalists should be strengthened.
- Some incentives (conditional state funding distributed by an independent body, for example) for better compliance with the ethical standards of the journalistic profession should be introduced and rigorously implemented.
- Conflict of interest legislation (going beyond the self-regulatory provisions in the ethics code) for separating journalistic and PR activity should be adopted and implemented.
- Sanctions for conflicts of interests (mixing journalistic and PR activities) should be introduced and enforced.

#### **5. Enhance the independence and effectiveness of the media regulatory bodies**

The media regulatory bodies – the independent CEM and the governmental CRC - were born with 'an original sin' – the political appointment of their members. The appointment procedure and the ensuing political dependence continue to delegitimize CEM in the eyes of both internal and external observers to this day. The CRC was a major player in the scandals around the digital switchover process, which prompted the European Commission to start a violation procedure against Bulgaria (in which the controversial practices of the CRC are a major concern). Another body involved in media policy is the Competition Commission,

which has recently taken several controversial decisions for media company mergers and unfair business practices of media companies.

**We have the following suggestions for improving the work of these bodies:**

- The CEM, the CRC and the Competition Commission should be closely monitored by CSOs to avoid political and corporate influences on their work.
- The appointment procedure concerning the members of the CEM should be improved – by including a CSO quota and by requiring a qualified majority decision for filling the quota of the Parliament.
- The CEM should become more pro-active in monitoring commercial BM's compliance with their programme licences, impose tougher fines, and even withdraw programme licences, for serious and continuous breaches of the licence terms.

## **Policy suggestions for free and independent media in Croatia**

*Nada Švob-Đokić*

### **Policy summary**

The case study report on Croatia published in the frame of the MEDIADEM project in January 2012 ('Case study report. Does media policy promote media freedom and independence? The case of Croatia') focused on the study of Croatian media policy-making, the regulations enacted that impact the development of free and independent media, and their implementation. It presented the actors involved in media policy and the values the Croatian media policy regulations pursue in line with human rights observation. The report analysed the structure of the media market and the composition and diversification of media content, outlined the professional and social position of journalists and gave an overview of how media literacy influences media transparency requirements. The case study report follows on from the underlying research for the MEDIADEM background information report for Croatia ('Background information report. The case of Croatia') and further develops an overview of the restructuring and development of the Croatian media.

In Croatia the media have been radically transformed during the last 20 years or so, to adapt to media industrialisation processes and global media industries and networks. The initial industrialisation of the media has led to their faster expansion and has created problems for all participants in processes of media production: journalists, editors, media managers, advertisers and audiences. In this respect the media market has radically changed through privatisation of the media and in order to avoid increasing direct state and political intervention. At the same time, public and civil society demands related to democratic discussion of the new media laws and regulations (or their amendments) have been marginalised while the national media system has been exposed to transnational media influences and interests.

Media policy has not always followed these rapid developments and radical changes in the media and their social roles. Its dynamic evolution over the last 20 years or so testifies to the considerable efforts invested in the restructuring and transformation of the media, in the establishment of media markets and in the development of new regulations and laws affecting the media system and markets. Media policy has been under pressure to become better managed and demands for evidence-based media policies have increased. At the same time, the Croatian media policy has constantly referred to European instructions and regulations, which have not always coincided with local situations.

These are the reasons why media policy needs to be further adjusted to the transitional public domain, the rapidly expanding new technologies and the process of individualisation of media consumption, as well as to the emerging new types of communication interactivity. Although the position and social role of the media has been changing rapidly, the media in Croatia have not yet been established as an autonomous system of information, education and entertainment, increasingly internally diversified and specialised, as well as self-referential to a certain degree. The media have, however, appeared as agents of social and cultural change, though their role in this respect is primarily reflected in their increased number and diversification and in the social impact of new media.

Against this background, our recommendations include the following:

- 1. Base the establishment and coordination of media policy on high professional and democratic criteria**
- 2. Fully expose the functioning and reorganisation of public services to public influence and democratic procedures**
- 3. Create a reliable analytical basis for the development of media laws and regulations**
- 4. Amend and restructure the existing laws and regulations, in particular the Media Act and the Electronic Media Act**
- 5. Strengthen the role of the independent regulator (the Agency for Electronic Media)**
- 6. Liberalise the approval of concessions**
- 7. Increase the transparency of the market structure**
- 8. Support programmes of public interest**
- 9. Follow the changes in journalism**
- 10. Promote media literacy and transparency**
- 11. Rely on the Council of Europe and European Union media policy regulations**

#### **Key observations concerning free and independent media in Croatia**

An almost total transformation of the media scene clearly indicates that the social role of the media has been radically changed. The media in Croatia do not yet function as a relatively autonomous system, open to the direct influence, interventions and needs of its consumers. The media primarily disseminate content and standards developed in the transnational media corporations which easily accept and include local content and values in their programmes. This social status of the media contributes towards a decline in the production of content and to a certain extent limits democratic discourse on the media and their regulation, though it supports a quick exchange of information and acceptance of global standards.

This social position of the media is not in favour of the establishment of media policy as a structured public policy that would support free and independent media. The functioning of the media is exposed to different economic and political interests and is only partly the subject of systematic analysis. In Croatia there is a lack of basic data on media functioning and a public insight into the media ownership structure is limited. The character and specialisation of the media is not fully clear and there is no systematic overview of their operation in relation to regulations and laws. The number and professional structure of media employees and details of their working conditions are not precisely known.

In order to encourage the establishment of free and independent media, the Croatian parliament (Sabor), and its Parliamentary Committee on Information, Computerisation and the Media, the Ministry of Culture of the Republic of Croatia, media agencies and the public media organisations **should invest efforts to establish and coordinate media policy that follows the public interest, supports media freedom and independence, and equally includes all aspects of public communication: cultural, economic, technological and infrastructural. The efforts to interpret and understand media functioning as a holistic and constitutive democratic process need to be supported. For a small country like Croatia the public services are very important and their optimal functioning should be a primary aim of media policy.**

## **Policy recommendations**

### **1. Base the establishment and coordination of media policy on high professional and democratic criteria**

Media policy is primarily reflected in the passing and amending of laws and regulations, in the establishment and organisation of work within various state and para-state organisations (agencies), and in the supervision of media activities (regulator). The state is a key actor in media policy. The mandate is given to the Ministry of Culture which is supposed to influence all aspects of the organisation and functioning of the media. However, the Ministry is not well equipped with professional personnel. The state administration is not a successful coordinator of the activities that it is responsible for; it is easily persuaded by political and economic pressures, and eventually follows particular (non-media) interests. Discussions of regulations and laws that design media policy are rare and do not have an important bearing on the formulation of laws. This was particularly visible when the Croatian Radio-Television Act (2010; amended in 2011 and changed again in 2012) was passed. The missing link in the processes of formulation and interpretation of media policy is an organised and interested civil society. A credible analytical insight into media development and the implementation of media policies is lacking.

**The Ministry of Culture, the Agency for Electronic Media (AEM) as well as media companies and organisations should invest efforts in the establishment of media policy based on high professional and democratic criteria. It is essential to raise the professional level of the present day implementation of media policy and to ensure an effective coordination of all actors involved, particularly those that have a mandate and the means to implement media policy (state agencies).**

**The Ministry of Culture should publish annual reports on media policy, the media market and the activities of all bodies involved in media regulations, including public media organisations and services.**

### **2. Fully expose the functioning and reorganisation of public services to public influence and democratic procedures**

The number and diversity of media policy actors involved in the formulation and implementation of media policy has been constantly growing in parallel with the industrialisation of the media and the enlargement of the media market. All actors included in the media functioning and media policy constitute a reliable democratic basis that may influence the functioning and the reorganisation of the media in general and public services in particular. There are new elements in the implementation of media policy, such as the regulation of the Internet, observance of authors' rights, problems of self-censorship, restructuring of public services, in particular the public service broadcaster (PSB), the Croatian Radio Television, and other issues. The networking of different actors interested in media policy is needed, as well as an effective coordination of their proposals, requests and activities. Tendencies to cooperate are visible among interested groups. All these elements represent a basis for the democratisation of media policy and the media themselves. The efforts to reorganise public services should therefore be inspired by the positions and activities of all media actors most of whom declare that they are following the key values orientating the Croatian media policy, such as the freedom of speech and information, media

diversity and media pluralism, as well as the values derived from the Universal Declaration of Human Rights and, in particular, from the European Convention on Human Rights. The plurality and diversity of the media and media content enable freedom of speech and an overall democratisation of the media and media policy.

**The reorganisation processes and overall functioning of public services should be more exposed to public influence and democratic procedures in general, and to media operation in particular. The Parliament, political parties, civil organisations and citizens should openly support the establishment of ethical codices and the observance of values promoted by media policy.**

### **3. Create a reliable analytical basis for the development of media laws and regulations**

In the Croatian transitional context the rapidly changing media environment demands the equally rapid development of regulations and laws, including those that refer to the new media and their increased presence in the country. Solid analytical insight in the media functioning and possibilities are therefore needed.

**The Croatian Statistical Bureau and the Ministry of Culture should provide for a reliable analytical basis for the development of media laws and regulations. It is necessary to develop and sustain a professional specialisation in the legal regulation of the media (including issues such as, for example, authors' rights, open access publishing and intellectual property rights). Statistics on the economic and content characteristics of the media need to be improved.**

### **4. Amend and restructure the existing laws and regulations, in particular the Media Act and the Electronic Media Act**

Media regulations are based on and derived from the Media Act (2003) and the Electronic Media Act (2003) which have been amended and changed several times. The media regulations include ten other acts that pertain to specific issues or specific media organisations (e.g. the Croatian Radio Television Act and the acts on the Croatian Information Agency, audiovisual activities, access to information and others). A number of other laws (e.g. the Penal Act, the Labour Act, the Market Competition Protection Act, and others) also refer to the media. These rather ample regulations have been developed in the past ten years or so. Self-regulatory provisions (ethical codices, statutes of organisations and associations) are often missing or, where they exist, they are rarely enforced. This makes the media regulations incomplete and one-sided. The Croatian media regulations are formally harmonised with EU laws, directives and recommendations and fully in line with EU regulations. However, due to the rapid development of the media and rapid changes of its social roles, amendments to the laws are necessary.

**In this respect a number of laws and regulations, in particular the Media Act and the Electronic Media Act, need to be amended, while other laws and regulations need to be harmonised and improved in accordance with the two above-mentioned basic acts. In the process of restructuring the above-mentioned acts, the status of the non-profit media**

**should be fully acknowledged in order to particularly stress their social role in the development of free and independent media.**

**Following the efforts to regulate some aspects of the Internet, in the process of the amendment of laws, the definition of ‘electronic publication’ (Electronic Media Act, Article 2) should be revised and functionally harmonised with the EU Audiovisual Media Services (AVMS) Directive. At the same time all issues linked to the regulation of electronic publications need to be closely followed.**

#### **5. Strengthen the role of the independent regulator (the Agency for Electronic Media-AEM)**

The Agency for Electronic Media (AEM) is an independent regulatory body managed by its Electronic Media Council (VEM). It monitors the electronic media operations, their ownership structure and operates the *Fund for the Promotion of Pluralism and Diversity of Electronic Media* which co-finances (although the criteria are not fully clear) the development of local media and media programmes for national minorities. The Agency decides on the allocation, transfer and withdrawal of broadcasting licences, and reports directly to the government and the parliament. It runs the *Register of Electronic Publications*. The VEM is in charge of overseeing the electronic media system, including elements of regulation, and has the authority to influence the broadcasting content. However, both the AEM and the VEM are not professionalised enough, there is not enough understanding of their spheres of responsibility and their ability to understand the impacts of new media needs to be increased.

**The public and communicational role of the independent regulator (AEM) should be strengthened. In cooperation with the Ministry of Culture, the AEM should clearly define criteria for the registration of electronic publications in the Register of Electronic Publications, as well as the rights and obligations that follow inclusion in the Register.**

**The AEM should bring into line the regulation of infrastructural, technological and content aspects of digital media in the light of the widening of new possibilities for the distribution of content and media services. Democratic discussion about new media services and their characteristics, as well as a harmonised regulation of their operation needs to be encouraged.**

**The AEM and the Ministry of Culture should, in the light of the fast transformation of the media and public communication in general, invest efforts to follow the regulatory processes affecting the Internet and the processes of ever faster networking, particularly through social networks. Particular attention needs to be paid to a flexible regulation of the Internet, in line with the observance of human rights.**

**The *Fund for the Promotion of Pluralism and Diversity of Electronic Media* should elaborate and follow the clearly stated criteria in supporting the production of national minority programmes, programmes of public interest and operation of local media.**



## **6. Liberalise the approval of concessions**

New technological developments have created complex mixtures of old and new media. In Croatia the Internet penetration level has rapidly increased to reach 59.2% by the end of 2011. The non-profit media organisations have been able to use new inexpensive and widely distributed platforms for the dissemination of independent ideas. Such platforms ever more converge with the radio and TV. Local radio and TV broadcasters still need to get concessions which are issued by the AEM.

**In the light of technological innovations and the fact that radio and television broadcasting are still regulated by concessions, the AEM should liberalise the approval of concessions. In Croatia the process of digitalisation of broadcasting was completed by the end of 2010, and the number of possible frequencies and their usage has been rapidly growing. Licences for cable, Internet and satellite broadcasting should be treated equally.**

## **7. Increase the transparency of the market structure**

The structure of the media market in Croatia is becoming ever more complex. It has been strongly influenced by the EU through the processes of membership negotiations, and this is clearly visible in the acceptance of democratic values and the liberalisation of various media markets (press, electronic media, online publications). The key factors in the diversification and restructuring of the media market are the technological changes and innovations that increasingly influence the character of the media and public communication.

Market regulations are not media specific. They are only partly based on the Media Act and the Electronic Media Act and are mostly within the competence of the Market Competition Protection Act. Opinions on these laws and incentives to restructure and amend them are complemented by discussions on state subsidies and interventions in media production (subsidies to Croatian Radio and Television (HRT) reached 1.2 billion kunas in 2010; the financing of the media from the budgets of local communities is unclear; the *Fund for the Promotion of Diversity and Pluralism of Electronic Media* does not operate on the basis of clear criteria, etc.).

The Croatian media market value is hard to establish due to imprecise regulation and non-transparent data on ownership, production and distribution. The problems of determining the value of the media market are also linked to statistical insufficiencies in data collection, since those coming from various sources offer various perspectives. The key problem is the statistical interpretation of the media: whether it is about print industries that include the printing and production of books and electronic broadcasting, whether the state subsidies are added to the established media market values or not, and similar questions.

Estimates claim that the media market value was about €628 million in 2008; a slight increase was recorded in 2009. According to the Croatian Statistical Bureau, new analyses based on the operation of enterprises active in the media market (publishing, film, video, television programme production, audio-recording and music broadcasting, programming and broadcasting, advertising and market research) show that the value of all these operations reached €491 million in 2010, and that advertising had the biggest share (€165 million), followed by publishing (€153 million). According to these data, the value of the media market fell by 14.1% in the period 2008-2010. The smallest decrease was recorded in the area of programming and broadcasting (4.7%), advertising and market research (7.3%), while the

biggest drop was recorded in publishing (24.8%). The television advertising market grew steadily until 2009.

Media policy has not so far offered relevant answers to the challenges of media commercialisation. The legal framework and legal regulations are not coherent enough, while the increased liberalisation of the market has not been seen to lead to increased openness, media pluralism and promotion of public interest. It has rather seen a strengthening of the particular interests of the media organisations and their owners.

**The Croatian Statistical Bureau and the Croatian Chamber of Economy should pay particular attention to the insufficient transparency of the market structure and market values that should be supported by better and more detailed collection and analysis of data on ownership, financial and economic aspects of the operation of media organisations, their market shares and other aspects. The influence of advertising on the overall operation of the media should be assessed. The media market needs to be regulated in compliance with the processes of media liberalisation and diversification.**

## **8. Support programmes of public interest**

The Croatian media policy promotes programmes of social, cultural and political interest, in line with the standards of objectivity and impartiality for information reporting and observance of journalists' independence. Apart from the laws, professional reporting standards have also been drawn up in the rare self-regulating acts, that is, the ethical codices. Public interest content extends to culture and art, education, science, protection of the environment, human health and human rights, as well as to the promotion of the Croatian national and cultural identity.

In the framework of media policy (and the Electronic Media Act in particular) the electronic media are interpreted as media of public interest, which is expressed in their obligation to broadcast content promoting human and political rights, the rule of law and the development of civil society and media literacy. This equally pertains to public and commercial media. In this context, the quotas for broadcasting European content and the obligations of the non-profit media to produce 50% of their own content are prescribed. The Croatian Radio-Television Act regulates the public broadcasting service and obliges it to have a balance of information, cultural, education and entertainment programmes, as well as programmes for children, people with disabilities and minority groups. The diversity and plurality of content in the audiovisual and electronic media, as well as the observance of other regulations, is supervised by the Electronic Media Council (VEM).

**Programmes of public interest should be eligible for support from the Fund for the Promotion of Diversity and Pluralism of Electronic Media, whoever their producers and authors are, and included in the regular broadcasting of the HRT and other public services.**

**Particular attention should be paid to quotas which essentially influence the presence of different programme content. Quotas may support the inclusion of content of civil, cultural and educational importance and may thus influence ways in which audiences treat the consumption of programmes.**

## **9. Follow the changes in journalism**

Technological change and an intensive liberalisation of the media have substantially influenced journalism as a profession and the professional and social position of journalists. So far such changes have not affected some specific aspects of media regulation. The profession of journalism has been fully exposed to the tendencies of ‘new journalism’: lowering journalists’ professional and education standards, imposing a fast and ever increasing production of information, unprotected authorship rights, elimination of ethical issues and standards in the processes of communication and reporting, only partly regulated or totally unregulated labour rights, editors’ censorship and self-censorship, and decreasing working autonomy. New techniques of reporting are being sought, as well as increased networking and targeting different audiences. The research and independent journalism that should support public interest and civil society activities is being jeopardised. The professional and social position of journalists, in particular their labour rights, are barely mentioned in the media themselves; details about strikes in media organisations are avoided. Labour conditions have worsened with market liberalisation, and informal employment in the media has increased. The regulation of the status of journalists is uncertain in an atmosphere of general economic uncertainty. The profession of journalism is far from the ideal of independence and freedom, while the criteria of objectivity and truthfulness of reporting are being ignored.

**The Croatian Journalists’ Association and other related professional associations including journalists’ trade unions need to work with other civil organisations and professional journalistic organisations in order to disseminate information on changes in journalism. The professional and social status of journalists should be strengthened and supported by regulations referring to the protection of journalists’ work from commercial and other pressures.**

## **10. Promote media literacy and transparency**

Media literacy and transparency requirements are not clearly linked. Media literacy initiatives have not evolved to become a part of formalised education programmes. They depend on the private interests of citizens to join market-oriented programmes, on the technological aspects of media communication, or on the willingness of mother tongue teachers to include some aspects of media literacy in their lessons. The need to protect authors’ rights or to cite sources of information is not observed. The Ministry of Science, Education and Sports and the media organisations should invest efforts to enable citizens to make informed choices about media services.

**A more intensive development of media literacy should be encouraged by the inclusion of media literacy in education programmes at elementary, high school and university level. The media themselves should be stimulated to promote knowledge of human rights and observance of information sources.**

## **11. Rely on the Council of Europe and European Union media policy regulations**

The European Union and its institutions, particularly the European Commission, have based their media policy and related activities on the differentiation of the cultural and economic

dimensions of the media. The technological and economic dimension of media services has allowed the media to be treated under the rules of free trade among EU members, in line with industrial policy regulations. The Maastricht Treaty (1992) enabled culture to be included as an element in the free movement of goods and services among the EU member states and thus initiated the regulation of media content through quotas. These are the two key sources that define the activities of the EU and the European Commission in the area of the media and media policies. Public communication and media operation are closely linked to the observance of human rights and are thus within the jurisdiction of the European Parliament and the European Court of Human Rights.

In a practical sense, the regulation of the media includes the regulation of networks (telecommunications/Internet provider networks, mobile networks, cable networks, territorial broadcasting and satellite networks) and the regulation of services and content.

**The national media policy makers should, where possible in the present, and in the future after EU accession, promote the freedom and independence of the media on a European level by supporting the development of regulatory practices providing for the democratisation of the media, the strengthening of their authenticity and their independence at the national level. The information on the formulation and implementation of national media policies should be continuous and easily accessible through annual reports on media operation at national level, including concerning changes in media policies, as well as the most important issues discussed in the sphere of public communication and the social role of the media. A regular distribution of detailed information on the measures regarding the content and quotas decided at national level should be enabled in order to encourage the active engagement of the national media policy actors regarding these issues. A permanent insight into the formulation and adaptation of quotas for the broadcasting of national and multilingual content should be ensured.**

**It would be necessary to follow and analyse the operation of the global media corporations in the less developed and new members of the EU, since they are exposed to strong media and economic pressures as part of rapid market liberalisation and strong media convergence. A number of countries are not prepared for such processes and they are suddenly losing control in the sphere of public information.**

## **Policy suggestions for free and independent media in Denmark**

*Rasmus Helles & Henrik Søndergaard*

### **Policy summary**

The research carried out in Denmark under the MEDIADEM project has focused on the study of media policy-making, including the institutional and regulatory framework of the Danish media sector that affect the development of free and independent media, and the roles played by key stakeholders in the media policy process. The analysis has been based on legal documents, parliamentary proceedings, reports by key stakeholders in the media business and the regulatory system and academics, in addition to semi-structured interviews with politicians, public officials, independent regulatory authorities, media operators, journalists and other key actors.

The research shows that a significant political consensus has existed concerning the importance of having a free and pluralistic media system as a precondition for a well-functioning political democracy and for maintaining the Danish culture. Freedom of expression is guaranteed in the Constitution, and there are very few restrictions on what can be published. However, findings also point to the importance of the specific regulatory tools that are adopted for media freedom and independence. In a small country such as Denmark, the media are heavily dependent on regulation and on various forms of state subsidy. Without these interferences in the media market, the Danes would have to make do with a very limited number of media that could hardly satisfy the needs of a pluralistic and culturally diverse democratic society. Moreover, within such a small market, diversity and pluralism are obviously at stake. Financial constraints limit the number of different media, making it difficult to avoid media concentration and preventing the entrance of new media.

The research also highlights the existence of new kinds of problems to be handled in media policy, not least as a consequence of the rapid digitisation of the media sector. These problems clearly fall outside the scope of existing regulatory structures and established policy forms, requiring a more comprehensive approach to media policy reform. Media policy is observed to have developed in an *ad hoc* form for many years, tackling problems one by one as they have appeared in increasingly closed fora. The research clearly indicates the inadequacy of this format for handling the challenges facing the media system now and in the foreseeable future. For many years, public service broadcasting and the printed press have coexisted peacefully, and have both played a key role in raising the general level of public knowledge and democratic debate. However, due to the development of digital media, the impact of media convergence and the twin processes of globalisation and commercialisation, the existing balance between private and public media has changed, and for the last few years it has become obvious that the current regulatory framework needs to be revised in order to rescue the quality and diversity of the Danish media system. Questions regarding a reform of the press subsidy system are currently of utmost importance, and the same holds true regarding the organisation and regulation of public service media. When examining these issues, it becomes clear that in a media system that is so heavily dependent on both regulation and subsidy, the ways in which subsidies are granted and the principles underpinning the actual regulation of media institutions are critical to media independence: fulfilling the aims of quality of content and diversity in media voices at a reasonable cost can easily impact the independence of the media, even if media freedom and independence are recognised as important by the legislators.

Drawing on the MEDIADEM research findings, this paper makes the following policy recommendations for the support of free and independent media in Denmark:

- 1. Reform the press subsidy system in order to strengthen the quality of news production**
- 2. Reform the press subsidy system in order to make independent online-only media eligible for subsidy**
- 3. Strengthen the editorial independence of public service broadcasting by implementing a new kind of public service contract that focuses on social and cultural functions instead of programme requirements**
- 4. Strengthen the institutional autonomy of public service media through the abolition of the current top-slicing of the public service broadcaster**
- 5. Strengthen the independence and autonomy of public service broadcasting by defining public service broadcasting exclusively as a requirement of institutions**
- 6. Strengthen the efficiency of media regulation by achieving Danish jurisdiction over foreign television channels that mainly broadcast to Danish audiences**
- 7. Make the media policy-making process more transparent and research based**

#### **Key observations**

Generally, the print media are regarded as the cornerstone of the media system when it comes to production of news, and the newspaper organisations traditionally have a very strong impact on media policy development. However, the print media are facing a severe crisis, as the number of subscribers and advertising revenues are declining. The funding mechanism is further challenged as advertising spending is increasingly moved from print media to digital media, of which a significant part is controlled by international operators (e.g. Google) that do not reinvest their advertising revenues in Danish media. This means that the former ecology of commercial media funding is threatened. The small market size makes the Danish media system vulnerable to changes in the balances between the different parts of the media system and means that those parts of the regulatory system aimed at subsidy become particularly important.

Although the printed press has started to launch online services in order to keep up with changes in user preferences, it has yet to develop its online activities into a profitable business. Taken together, the changes to the newspaper market outlined above are undermining the funding of quality journalism, leaving no doubt that new forms of press subsidy are much needed.

The crisis within the print media is seriously challenging the political role of the media, as the printed press is responsible for the production of the majority of original news content, and thus performs an indispensable role in the ecology of news production.

The peaceful coexistence of public and private media is obviously challenged by the structural transformation of the media system. As in other European countries, the question of how public service programming should be defined in order to fulfil its role within a democratic society and at the same time avoid distortion of competition is a major issue in the Danish media debate. Public service media do have a remarkably strong position in Denmark,

which many politicians find controversial. The former right-wing government did make efforts to strengthen the private media industry, not only by selling radio frequencies to private companies, but also by the attempt to privatise one of the two public service broadcasters. Due to a number of trials against TV 2, the plan to privatise the station has been cancelled and, more generally, the ambition to vitalise the *Danish* media industry has not really succeeded, whereas foreign media companies operating in Denmark have expanded. At the organisational level, this has resulted in the creation of a number of new organisational arrangements. Denmark, thus, is the only country in the world, where a public service broadcaster is funded by subscription fee (TV 2), and where a private company runs a public service radio station exclusively funded by licence fees (Radio 24Syv). Moreover, the public service media in Denmark in a quite remarkable way are regulated through top-slicing, which potentially undermines the independence that otherwise is a key feature of the public media.

Online media services have mainly developed within existing media companies, whereas the development of so-called online-only news media has been seriously hampered by the lack of access to state funding and the value added tax (VAT) exemption enjoyed by existing newspaper publishers. The development of alternative forms of media support needs to take into account that digital media not only represent an obvious development in terms of distribution, but also in terms of production. The few online-only media to gain entry to the market despite adverse conditions and no access to state funding are all niche media, which underlines that large, national media houses publishing so-called omnibus newspapers are not necessarily the only way to produce and circulate quality news.

Media regulation in Denmark has tried to keep pace with the developments within the media system, but so far, regulation has taken into account the consequences of the emerging media convergence only to a very limited extent. Still, the broadcast media are heavily regulated, and content regulation is obviously the key element when it comes to regulation of public service media. The ideals of self-regulation, which, for historical reasons, prevail within the print media and are seen as the cornerstone in maintaining media freedom and independence, have inspired the regulation of public media as well. The 'arm's-length principle' is still a structural element in the management and control of public service broadcasting, though the actual fulfilment of this ambition can be discussed. Moreover, DR and TV 2 now have media ombudsmen who take care of matters regarding media ethics and have a considerable impact on the handling of complaints and on improving the quality of the broadcasters' programming.

As part of the effort to vitalise the private media industry, a number of new media policy tools have been developed, one of them being the auctioning of licences to radio channels, which took place in 2003. The idea was that licences should be given in a more market-oriented way, excluding political considerations or interference. As a result, media regulation has changed, as it has become still more based on formal juridical contracts that leave very little room for adjustments once they are signed. The political aim of developing a more businesslike media system obviously failed, as the new radio channels quickly ran into huge financial problems and went bankrupt.

Despite the actual outcome of this effort to create market-based media, the system of selling concessions to radio frequencies fostered a new and more independent regulatory system with the Radio and Television Council as the main regulatory authority. The Council contributed to a less politically influenced regulation of the media, as it operates independently of the government and is based on various kinds of expert knowledge. Of course, the creation of the Radio and Television Council reflects the need for expert knowledge in an increasingly complex media system, but it also contributes to the

independence of the media that are controlled by the Council, as the government is excluded from any direct influence on the media in question.

### **Policy recommendations**

Our recommendations for media reforms primarily concern the way in which the media subsidy can be organised in order to achieve its goals regarding pluralism and quality without threatening media independence. Conceptually, editorial independence and state subsidy are difficult to balance, but the history of the media subsidy shows that such a balance can be achieved in practice. The media that receive the public subsidy cannot obviously be economically independent, but this kind of dependence does not need to lead to editorial dependencies. The important mechanism in such a system is the ‘arm’s-length principle’, which limits the direct influence of regulators on the daily operations of the media.

#### **1. Reform the press subsidy system in order to strengthen the quality of news production**

The decline in the number of Danish newspapers and in the number of copies sold makes the current system of indirect subsidy inadequate, because it financially supports the physical distribution of newspapers and therefore works counter to digital distribution.

**Policy makers are called upon to develop a subsidy system that supports editorial content production in order to stimulate the digitalisation of journalistic media.**

#### **2. Reform the press subsidy system in order to make independent online-only media eligible for subsidy**

The current media system and media subsidy regulation favours the development of online services in public service media and gives the online services of newspapers certain advantages, as the economic privileges related to the print media can subsidise the online versions of the newspapers. Consequently, it is difficult for newcomers to establish themselves in the online market, as they cannot get any kind of subsidy.

**Policy makers should reform the current press subsidy system in order to allow stand alone online journalistic media have access to state subsidies and create opportunities for developing niche media (e.g. local news media) online.**

#### **3. Strengthen the editorial independence of public service broadcasting by implementing a new kind of public service contract that focuses on social and cultural functions instead of programme requirements**

Public service broadcasters (PSB) generally have a high level of independence, which is guaranteed in the Radio and Television Act that states that DR and TV 2 are independent institutions. However, there has been a tendency towards more detailed regulation of the PSB through a public service contract regarding DR and a licence regarding TV 2 during the last two decades. DR’s public service contract has increasingly become an instrument for detailed regulation that puts limits on the editorial freedom of DR. The government is obliged to



define the general scope for DR and TV 2 and their programming, but the development of programming policies and the specific programming goals should be decided by the Board of DR without any political influence. The increasingly detailed contracts make it more difficult for the Board to work independently, as a significant number of very specific programming requirements have to be fulfilled.

**Policy makers should implement new public service contracts that avoid detailed programming requirements. Instead, the contracts should primarily concentrate on what are conceived to be the major social and cultural tasks of a PSB. Such a reform should emphasise that PSBs cannot primarily be defined by a number of particular programmes, but by their *functions* within the society of which they are a part.**

#### **4. Strengthen the institutional autonomy of public service media through the abolition of the existing top-slicing procedure for DR**

The conception of public service broadcasting has changed in Denmark during the last twenty years. Originally, when DR still had a monopoly position, public service broadcasting was understood as a particular institutional arrangement, but later on, public service broadcasting increasingly became regarded firstly as a *particular kind of programming* (mixed and diverse programming) and in recent years as *particular programmes* (quality programmes within genres such as news, current affairs and cultural programmes). This evolution of the definition of public service broadcasting has gradually changed important areas of media policy, which potentially threatens the independence of PSBs. The idea behind the Danish regulation of PSBs is that public money (licence fees) should not go to particular institutions, but rather to particular programmes that are regarded as socially or culturally important. Instead of regulating a few PSBs (DR and TV 2) with a high level of editorial independence, the licence fee revenue is increasingly spread out over a number of media actors that have to fulfil specific programming tasks defined by the legislators, as is most significantly the case with Radio 24Syv and the Public Service Fund. Moreover, requirements put on DR regarding the amount of outsourcing to independent producers and DR's co-financing of Danish film production represent restrictions on the institutional autonomy of DR.

**We recommend that the top-slicing procedure is abolished.**

#### **5. Strengthen the independence and autonomy of public service broadcasting by defining public service broadcasting exclusively as a requirement of institutions**

We find it important to maintain and even strengthen the institutional autonomy of PSBs in order to guarantee the 'arm's length principle' in the political steering of the media, not least when it comes to editorial decisions. The Public Service Fund, which is based on money from licence fees, subsidises the broadcast of certain kinds of documentary and drama programmes on commercial television stations. In this way, licence fees are directed at particular kinds of content without an independent editorial decision on the need for these programmes.

**Licence fees should be exclusively spent on one PSB with a high level of editorial independence. As a consequence, we suggest that the Public Service Fund be phased out.**

## **6. Strengthen the efficiency of media regulation by achieving Danish jurisdiction over foreign television channels that mainly broadcast to Danish audiences**

The Danish state has twice taken steps in order to change the jurisdiction of television stations that target a Danish audience, yet broadcast from the UK in order to avoid the stricter Danish regulation of television advertising. The UK-based channels have significant economic advantages from this arrangement, which makes it difficult for the Danish TV 2 to compete with them. We suggest that the Directive on Audiovisual Media Services (AVMS) be revised in order to make it easier for a Member State to enforce jurisdiction, and that Danish politicians take steps to address this issue at the European Parliament. Today, legislation pays attention to the geographical location of the headquarters of a television station and to where decisive editorial decisions are taken. This system makes control difficult and allows broadcasters to avoid the regulation in force at their actual market. It also means that neither the Danish SBS channels nor Viasat's channels are subject to the Danish Media Responsibility Act, as the act explicitly covers only the television channels that are regulated by the Danish Radio and Television Act.

**We recommend that the definition of jurisdiction under the AVMS Directive is changed, so that it follows the origin of the *majority of the audience* for a given television channel and/or the origin of the *sources of revenues*. Also, in order to make the SBS and Viasat responsible to Danish law, the Media Responsibility Act should be changed and cover television channels that are broadcasting to a Danish audience.**

## **7. Make the media policy-making process more transparent and research based**

We have already observed the *ad hoc* nature of media policy-making in Denmark. When it comes to media subsidies, in particular, legislation is a result of a kind of budding, which increasingly becomes inappropriate, not least because of media convergence, as convergence leads to a higher level of interdependence between the different media. Media policy-making often takes place behind closed doors in the ministry, where members of the political parties are gathered. The content of what is discussed is kept secret, mainly because negotiations would be more difficult if the general public could follow them, but probably also because the negotiations involve a lot of give and take, where also less substantiated perspectives are taken into account. The secret and *ad hoc* nature of media policy negotiations cannot but restrict the quality of the policy decisions. It also makes it difficult to make major and comprehensive reforms that sufficiently take into account the increasing complexity of the media. In a longer perspective, the closed manner in which media policy develops may also lead to a bias in influence, favouring strong established actors over newcomers.

**We suggest that media policy-making in the future be more open to the public and also to a greater extent based on research and public investigations in order to reach better decisions. We suggest that, before media policy negotiations start every fourth year, a research-based report on general media trends be generated in order to establish common knowledge upon which policy-making can be based.**

## **Policy suggestions for free and independent media in Estonia**

*Halliki Harro-Loit and Urmas Loit*

### **Policy summary**

In our first report for the MEDIADEM project ('Background information report. The case of Estonia'), we presented a brief summary of the existing media structures and regulations which set the framework for public communication and media performance in Estonia. We also presented a schema of actors, based on their level of activity or passivity with regard to the implementation of media policies in Estonia. Our second report ('Case study report. Does media policy promote media freedom and independence? The case of Estonia') focused on the interplay between the different actors who influence the implementation of media policy in Estonia and the dominant values followed by these actors (both reports are available at the MEDIADEM website). The analysis of the implementation of media policy included an analysis of the Supreme Court cases related to the media since 2000, as well as an analysis of the implementation of the legal framework and the self-regulation system with an emphasis on the cases proceeded by the two impartial bodies for the settlement of press disputes: *Avaliku Sõna Nõukogu* (ASN – the Public Word Council) and the publishers' Press Council (PC). Different empirical sources were used to analyse any problems related to the perception of media performance and the policy tasks for different actors: academic research articles, articles from the press, as well as seventeen semi-structured interviews conducted with politicians, public officials, representatives of national regulatory authorities, journalists and editors-in-chief.

According to the Freedom House, Estonia ranked 22nd in terms of 'global media freedom' in 2012, sharing its position with the United States. Besides the strong constitutional protection of press freedom, the small size of the media market is an important contextual factor that determines media policy. At the same time the Estonian market (with a total population of 1.3 million of whom 0.9 million are consumers of the Estonian language media) disfavours competition among several media companies, as too many companies would cause fragmentation of resources. An important contextual factor is also the ultra liberal and market-oriented media policy. By taking into consideration these contextual factors and the research tasks performed in the framework of the MEDIADEM project, the major policy recommendations for the promotion of media freedom and independence in Estonia are the following:

- 1. Review the liberal and market-oriented approach to media policy**
- 2. Enhance independent mechanisms for the scrutiny of broadcasting organisations**
- 3. Support professional journalism, transparency of job appointments and accountability of individual journalists**
- 4. Balance the freedom of the press and individual rights in the context of justice administration**
- 5. Promote multi-faceted debate on media ethics**
- 6. Integrate journalists' professional education and media literacy in the media policy**

## Key observations

While the Estonian national strategy of media politics has been liberal since the 1990s and the freedom of speech – and especially the freedom of the press – has been highly protected, the overall media policy of the country is highly heterogeneous. Unlike other post-soviet countries, there is no political parallelism. **Economic factors are more relevant to the issue than political ones.** Research findings provide evidence that Estonia has a liberal and market-oriented approach to media policy. The state does not subsidise professional journalism either directly or indirectly (e.g. via taxes).

**The small market favours oligopoly of professional media channels:** the press market is predominantly shaped by two media groups: *Eesti Meedia* and *Ekspress Grupp*. The first of these groups possesses 5 out of the 25 local newspapers. There are also two major groups that dominate the radio market and another two that dominate the television market. The number of local radio stations is few (six), and local television stations cannot emerge because of technical aspects of the state digital TV policy. Prime news flows are produced by a few media organisations, and consequently the number of people who decide upon news content has been narrowed down.

**The system of financing the public service broadcaster (PSB) is unpredictable and unsustainable, and does not fully safeguard the growing importance of production of public broadcasting content.** The parliament allocates finances to the PSB annually, while the law prescribes three-year envisagement. Recent years' budgets have enabled the PSB to fulfil short-term tasks, but long-term tasks still remain poorly performed. Political influence on the PSB is relatively low, although it has increased within the last couple of years.

The media content is regulated only in licensed broadcasting. **The provisions concerning broadcasting** (audiovisual media services under the new law, including radio), however, **have been supervised randomly, except for advertising TV quotas.** The position of the current Minister of Culture, Mr. Rein Lang, indicates that the government would rather abolish the licensing and restrictive programming provisions than allocate more resources for surveillance. Divergent compliance with legal provisions by some market players creates unequal competitive conditions and infringes legitimate expectations of the general public towards the channels which make use of the limited resources (broadcasting frequencies).

**The Electronic Communications Act sets out technological neutrality as the core principle.** This keystone has never been questioned.

**In Estonia, the professional culture of journalism is protected by tradition: a history of reading newspapers, professional education and media research.** Professional education and research have a crucial influence on journalistic culture. Estonian professional education in journalism dates back to 1954. Since then, the Estonian approach to journalistic education has been developed in the academic environment. However, better cooperation and dialogue between educators of journalism and representatives of the mass media and the public is needed, as there is some tension between the practice of the (market-led) journalistic institutions and public expectations about the functions of 'good journalism'.

**The ability of the journalists' trade union to carry out its social mission is weak, and journalists are rather marginalised as a group of media policy actors.** Editors-in-chief are better represented via the Estonian Newspaper Association and its self-regulatory body, the Press Council. The number of professional journalists has fallen from app. 1,200 in 2004 to app. 900 in 2012. This might become one of the most critical factors to work against the independent performance of the media.

**The small job market together with the liberal approach to media policy and the weakness of the trade union of journalists might endanger professional journalism on both the institutional and individual level.** At the same time, economic pressure from marketing communication is growing. It is unequal towards different channels and formats of journalism. Magazines, some television channels and soft news producers at daily newspapers experience more pressure than journalists who work at hard news departments. Estonian professional journalists do not form a homogenous community with well-established professional ideology. The borders between the news media, infotainment and advertorials are increasingly blurring and the audience needs special competencies to distinguish between news and marketing messages.

**The Supreme Court has demonstrated an extremely defensive attitude towards the freedom of the press,** especially until the beginning of the 21st century. Since then, the quality of argumentation has been increasing in the court rulings. Truth is the value that has been discussed most of all, while the rulings of the Supreme Court indicate that truth is also the most advocated value. As defamation is not covered by the Penal Code, there are no criminal procedures that could be applied against the freedom of the media. Besides, it is rather expensive to bring a lawsuit against a media organisation – there have only been 29 media-related cases discussed in the Supreme Court since 2000.

**The biggest barrier to the promotion of media literacy and the implementation of the concept of the use of communications skills is the lack of political decisions concerning citizen education on how to behave in the information society.**

The levels of effort applied by different actors to the implementation of media policy appear to be unequal. Politicians are passive actors, rather preferring not to interfere. The influence of the owners of private media is indirect and not transparent. The influence of editors is ambiguous, and the influence of journalists on the media policy is marginalised. Public criticism of the media is marginal. On the other hand, the court system operates on a clear value-oriented basis, and the self-regulatory system with its two bodies has provided a forum for a relatively wide discourse on relevant moral dilemmas and good journalistic conduct. There is an ongoing value conflict between the protection of privacy and the public need for information, which is also reflected in cases dealt with by the Data Protection Inspectorate.

## **Policy recommendations**

### **1. Review the liberal and market-oriented approach to media policy**

The EU liberal media policy, which advocates private media, is not appropriate for a very small media market. First, the explosion of information has increased the number of options for choice, but has also led to a high degree of information waste and an overload of information. Secondly, the telecommunication companies have become major players and profit-makers, while content producers (especially news producers) are currently losing their resources. While the majority of consumers might prefer entertainment, democracy needs professional journalism to perform surveillance over small and big power-holders. Therefore content producers need some force to counterbalance the market forces. As Estonia is one of the few European countries that does not subsidise the production of journalistic content, an appropriate taxing policy should be discussed to support professional news production. A new model for financing the public service media should be developed.

Multidimensional analysis implies systematic data collection and the possibility to monitor the dynamics of resources on an annual basis. At the same time, a system of obligatory and regular collection of data on the media should be developed with a special focus on the dynamics of human resources (e.g. numbers of professional journalists in media organisations and freelancers; their age, level of education, career, experience and employment contracts – full-time or part-time, salaries). Existing data, found in various databases, should be synthesised. This would enable rational decisions concerning the professional resources that are needed for the functioning of high-quality journalism. Representatives of various media organisations and researchers should work together to develop such a system of continuous data collection where the human resources data and financial data would be integrated.

**The liberal and market-oriented approach to the media policy should be critically reviewed according to the needs of the Estonian democracy and culture. Political decisions should be based on a multidimensional analysis of the performance of different media sectors as well as specific analysis of the media economy in Estonia.** In this respect, the following measures might be pointed out for consideration:

- When planning state activities concerning the media, the state authorities should take into account the ongoing changes in the media economy.
- Media practitioners and media researchers should promote appropriate knowledge about the complexity of media regulation and policy.
- A new media policy strategy, based on systematic data collection and analysis, should be adopted.
- A new business model for the public service media should be developed after public discussion to ensure the growing importance of the public service media in the production of high-quality information.

## **2. Enhance independent mechanisms for the scrutiny of broadcasting organisations**

Estonia has not adopted any legal act to regulate the media in general, although there is a law that regulates the audiovisual media. The research conducted within the framework of the MEDIADEM project proved that there is no monitoring of the performance of broadcasting organisations. Penalties for not complying with the law or the licence conditions have only been applied in very few cases and thus possible penalties do not motivate the broadcasters to follow the licence conditions or the law. The development of media policy, the processing of licences as well as supervision – all these are responsibilities of the Ministry of Culture. No actual compromise of independent regulatory functions has occurred, but this can apparently be suspected. Moreover, the media department of the Ministry is currently not manned at all and, therefore, it cannot perform its tasks. For this reason it is necessary to establish an effective independent body to supervise the performance of media organisations.

**State authorities should perform effective and sufficient scrutiny concerning the performance of media service providers.** In this respect, the following measures might be pointed out for consideration:

- The provisions of the Media Services Act should be equally enforced on all market players.
- A supervisory body should be established with appropriate financial and human resources to carry out surveillance functions.
- An effective independent regulator should be established to supervise the performance of media organisations.
- The existing legislation should be assessed and relevant amendments made if necessary to assure effective and sufficient monitoring of the performance of broadcasters.

### **3. Support professional journalism, transparency of job appointments and accountability of individual journalists**

Because of extensive changes in the media economy and business models during recent years, resources for the production of professional high-quality news content have been cut down. Journalists say that they need to work quicker and have less time for analysis and checking facts; some journalists describe a value conflict between what they consider high-quality reporting and what is valued by their media organisation (e.g. speed and news to satisfy public curiosity). At the same time, while being critical, they do not ‘fight’ for their personal values. For their job safety, it is more reasonable for them to remain loyal to the values of their organisations.

The changing business model in journalism is also causing some changes in career models in Estonia and all over Europe. More journalists are earning money as freelancers or part-time employees, irrespective of the fact that this type of career model is insecure from the economic point of view.

There is a need to reinforce the trade union of journalists in Estonia, which is weak in protecting the autonomy of individual journalists and their job safety. The requirement for job safety should first of all serve as a tool for the protection of the autonomy and accountability of individual journalists and as a tool to balance against the commercial interests of the media organisations. The existence of a small professional community means that each single journalist might have a strong influence on news discourse. Therefore it is important that entrance to the journalistic market - and journalists’ competences – become more transparent. It is not in the public interest to guarantee job security equally for all journalists, but rather to support highly qualified journalists and journalists who are working outside the capital. Therefore the public should know for what reasons any key journalist is employed or dismissed by media organisations: is it for his or her professional competencies (and which ones?), moral sensitivity, close relations with politicians or something else?

Given that this kind of regulations that serve the public interest can only be applied in the public sphere, transparency of job appointments should first be applied in the PSB as the implied flagship of high-quality journalism.

The individual accountability of journalists should also be promoted. This could be achieved if journalists themselves present their personal explanations to both press councils (ASN and PC). Although the explanations provided by the media organisations and editors-in-chief are indeed important for the public debate on media ethics, the analysis shows that such explanations are dominated by organisational values, while personal dilemmas and the personal responsibility of the reporter or the middle-rank editor are hidden for the public.

Newsroom decision-making processes and background stories are seen by the editors-in-chief of national newspapers as inside information and therefore as a form of trade secret. Local journalists and the editors-in-chief of local newspapers tend to value a more open editorial process and close relations with the community. Therefore the dissemination of best practice cases of editorial transparency and individual accountability might promote positive changes in newsroom mentalities regarding the transparency and autonomy of individual journalists.

Given that media critique is almost nonexistent and the news organisations are not transparent to the public, it is the cases that are brought to either one of the press councils, the ASN or the PC, which help to create public discourse on media ethics and hopefully some kind of dialogue between the press and the public. The two press councils provide more diversity to the debate on media ethics, which is important for the development of professional ideology.

**Policy makers and publishers should clarify the professional competencies required from journalists and increase transparency as regards the conditions of entry to the journalistic job market. The individual accountability of journalists should be promoted.** In this respect, the following measures might be pointed out for consideration:

- The Union of Journalists should be encouraged to insist more on protecting the autonomy of journalists as individuals (collective agreements as well as individual accountability).
- The Council of the PSB should be encouraged to initiate public discussion on the mandatory competencies of journalists and heads of department at the PSB.
- Media organisations should encourage individual journalists to respond to either one of the press councils in case of complaints on their reporting themselves.
- There should be mandatory collection of statistical data on journalists: the number of professional journalists in media organisations and freelancers (including their age, level of education, career, experience, type of employment contract, and workload), in order to make rational decisions on the professional resources needed for high-quality functioning of journalism.

#### **4. Balance the freedom of the press and individual rights in the context of justice administration**

The Estonian courts have been supportive of free media in their rulings, while in recent years they have also focused on the protection of individual rights, such as privacy and the protection of personal data. The court practice has shifted towards more sophisticated argumentation on the need to balance the rights of individuals and the public need for information. Still, relatively few cases are taken to the Supreme Court. One reason for this



might be the high costs related to a lawsuit and fairly small indemnifications for moral damages. Common people without high incomes have hardly any motivation to defend themselves at court, even if they have been seriously harmed by the media. Today, the Internet archives provide very easy access to any published materials that may be incorrect in terms of their content, defamatory or cause infringement of privacy. In some cases, the Supreme Court has overruled the argumentations of the basic values adopted by the courts of the first and second instance. It is therefore important that the media-related lawsuits would end up in the Supreme Court. However, one cannot appeal to the Supreme Court without employing a lawyer.

Estonian courts have been rather sparing at sentencing moral damages. One of the largest compensations sentenced from a media organisation was EEK 200,000 (EUR 12,782), while the average compensation has been approximately EUR 320.

In conclusion, although the Supreme Court has generally protected universal values, such as truth and privacy, in its rulings, the Court's influence on the media policy has been meagre. Perhaps the most influential case in this respect was the *Vjatšeslav Leedo* case. As a result of the settlement of this case, it was clarified whether the online reader comment sections on the media websites must be considered as part of the journalistic output, and whether the media organisation is liable for the content of such sections.

**The legislator should develop *modi operandi* to balance the freedom of the press and the individual rights of persons both in judicial and extrajudicial proceedings, and grant individuals the right to define their private life and oblige the media to provide the general public with information that is highly important for democracy.** In this respect, the following measures might be pointed out for consideration:

- The potential positive influence of indemnifications for moral damage on the access of media organisations and individuals to courts should be analysed, with the final aim to better satisfy the public need for trustful information.
- Individuals should be enabled to define their private sphere and be sufficiently indemnified for any serious personal damage.
- The state should provide sufficient legal assistance to individuals in order to enable common persons to re-establish their individual rights against the mass media.
- The state legal assistance system should also include extrajudicial proceedings to remedy any violations of personal rights.
- Freedom of information should also be assured in cases related to personal data protection proceedings in order to avoid an unbalanced and excessive application of the Personal Data Protection Act, and also emphasise the individual's own responsibility at providing personal data.

## **5. Promote multi-faceted debate on media ethics**

With its two press councils, Estonia experiences a two-faceted situation. On the one hand, many journalists consider this situation to be confusing. On the other hand, the analysis of the argumentation quality of the adjudications of these two councils (particularly of the cases

examined by both councils) demonstrates a positive influence on the diversity of public debate about moral dilemmas that may occur in journalistic work.

Journalists themselves complain about the pressure exercised on them by advertisers and public relations. However, some journalists do not see this blurring borderline between journalism and marketing as a moral conflict or as questioning professional ethics. One reason for this could be the absence of an ethics council for advertisers and marketing communication. Because of the lack of such a council, there are no sample cases that could help increase the sensitivity of journalists, of the public and of marketing professionals towards the value of objectivity in the news and the harm that could be caused by the ongoing legitimisation of hidden advertising. The existing Advertising Act seems insufficient to provide such mechanisms.

Even though professional journalists possess wide and relevant experience in their field, decision-making on public communication may not be trusted to one single interest group. Unlike legal norms, moral choices are always disputable, and the discussion should always give the answer to the question of ‘who watches the watchdog?’ In this respect, the two complementary press councils is a currently a good solution for the sake of principle of variety.

**The state, the industry and civil society organisations should engage diverse actors involved in the field and initiate debate on media ethics in order to balance the different interests and values related to the mass media.** The following measures might be pointed out for consideration:

- More discussions should be launched on moral issues – from the aspect of public interest.
- A self-regulatory or co-regulatory body should be established to examine complaints and problems that occur in the field of public relations and marketing. The principle of co-regulation could be included in the Advertising Act.

## **6. Integrate professional journalistic education and media literacy in the media policy**

The development of media and communication competencies already at primary and secondary school should be incorporated in the general media policy as one of its important aims. Media education is indeed compulsory at Estonian schools under the national curriculum. It could be applied as a cross-curricular theme or as a special course (as part of the curriculum in the Estonian language and literature). Media education should, however, not be about just providing media literacy, but also about implementing a completely new style of learning and teaching (e.g. one of the principles of media education is to discuss about the students’ media experience, and this cannot be done without giving the students time to talk, to discuss and to argue, while the teachers must have methodological competencies to teach their students to analyse). Therefore media and communication competencies should be included in the teacher training programmes.

Professional journalistic education should also be considered as an important part of media policy. Besides bachelor and master programmes, it should receive attention also by higher levels of education. The journalists of today need a kind of education that enables them to learn and adopt new methods of processing information, makes them capable of noticing

value conflicts and carrying out value clarifications, provides them with the skills they need to learn the possibilities of new technology, etc. The challenge is not the curriculum but the didactics of teaching and the motivation to learn. The problem is that the needs of the news organisations do not always coincide with the needs of individual journalists. This is particularly true with regard to the clarification of values: quite often organisations rather prefer ‘collectively accepted values’.

Until now the media policy has belonged to the administrative field of the Ministry of Culture, while the Ministry of Education and Science has been responsible for education. Communication between the two ministries in the field of media literacy and professional journalistic education has not been sufficient, however.

**The government should promote an understanding of the interrelatedness of professional journalistic education and overall media literacy.** In this respect, the following measures might be pointed out for consideration:

- The importance of the Estonian news journalism as well as of the studies on journalism should be underlined as part of the Estonian cultural heritage.
- In order to improve the media and communication competencies of citizens, the communication between the Ministry of Culture and the Ministry of Education and Science as well as the universities that provide media and journalism education and teacher training programmes should be improved.
- Academic professional education should be promoted as a means to serve the public interest and the independent competitiveness of individual journalists, in order to provide a material force to counterbalance the commercialisation of the media and create a healthy tension between the various interests of the media industry.

## **Policy suggestions for free and independent media in Finland**

*Heikki Kuutti and Epp Lauk*

### **Policy summary**

In the following, we first identify the main characteristics of the Finnish media policy, based on our earlier research done within the MEDIADDEM project. This research was focused on the state of the Finnish media environment and policy-making, including a detailed report on the structural and content regulations; main actors and values; the role of self-regulation; media ownership and competition issues; the development of journalism as a profession and media literacy, as well as emerging problems concerning the spread of new communication technologies. The focus has been on processes of media policy-making, the regulations enacted that influence the development of free and independent media, and their implementation. Research was based on a number of sources, such as legal documentation, materials of various actors involved in media policy, interviews with media professionals, specialists and researchers, and earlier studies. On the basis of the research results we outline some recommendations and suggestions for improving the Finnish media policy from the viewpoint of free and independent media.

Research findings demonstrate that the overall tendency in the Finnish media policy is towards limiting statutory regulation and strengthening media self-regulation and public control. Consensus based by nature, the media policy as a whole is transparent and directed towards securing the population a plurality of choices among channels, programmes and platforms, and providing access to information in all possible ways. Overall, there are no fundamental problems or contradictions between different actors regarding the implementation of freedom of expression or media freedom. Statutory and non-statutory operators have a common goal in favouring the freedom of expression even if they approach it from different angles based on their tasks and responsibilities.

In Finland, legal regulation of the freedom of expression, as well as media self-regulation is all-inclusive: regulation covers all media, irrespective of their channel of distribution (the press, broadcasting and the Internet). Along with the traditional media, online publications and user produced content distributed by the media are the targets of self-regulation. Media organisations and professionals are widely committed to adhering to the ethical rules of the field. In many cases, the ethical guidelines influence journalists' work more than juridical regulation. The media actors are widely represented among the self-regulatory bodies.

Although there is basically a highly favourable legal framework combined with a long tradition of the freedom of speech, some problems appear in the practical implementation of the principles of the freedom of expression and publicity of information. For example, in court practice, the protection of privacy has often dominated the freedom of expression, and has been criticized by the European Court of Human Rights. On the legal level, Finnish citizens' right to access official information and documentation of public authorities is well protected. In practice, however, public authorities are still able to impede access and there is a certain lack of transparency in the activities of some authorities. Furthermore, there is insufficient information available on media ownership. The increasing competition among media companies in the course of the economic crisis creates pressures on journalistic work: fewer journalists with heavier workloads are not always able to maintain high professional standards. Also, media organisations try to meet the demands for cost-efficiency by

combining the posts of editor-in-chief and publisher, which may blur journalistic and financial decisions and put journalistic independence in danger. In addition, the public broadcaster's (YLE) renewed role as an active provider of free content on the Internet has provoked commercial operators' demands about defining YLE's public service role more precisely.

Against this background our recommendations include the following:

- 1. Emphasise the importance of the freedom of expression in the court practice and judicial interpretation**
- 2. Train officials in delivering requested information**
- 3. Make information on the media's ownership and economic issues more transparent**
- 4. Introduce a readers' ombudsman system in the news organisations**
- 5. Develop the ethical practices of online forums and other discussion platforms**
- 6. Abide accurately by the ethical guidelines in online publishing**
- 7. Accumulate resources and enlarge autonomy for journalism**
- 8. Emphasise the ability of critical consideration in journalistic training**
- 9. Evaluate properly the social and communicational policy responsibilities of YLE**

#### **Key observations concerning free and independent media in Finland**

The overall character of the Finnish media policy is in accordance with the EU 'light touch' regulation principle that presupposes gradual relaxation of state regulation and an increase of importance of co- and self-regulation. It could be termed as a **'less restrictions, more directions' policy**.

The advanced democratic traditions of governance and a developed civic culture offer sufficient guarantees to the freedom of expression and therefore, the main issue is not protection of media freedom, but **securing the responsible use of this freedom in the public interest**. In Finland the press, broadcasting and online media operate within the same legislative framework and the freedom of expression and media freedom are defined explicitly in the legislation. This constitutional right is connected to everyone's right to the access of information defined in detail in the Freedom of Information Act. The Act on the Exercise of Freedom of Expression in Mass Media is technology-neutral and applies also to private individuals who maintain a web site on an electronic communications network; and technical operations of transmission, intermediation or distribution of publications and online messages. The Act contains some responsibilities for considering the removal of unlawful messages and interruption of their delivery as well as assigning the sender's identification information to authorities.

However, in spite of advanced legislation, Finnish courts have not sufficiently considered the value of freedom of expression as defined in the European Convention on Human Rights. Courts tend to prioritise protection of privacy over the freedom of expression, and thus have problems in following the freedom of expression line of the European Court of Human Rights (ECtHR). In 2010-2011, in seven cases out of nine, the ECtHR convicted Finland for favouring protection of privacy and dignity at the expense of the freedom of expression. **The overvalued privacy** in courts' judgements have created difficulties for the

media to intervene also in social important issues, as the reduced level of privacy protection is applied only to high rank public figures and not to private citizens even if their participation in public incident would be predicted.

Requirements to check the truthfulness of published information also seem to be stricter in Finnish courts than in the ECtHR, which emphasizes the *bona fide* attitude of journalists. Journalists' aspirations in **raising public discussion and exercising public criticism** are not always sufficiently evaluated and considered by Finnish courts as elements of media freedom.

The Finnish Freedom of Information Act (The Act of Openness of Government Activities) sets the principle of official documents to be in the public domain unless there is a specific legislation for withholding them. **In addition to the documents, the transparency of government also regards the activities of authorities and requires informing of certain issues without prepared documents.** The public right to access information applies to the information regardless of its form and includes, for instance, print and electronic formats, microfilm, voice recordings, register entry or a collection of entries. If a part of a document contains secret information, access must be granted to the public part of it. As a rule, information seekers are not required to provide reasons for their request or to verify their identity. Access may not be restricted without a lawful reason and cannot be limited beyond the necessary for the data being protected. However, despite the Act favouring 'opening-up' possibilities, technical and other kinds of restrictions are limiting the access of information. Problems partly arise from inconsistent legal interpretations of public and non-public issues and partly from the negative attitudes of the authorities providing requested information.

The evaluation of, and surveillance over, the performance of the media from the ethical perspective occurs through the self-regulation system. In practice all Finnish news media organisations and news agencies have committed themselves to the objectives of the Council for Mass Media (CMM) and its Guidelines for Journalists (the Code of Ethics) by joining the Basic Agreement. These objectives and guidelines become automatically binding on any journalist working for a CMM member organisation. The collective membership is also reflected in the way in which complaints to the CMM are dealt with: these are always **directed against the media organisation and not against a particular journalist.** Along with the traditional media, **online publications and user produced content distributed by the media are the targets of self-regulation.** The decisions of the Council are published on the homepage of the Council, in the publication of the Finnish Newspaper Association and (as a news format) in the media outlet concerned. The outlets, which have violated the ethical principles, must publish the full version of the decision of the Council on their websites.

During the last decade the working environment of journalists has gradually changed towards industrialised production of news. The shrinkage of staff in newsrooms has increased the workload of individual journalists, and short deadlines increase the speed of the work and cause higher levels of stress. Also, the multi-tasking element of work – producing different stories on the same topic for various platforms – raises the workload of individual journalists. **This results in putting less time and effort into fact checking and choosing sources on the basis of easy reach.** Instead of journalistic filtering or critical evaluation, reporting increasingly relies on material prepared and provided by information sources.

In the renewed YLE legislation the operations of the Finnish Broadcasting Company were secured by the annual financing of €500 million. **Securing stability of YLE's financing** would increase YLE's independence since the level of financing is enshrined in legislation, rather than being subject to the state budget and political judgements. As a part of the new legislation, YLE also received total freedom to operate in local and national Internet networks.

## **Policy recommendations**

The recommendations and suggestions concerning the free and independent media in Finland can be divided in four groups. They are targeted at (1) the implementation of the freedom of expression, (2) the improvement of the general trust in the media, (3) maintaining high quality of journalism and (4) evaluating YLE's role in the competition with the commercial media. The essential condition concerning the implementation of the freedom of expression is the wide access to the relevant documentation and information on the activities of the authorities. No less important is the possibility to freely express critical opinion on societal issues, and if necessary, also on the activities of (private and public) individuals.

Concerning the improvement of the public trust in the media, the issue not only concerns the openness and transparency of the media organisations and their editorial practices, but also their readiness to accept and correct mistakes. The quality of journalism also depends on the level of individual autonomy of journalists, and on their opportunities to receive professional training of high quality. An increasing problem for YLE seems to be its ever-complicating relationship with the commercial broadcasters.

### **Implementation of the freedom of expression**

#### **1. Emphasise the importance of the freedom of expression in the court practice and judicial interpretation**

Finnish court practice does not sufficiently value the importance of the freedom of the speech and the free media in providing the public with relevant and accurate information. The ECtHR has on several occasions convicted Finland in violation of the principle of the freedom of expression enshrined in the European Convention on Human Rights. Currently, the online database about the decisions and adjudications of the ECtHR is neither easy to find nor sufficiently systematic. Along with the content and form of the issue under adjudication, and other parties' rights, the courts in their interpretations of the law do not pay enough attention to the effect that publicising the matter had on the public debate. According to some recent studies, the current Finnish legislation does not contain imperfections that would allow interpretations more favourable for the freedom of speech. For example, in cases of critical assessment of a person's political, economic or other socially important and influential activity, the Penal Code enables the interpretation of this criticism, if the validity of the published information and/or its importance for public interest is sufficiently verified, as non-defamatory. However, the law includes imprisonment as punishment.

**The importance of the freedom of expression must be emphasised more strongly in the court practice and judicial interpretation.** In particular:

- The courts, which deal with the violations of the freedom of speech, should in their proceedings and decisions more deeply assess and take into consideration the importance of the freedom of speech for democracy and democratic governance.
- Broader knowledge about the freedom of speech cases of the ECtHR is necessary for: the authorities carrying out prejudicial inquiries and indictments; the judges dealing with violations of the freedom of speech; and journalists and news media, all of which maintain the public debate on socially important issues.
- Regularly updated translations to Finnish language must be made easily accessible through a detailed and systematic online database about the decisions and adjudications of the ECtHR.
- In addition to limiting the scope of punishments, the punishments should be constrained, with imprisonment only being imposed in the case of a severe offence.

## **2. Train officials in delivering requested information**

The Finnish Act of Openness of Government Activities sets the principle of official documents to be in the public domain unless there is a specific legislation for withholding them. In practice, the authorities are not always able to carry out the principle of publicity or to prioritise their commitment to the publicity in their responses to the journalists' information requests. Often, they do not even respond. Their understanding of what is public and what is secret/classified documentation and information also seems to be inadequate. It also happens that when the authorities are uncertain whether the information is public or not they refuse to provide access, just to be on the safe side. In addition, the material resources of the authorities necessary for responding to the information requests seem to be insufficient.

From their own point of view, journalists often have insufficient time to request information from public authorities or have no time to wait until the documents are delivered. In many cases, journalists are insufficiently informed about the possibilities of getting and using public documents.

**Technical and mental obstacles, which limit the access to public documents, can and should be removed by training authorities in information requests and in respect of the implementation of the principle of information publicity.** The following measures merit attention in this respect:

- Train officials to better understand the importance of their public role, and the function of the media in serving citizens' need for information.
- Redesign existing databases in order to easily access digital information.
- Improve access to official information by making more requests and by using more document-based public material in journalism.



## **Improvement of the general trust in the media**

### **3. Make information on the media's ownership and economic issues more transparent**

Information on media ownership is not transparent enough and it could be better publicly accessible. According to the law on joint stock companies, information about the ownership of the media companies should be public. The list of the shareholders should be publicly available in the headquarters of the company. Ownership, administration and book keeping information are also accessible in the Trade Register maintained by the National Board of Patent and Registration of Finland. Currently however, available information is selective and dispersed, and only a part of media companies publish their ownership information on their websites, although availability of this information is an important aspect of transparency of the business. Publicly available information would improve the possibilities of the public to assess the external liabilities of the media companies and news organisations. In addition, this would improve people's understanding about the reasons and consequences of the rapid changes in the media industry and would enable them to predict future developments.

**Information on media ownership should be more transparent and it should be publicly accessible by the Internet.** This could be achieved in the following ways:

- Media companies should publish in their websites up-to-date-data on their ownership and economic issues.
- An online public database should be compiled, which would provide any interested party with up-to-date data on the media companies' ownership and economic issues.

### **4. Introduce a readers' ombudsman system in the news organisations**

The significance of openness in society in general and in the activities of the news media organisations will remarkably increase in the near future. For example, in the social media, public criticism towards a media outlet or channel can be surprisingly rapid and large. The CMM as the only respondent to the complaints from the public will not necessarily be sufficient for maintaining the reliability of each single media organisation.

The readers' ombudsman system introduced in some media abroad would be ideal also in Finland to deal with the feedback from the audiences and to publicly assess their own organisation's activities from the ethical perspective. Ombudsmen would be able to give people a closer picture of the responsibilities and commitment of the news organisations. Since this kind of practice would direct the audience's feedback instantaneously to the editorial offices, the response to the people's requests would also be much quicker. For example, readers who feel being abused by a newspaper could, through the intermediation of an ombudsman, get the information and (moral) compensation much quicker.

**Media organisations should consider introduction of the readers' ombudsmen in their newsrooms to maintain the relationship with their audiences and ethical practices in journalism.** Consideration could be given to the following measures:

- Guarantee the ombudsman total independence and immediate contacts with the public.
- Allow the ombudsman to explain to the public the editorial practices of the media house and the editorial decisions concerning stories that have provoked public discussion.
- Secure that the ombudsman can give feedback and advice to the journalists of the news organisation for improving the ethical quality of their work.

## **5. Develop the ethical practices of online forums and other discussion platforms**

The Internet has remarkably increased the possibilities of individual citizens to exercise their freedom of expression. The new publishing platforms have, however, created new problems, such as the spread of hate speech or violations of privacy and personal integrity.

By developing the ethical publishing practices of online comments and discussions on their websites, media organisations will be able to reduce the level of misbehaviour in public forums. In addition, they would also reduce or even remove the need for state intervention to legally regulate online publishing.

**Media houses should develop the ethical practices of online forums and other discussion platforms.** For that purpose they should:

- Underline the responsibility for publishing practices and decisions by reminding the readers that the ethical rules of journalism apply also to online-only publishing and to the consumer-produced content of the web publications.
- Oversee the discussions on the websites.
- Enable the readers to notify about problematic messages they found on the websites.
- Provide the public with the receipts about their notifications.

## **6. Abide accurately by the ethical guidelines in online publishing**

Two important factors that weaken the reliability of the news media in the eyes of their audiences are the avoidance of the correction of mistakes and the spread of ‘click journalism’ that misleads the readers. The Internet does not ‘forget’ and ‘forgive’, and is quick in spreading inaccurate information, which has been published online. In order to maintain the trust of the audiences, it is important not to try to hide the mistakes made online and not to try to remove the story containing misinformation. Since the marketing value of online stories derives from the number of their readers, journalists strive to achieve the attention of the readers with attractive headlines that often appear to be misleading. This kind of practice likely increases the pressure for choosing stories on the basis of attractiveness and simultaneously leaves socially important but less attractive topics aside.

**The news media should accurately abide by the ethical guidelines in online publishing.** The following measures could be given consideration in this respect:

- Link the erroneous story to the correction in a way that the connection between the two would be clearly explicable.
- Correct any mistake as quickly as possible.
- Correct a mistake in the print version also in the online version.
- Avoid the consequences of ‘click journalism’ by ensuring that the headline properly corresponds to the content.

### **Maintaining high quality of journalism**

#### **7. Accumulate resources and enlarge autonomy for journalism**

In getting important and adequate information, citizens depend on news media’s ability to efficiently fulfil their information provider’s commitment. Thus, news organisations have voluntarily narrowed their journalistic activities as a consequence of their business aspirations. For example, the co-operation of newspapers for producing common pages has not improved the journalists’ possibilities to work on stories that need lengthy investigation or verification of complex facts. On the contrary, such co-operation has enabled the companies to reduce the number of journalistic staff and to increase the workload of those employed. In addition, the co-operation of the newspapers in producing common content has reduced the proportion of regional and local issues and restricted the freedom of expression in the covering of local issues. Increasingly in journalistic work, quantity is replacing quality. Journalism is turning into a ‘conveyor belt’ industry and the pre-designed content and format leaves very little room for journalists’ creativity and innovative approaches. As a consequence of the time pressure, journalists do not receive sufficient feedback about their work. The public’s feedback too often ends up on the desks of the newsroom’s managers and does not reach the authors of the stories.

The leadership oriented newsroom management narrows journalists’ individual autonomy. The concept of industrialised production of content prescribes stories with a certain length, pre-designs layout and determines the story angles and sources. As a consequence, stories do not contain as many surprising viewpoints or as a diverse content as they could have in a more liberal working environment.

**News media should accumulate resources for producing high quality journalism, and enlarge journalists’ autonomy in their day-to-day work.** This could be achieved in the following ways:

- Invest in journalism additional resources for reducing mistakes and creating possibilities for persistent and profound journalistic work.
- Improve journalists' individual autonomy by giving more freedom in their day-to-day work.
- Give journalists more opportunities to develop own story ideas.
- Do not decide the scope of the story, the aspects to cover and the viewpoints to express by newsroom meetings or pre-designed layouts. Derive them from the journalists' independent research on the topic.
- Give more feedback to journalists.

### **8. Emphasise the ability of critical consideration in journalistic training**

Journalistic work presupposes a critical attitude in gathering the material and assessing the sources. In the current training of journalists, however, media's short-term commercial interests prevail over other topics. The content of the training focuses too much on the in-house routines and practices of media organisations instead of creating 'thinking skills' in journalism.

**Developing the ability of critical consideration should be emphasized in journalistic training.** In particular, consideration could be given to the following measure:

- Train journalists to independently assess sources, critically evaluate the information gathered, and critically reflect their own work process.

### **The role of YLE in competition with the commercial media**

#### **9. Evaluate properly the social and communicational policy responsibilities of YLE**

The activities of YLE focus on socially important sectors, such as development of high quality journalism, quality news production and cultural advancement. It is also important to develop the sectors that the commercial broadcasters are not able to efficiently contribute to because of high costs, such as the programmes for minority groups, documentaries, or programmes for foreign audiences. The Internet has become an important sector in YLE's activities. However, private media companies are not content with the situation, as they have to compete with the state funded free online services of YLE. They also argue that the public service tasks of YLE are defined too vaguely. The law of YLE prescribes a pre-evaluation of YLE's new (particularly online) services from the viewpoint of public service tasks. Critics argue that the overseeing authority is not sufficiently independent to fulfil this task, since it is politically composed of YLE's own Administrative Council and may act in favour of the company.

**The social and communicational policy responsibilities of YLE should be properly evaluated and the independence of the pre-evaluation of the new services of YLE, from the perspective of public service function, should be increased.** The following measures could be given attention:

- Determine more precisely the public service tasks of YLE.
- Re-examine the activities that are clearly public service, and those that do not naturally belong among public service tasks and cross-over into the activities of the commercial broadcasters.
- Make sure that the members of the authority that pre-evaluates YLE's new services come from outside the company.
- Examine the tasks of YLE on the basis of the quality and nature of the content produced and not on the basis of technological resources.

## **Policy suggestions for free and independent media in Germany**

*Sebastian Müller and Christoph Gusy*

### **Policy summary**

Democratic states are based on interrelated and organic relationships between societal groups and democratic individuals, which evolve and develop through personal and public communication. Individuals and societal groups participating in democratic processes need to be informed and acquire both the ability and the wish to communicate. A free and independent media plays an important role in communication. The German Federal Constitutional Court has always emphasised the role of the media in open and democratic societies, and has consequently declared that the expression and imparting of opinions and freedom of information are both human rights enshrined in the German Constitution. Communication can take place privately and publicly. With regard to public communication, a free and independent media plays a crucial role in mass communication and thus ideally in unbiased opinion forming. However various interests from both state actors and private entrepreneurs pull at the foundation of the media landscape, leading to the conclusion that a free and independent public sphere must to a certain degree be supported and regulated.

In the first report for the MEDIADEM project, the ‘Background information report. The case of Germany’, we presented a brief summary of the existing media structures and regulations in Germany which frame public communication. Our second report, the ‘Case study report. Does media policy promote media freedom and independence? The case of Germany’, illustrated current debates and media policy mechanisms in Germany (available at [www.mediadem.eliamep.gr](http://www.mediadem.eliamep.gr)). As a guiding question throughout, our main focus lies on the democratic function of a free and independent media and how the necessary communications spaces are created, especially as these spaces are constituted anew with new individuals, new technical means (such as the Internet), and new subjects, thus requiring changes to the regulatory framework.

This policy paper draws on the research results of the two preceding reports to provide concrete recommendations for policy makers, media organisations and media authorities. These are:

#### **1. Guarantees for a free and independent public communications space**

- **National lawmakers must ensure non-discriminatory access to Internet services, also known as net neutrality. National lawmakers are called upon to include a clearly worded provision in the Telecommunication Act and amend the existing one. National media policy makers are encouraged to support, where possible, European legislation to ensure non-discriminatory access to Internet services.**
- **National lawmakers are called to ensure that the composition of the broadcasting councils as governing bodies of public service broadcasters clearly mirrors the representative societal groups, places them in a majority position and gives them the right to nominate the broadcasting council representative. The combined number of representatives from the state and political parties in the council should not exceed 20 per cent.**
- **National lawmakers are encouraged to ascertain the need to guarantee an**

independent and impartial communications space in the Internet necessary for a democratic society. This includes the revision of the provisions relating to freedom of the press and broadcasting in the Basic Law as well as the possible extension of journalists' rights to bloggers.

- National lawmakers should enact efficient media concentration legislation in order to allow the Commission on Concentration in the Media (KEK) to decide on, firstly, the basis for determining a clear market share of viewers and, secondly, on the basis of making an overall assessment of the market dominant position in comparable media markets.

## **2. Free and independent media: national and European tasks**

- Where necessary, national media policy makers should enhance their comprehension of the interrelated and multi-level governing nature of media policy comprising of the state level (*Länderebene*), the federal level (*Bundeseben*) and the European level.
- National media policy actors are encouraged to take into account the European Parliament's resolution 'Public service broadcasting in the digital era: the future of the dual system'.
- State actors are called upon to strengthen, on the European level, the right of the European Union Member States to define the public service remit and to provide for the funding of public service broadcasting as foreseen in the Amsterdam Protocol. A revision of the Treaty on the Functioning of the European Union might be advisable in order to legally enhance the position of public service media.

## **3. Information services and news bulletins**

- National media policy actors must ensure – on a European level and national level – that public service broadcasters are in the position to maintain and develop online news services and online versions of their existing services.
- State media authorities and national lawmakers are called upon to enhance the legal framework conditions in order to increase programme minutes with political journalism and controversial subjects provided by commercial broadcasters.

## **4. Working conditions for journalists**

- Publishers, commercial and public service broadcasters must ensure financially and socially sufficient as well as stable working conditions for traditionally employed or freelance journalists. They should also ensure the independence of editors from undue state, economic or societal influence.

## Key observations

The first key observation concerns the **core notion**: what is free and independent media? This notion must be seen in the context of democratic societies. This is because media freedom and independence do not constitute absolute terms without any relationship to the environment the media works in. The idea of a free and independent media is based on the assumption that the primary, overarching, role of the media in a democratic society is to function as an agent of information and public debate that facilitates the functioning of democracy. The terms are thus employed in relation to the media's function in a democracy. It is clear from the outset that media freedom and independence are prone to various constraints. They can stem from the political sphere, from economic actors, from media operators, or from the audience itself.

The second key observation relates to **the actors** involved in media policy formation and implementation. Historical political and technical developments account for a high number of media operators, a diverse media landscape, and a multitude of actors forming media policy. Currently in Germany more than 400 commercial television channels and 11 public service broadcasting stations provide nationwide and regional broadcasts, as well as online services. Furthermore, 14 state media authorities and their associated bodies, such as the Commission on Licensing and Supervision (ZAK), scrutinise commercial broadcasters' activities. State chancellors and state parliaments are responsible for key legislation, while technical questions, for instance, on telecommunications networks, are addressed at a federal level. These media policy processes act interrelatedly with European Union secondary law and the European Commission's state aid control procedures. Actors such as Internet-based policy activists influence political debates relating to media law. Policy forming and implementation interacts, finally, with the national and European courts. The German Federal Constitutional Court has significantly shaped media law and the Council of Europe's European Court of Human Rights has assumed a more complementary, but nevertheless important, role in developing European media adjudication.

The multitude of actors means that **German media policy processes work within an interrelated and multi-level field**. In this multi-level policy landscape, the legislature faces the challenge of identifying the different and partly competing interests of media operators while establishing and maintaining free and independent media through various different political forums. The state aid procedure, instigated by German commercial broadcasters with the European Commission, testifies to this. This procedure has affected the basic concept of public service broadcasters and the relevance of the economic interests of private broadcasters and publishers. Furthermore, technical developments emerging with the Internet raise the question of free and independent media in relation to an unfettered market or to a differentiated regulation concept, taking the distinct functions of media outlets necessary to a democracy into account. The German Federal Constitutional Court has provided with its interpretation of Article 5 of the Basic Law very valuable and relevant standards for the legal framework of communications space.

A third key observation concerns **political journalism in television programmes** covering politically controversial issues relevant to democratic discourse. Basic legal requirements exist for commercial and public service broadcasters. However, the practice of the commercial operators questions the legal requirement to provide sufficient airtime for information broadcasts, especially those covering controversial issues relevant for democratic discourse. The composition and diversification of media content necessary for free and independent democratic and public discourse is a field of tensions characterised by partly competing interests. The legislature and the courts have reacted differently to this situation and have created a legal framework for media content, while concurrently adhering to the



principle of media freedom from the state. While private broadcasters and, particularly, state media authorities are aware of the democratic function of broadcasting, economic considerations curb the provision of politically relevant information programmes and news bulletins by private broadcasting operators. It is argued that such programmes are cost intensive and draw only a low number of viewers, which adversely affects advertising revenues. These economic considerations have led the commercial broadcasters to incrementally reduce the airtime of their news and information programmes with political journalism and coverage of controversial issues relating to politics, economics and societal debates.

Fourthly, **journalists' working conditions** play a crucial role. It is a simple truth that it is people who create intellectual content in the form of free and independent journalism and that they need to be paid adequately for this work. In order to fulfil the role of public watchdog, the media require sufficient staff (especially journalists), adequate income and financial security for personnel. Sufficient framework conditions allow journalists to think analytically and critically. While currently the overall working conditions enable journalists to produce print media, broadcasting, and online services relevant for societal and democratic discourse, some developments are threatening this. These include the trend for journalists in charge of print outlets or broadcast services to have to analyse more and more information provided by news agencies and other online services while, concurrently, editorial offices are cutting down in personnel. To maintain services, media operators rely increasingly on freelance journalists, who earn less and enjoy fewer social security conditions than their colleagues on the payroll.

Finally, **media literacy projects** in Germany shall be mentioned. Research has shown that most projects and programmes relating to developing media knowledge focus mainly on technical competencies, especially online techniques. These include, for example, data protection tools and applications aimed at handling risks when using social network platforms. Furthermore, projects and programmes relating to children and youth protection play a significant role. However, the necessary knowledge of linkages between political or economic interests and media content, and the understanding of new media services in the Internet for democratic participation seem not to be prevalent.

## **Policy recommendations**

### **1. Guarantees for a free and independent public communications space**

The Internet provides a democratic space in which new forms of participation can evolve. The decentralised structure and the (still existing) neutrality of access to Internet based services makes it much more difficult to influence, let alone, control the stream of information. As a result, organisations, be they political parties or independent non-governmental organisations, are no longer necessarily major actors shaping political developments. It is not yet clear whether Internet-based participation will replace traditional forms of political participation and how it will shape forms of governing. However, the evolving participative tools seem to point in the direction of a complementary form of political participation with the potential to alter basic structures. The access provided by the Internet allows individuals to partake in democratic processes differently, especially on local or regional matters. Much more information than before can be diffused via the Internet. This is much easier to access than printed information on a similar scale.

However, along with these possibilities come the challenges posed by private

companies and state authorities. Technical advancements threaten access neutrality. Internet providers such as large telecommunication networks could establish different speed standards or quality classes, making Internet access discriminatory. This development may even lead to cooperation between large Internet providers and companies such as Google, essentially creating their 'own' Internet and thus shaping users' online consumption significantly and presumably on the basis of market interests. Such developments would question the intrinsic character of the Internet, which lies in the opportunity for everybody with Internet access and a contract with a provider to publish and access content.

**National lawmakers must ensure non-discriminatory access to Internet services, also known as net neutrality. National lawmakers are called upon to include a clearly worded provision in the Telecommunication Act and amend the existing one. National media policy makers are encouraged to support, where possible, European legislation to ensure non-discriminatory access to Internet services.**

Public service broadcasting maintains an impartial and unbiased communications space with a focus on democratic discourse. This important democratic space needs to be organised and governed. The state legislatures sought to guarantee independence from the state and from single societal groups through the governing structure of the public service broadcasters: the independent director-general, the broadcasting council and the administrative council. The broadcasting council is vested with basic programme and staffing competencies and serves as the broadcaster's governing body. It is steered by different societal groups. The Bavarian Broadcasting Act illustrates the basic understanding of the broadcasting council as acting for the common good: 'The broadcasting council represents the interests of the general public in the field of broadcasting.' As such, it has to have the capacity to act completely independently from state representatives, such as governments, political parties and dominant single societal groups. The legislature seeks to implement this principle by placing different societal groups on the councils, such as representatives of unions, churches, sports or science associations and cultural groups. These groups hold a majority position on the broadcasting council and have the right to nominate their own representatives. In some cases, however, the composition and nomination procedure should be revised. Ideally, the societal groups should enjoy the discretionary power to nominate the council representative and the combined number of representatives from the state and political parties in the council should not exceed 20 per cent.

**National lawmakers are called to ensure that the composition of the broadcasting councils as governing bodies of public service broadcasters clearly mirrors the representative societal groups, places them in a majority position and gives them the right to nominate the broadcasting council representative. The combined number of representatives from the state and political parties in the council should not exceed 20 per cent.**

The national media law was designed for a world in which a clear distinction between mass and private communication could be drawn. With the advent of Internet-based services, however, the clear distinction between print media and broadcasting as public communication on one side and private communication on the other side has blurred. The way Internet-based communication works has given individuals the chance to reach a potential mass public. A

single blogger has with the Internet the capacity to reach a large audience, depending on his or her followers. Internet-based communication services, however, linger between private and mass communication. A blog on personal issues can be public in the sense that it is available in the Internet, but private in the sense that it intends only to reach a small audience. However, a blog on current political debates with background information and sound analysis usually aims to gain influence in the political debate and a public following.

The national legislation should be analysed against the background of these developments. For example, the Basic Law protects reporting by means of broadcasts and film, but it might be necessary to also add a reference to reporting by means of Internet-based communication services. Furthermore, domestic media law could be revised to take into account the distinct role of a communications space created by blogs. The need for a democratic communications space should serve as guiding principle.

**National lawmakers are encouraged to ascertain the need to guarantee an independent and impartial communications space in the Internet necessary for a democratic society. This includes the revision of the provisions relating to freedom of the press and broadcasting in the Basic Law as well as the possible extension of journalists' rights to bloggers.**

Media concentration is considered a threat to the provision of an unbiased basis for opinion forming and, as such, the German media concentration law provides for the application of a pre-emptive merger control system for media companies in the broadcasting sector. The Commission on Concentration in the Media (KEK) implements the applicable law and deals with concentration developments in Germany by examining what commercial television operators draw what percentage of viewers. The law aims to prevent opinion dominance and thus vests the KEK with the power to assess market share. This also applies in cross-ownership acquisitions involving broadcasting and other media outlets, including print media and online services. In such cases the KEK takes the convergent market situation, i.e. market share, into account. The KEK sought to prohibit the acquisition of private broadcaster ProSieben.Sat1 Media AG by publisher Axel Springer AG, but its decision, after years of legal action, was ultimately overturned. The existing legislation, in which the ceiling of 25 per cent of viewers is legally considered the benchmark when it comes to cross-mergers, needs to be complemented with an overall assessment procedure. This could allow the KEK to prohibit acquisitions in cases in which a market dominant position exists in a comparable media sector and the threshold of 25 per cent is not reached.

**National lawmakers should enact efficient media concentration legislation in order to allow the Commission on Concentration in the Media (KEK) to decide on, firstly, the basis for determining a clear market share of viewers and, secondly, on the basis of making an overall assessment of the market dominant position in comparable media markets.**

## **2. Free and independent media: national and European tasks**

Media policy has undergone a significant change within the last decades. While media policy was once the domain of state and federal political actors, these confines have been blurred and the system has changed to an interrelated multi-level policy process. The formulation of

media policy now comprises a multitude of actors including state governments and state parliaments, the German Federal Government and the German Federal Parliament, the European Union and the Council of Europe, national and international companies, usually highly organised in terms of political lobbying, and the Internet community with its capacity to mobilise individuals. Regulation of broadcasting, audiovisual online content, Internet-based communication services, the technical framework conditions of the Internet, media concentration law, and copyright provisions all exist in an interrelated policy process. While national media policy formulation seems still to focus on old fields, an awareness and understanding of the new forums is necessary in order to shape media laws that serve democratic public discourse.

**Where necessary, national media policy makers should enhance their comprehension of the interrelated and multi-level governing nature of media policy comprising of the state level (*Länderebene*), the federal level (*Bundeseben*) and the European level.**

European Union law provides several options for interacting with national media policy and enhancing the legal position of national public service operators on a European level. In November 2010 the European Parliament adopted an important resolution on the dual broadcasting system model in the Member States of the European Union. In the resolution ‘Public service broadcasting in the digital era: the future of the dual system’ the European Parliament stressed that public service broadcasting must be in the position ‘to cultivate a public sphere by making high-quality media content of public interest universally accessible on all relevant platforms.’ It also underscored – with reference to the Amsterdam Protocol – that it is an exclusive competence of the Member States to define the remit and provide the funding for public service broadcasting. State actors are encouraged to strengthen the legal position of public service media by taking into account the European Parliament’s statements and thus complementing the currently strong European Union economic approach as illustrated in the state aid control procedures on public service funding regimes.

**National media policy actors are encouraged to take into account the European Parliament’s resolution ‘Public service broadcasting in the digital era: the future of the dual system’. State actors are called upon to strengthen, on the European level, the right of the European Union Member States to define the public service remit and to provide for the funding of public service broadcasting as foreseen in the Amsterdam Protocol. A revision of the Treaty on the Functioning of the European Union might be advisable in order to legally enhance the position of public service media.**

### **3. Information services and news bulletins**

The national debate on technical convergence obfuscates the fact that different media outlets fulfil different tasks and serve distinct societal needs. In other words: technical convergence does not amount to functional convergence. The function of the mass media in a democracy is to ensure and guarantee free and independent media by, among other things, providing the necessary content relevant for political debates, cultural exchange and societal development. Online services provided by print media publications follow the tradition of print media ‘products’. They can be more partial, even exaggerate, and thus trigger societal discourse. Public service media (PSM) have another, distinct, role. Due to their secure funding

framework, PSM can provide a broad range of impartial and journalistically sound information. If consumers' assessment of media behaviour concludes that Internet services partly replace traditional broadcasting, state legislatures need to ensure that public service broadcasters are in the position to offer new online services in fulfilling their societal requirements.

**National media policy actors must ensure – on a European level and national level – that public service broadcasters are in the position to maintain and develop online news services and online versions of their existing services.**

Commercial broadcasting assumes an important role in national media consumers' behaviour. In 2011, the two largest commercial broadcasting companies in Germany, RTL Group and ProSieben.Sat1 Media AG, drew an average of 43.6 per cent of viewers to their channels RTL, RTL II, and VOX (all RTL Group), Sat.1, ProSieben, and kabel eins (all ProSieben.Sat1 Media AG). One problem lies in that commercial operators generally focus on entertainment programmes, neglecting political journalism and controversial subjects. Their television programmes averaged in 2010 content with political journalism of 2.6 per cent (RTL), 1.8 per cent (VOX), 1.4 per cent (Sat.1), 0.8 (ProSieben), 0.4 per cent (RTL II) and 0.4 per cent (kabel eins). That means a large audience is practically excluded from societally relevant discourse on political subjects. Broadcasting law requires commercial operators of full coverage television channels (which is a legal notion to distinguish between full coverage and special channels, like sole news channels) to offer diverse programme content with information, education, advice and entertainment. The question is whether the commercial operators meet the legal requirements. But even if they do, the paucity of politically relevant programmes offered by commercial operators questions nevertheless the basic function of a public democratic space.

**State media authorities and national lawmakers are called upon to enhance the legal framework conditions in order to increase programme minutes with political journalism and controversial subjects provided by commercial broadcasters.**

#### **4. Working conditions for journalists**

Working conditions currently enable freelance and traditionally employed journalists to provide the media market with sufficient outlets for democratic discourse. High quality journalistic work is still possible in Germany, as editorial offices are still staffed sufficiently. However, journalists have to cope with more and more tasks and produce more content in a shorter time than some years ago. Internet-based services are one reason for the heavy workload, as journalists are required to produce, for example, print content and simultaneously audiovisual content for publications' websites. Media concentration processes resulting in the decrease of personnel employed is another issue adding pressure to journalists and their working conditions. In other words: more is to be done with less workforce. While journalists can cope with the pressure of the daily work, an increase in tasks is likely to threaten their role as watchdogs in the future. It is a simple truth that it is people who create intellectual content and provide critical and analytical journalism and that they need to be paid *adequately* for this work and participate in the social security system. To achieve this, collective wage agreements should be applicable for all media organisations, honorarium

agreements with freelance journalists should be transparent (clear terms for the payment, especially for the repetitive use of a work in different media like print and online) and not disadvantageous for the journalists, and the allocation of existing revenues could be revised to allow for high quality journalism. It is questionable, for instance, whether the large sums currently spent covering sports events are justified.

In addition, editorial standards should be adopted which assist to secure independence. Essentially, editors and journalists should be placed in a strong position to work freely and independently and be heard in the process of appointments to senior positions. This applies to print media and online publications with private owners as well as public service broadcasting.

**Publishers, commercial and public service broadcasters must ensure financially and socially sufficient as well as stable working conditions for traditionally employed or freelance journalists. They should also ensure the independence of editors from undue state, economic or societal influence.**

## **Policy suggestions for free and independent media in Greece**

*Evangelia Psychogiopoulou and Anna Kandyla*

### **Policy summary**

The research carried out in Greece in the framework of the MEDIADEM project has focused on the study of Greek media policy-making, the regulations enacted that have a bearing on the development of free and independent media, and their implementation. The objective has been to identify the policy processes, tools and instruments that can best support media freedom and independence in the country. The analysis has been built on a series of legal documents, parliamentary proceedings, reports by state and non-state bodies with a remit in media affairs, articles from the press, and semi-structured interviews conducted with politicians, public officials, independent regulatory authorities, media operators, journalists and their representative associations, among others.

Research findings disclose that the Greek media policy has been subject to strong politicisation. The interwoven interests and power relations that developed between the political system and the media have impacted on the latter's ability to perform as independent agents of information in a democratic society. The consolidation of media outlets in the hands of a few proprietors, the marginalisation of public service broadcasting and the absence of journalistic professionalism have further reinforced such trends. Presently, the pressures to accommodate technological developments and the economic recession plaguing the country might also have a pervasive impact on the media's independence.

Drawing on MEDIADEM's research findings, this policy brief puts forward policy recommendations for the promotion of media freedom and independence in Greece. The recommendations are addressed to state and non-state actors active in the field of media policy. We first propose reforms in relation to the governance model and the institutional design for media policy-making (recommendations 1-3). We then provide a set of policy actions targeting specific issue areas that are of relevance and importance for media freedom and independence (recommendations 4-10). Our recommendations are the following:

- 1. Enhance institutional stability for media policy-making**
- 2. Facilitate participatory and evidence-based media policy-making**
- 3. Strengthen the independence of the National Council for Radio and Television**
- 4. Regulate the migration to digital terrestrial television**
- 5. Ensure that undue media ownership concentration is prevented**
- 6. Promote the independence of public service media**
- 7. Redesign the system of press subsidies and public sector advertising channelled to the media**
- 8. Remove excessive legal and judicial constraints on what the media can publish**
- 9. Strengthen journalists' independence and ethical performance**
- 10. Promote media literacy and education**

## **Key observations concerning free and independent media in Greece**

The analysis conducted for the Greek case study as part of the MEDIADEM project illustrates that Greek **media policy-making is highly centralised in the hands of the government**. Important decisions are reached by the executive, and prior consultation with stakeholders is more often the exception than the rule. Such a policy-making model has allowed those in office to use the legislative terrain in order to gain influence over the media, and the latter to exert pressure over policy formation through the cultivation of informal relations with the government and state officials. This has nurtured a particularistic style of regulation that lacks a long-term strategy, and has also led to the development of a media market that for the most part operates under no scrutiny. Telling is the analogue broadcast media licensing saga: the state's inertia to license the broadcasting sector, largely driven by the desire to keep the channels open for the exercise of undue pressure on private media operators, has hampered the development of broadcasting services in line with specific normative prescriptions in the public interest.

Another significant element of domestic media policy setting is the **lack of genuine regulatory independence**, despite the establishment of an independent authority for the regulation of the broadcast media, the National Council for Radio and Television (NCRT). First, the dominant political elites have been ambivalent about safeguarding the independent status of the members of the executive board of the NCRT, as well as the authority's financial and operational autonomy. The state's reluctance to promote the authority's independent operation has also been manifested in its avoidance of addressing the factors impairing effective market monitoring by the NCRT (most of which arise from the incoherent and often contradictory legal framework for the media) and in that it has not involved the authority in substantive norm-setting. Concurrently, the decision-making practice of the NCRT has revealed the absence of a concrete approach to principles and measures guaranteeing the insulation of the broadcast media from political or other constraints. It is enlightening that the NCRT has at times imposed restrictions on the freedom of expression in cases where criticism of political persons and state institutions was involved.

**The preferential relations that developed between politicians and the media have provided support for the establishment of an essentially distorted media market.** First, media owners have been allowed to openly ignore the rules when these sought to restrain them. The high degree of mono-media and cross-media concentration that characterises the nationwide media in particular, notwithstanding earlier attempts to restrict media ownership, is indicative. Second, media ownership has been largely perceived as a means to exert influence over domestic politics, which to some extent explains the densely filled, yet economically unsustainable, Greek media landscape. Further, in an effort to appease media owners, the state has artificially supported several media outlets through the channelling of considerable public funds, undermining editorial policies supportive of accurate and unbiased reporting.

Another characteristic of the domestic media landscape is **the abundance of opportunities the state has enjoyed to intervene in the operation of the public service broadcaster (PSB), ERT**. To illustrate, the government appoints and can freely dismiss the board of directors of ERT, and also supervises its budget. This has created ample potential for political influence over ERT's news services, harming the operator's credibility among the public. Currently, the PSB faces fresh government attacks on its budget, while being asked to act as a pioneer in the digital environment.

Impediments to the ability of the domestic media to perform in an independent manner also stem from the **weakness of the existing system of journalists' self-regulation in**



**defending the freedom of expression and its responsible use.** The task of protecting the professional rights of journalists and maintaining a high level of professional standards and ethics has been assigned to journalists' professional associations. These however have neither been sufficiently distanced from the interplay between partisan politics and media interests, nor particularly attentive to issues of journalistic autonomy. Meanwhile, journalists' associations have generally sought, and to some extent managed, to protect the employment rights of their members, but have not catered to secure viable working conditions for the entire journalistic profession, including freelance journalists, and to curb or prevent employers' mal-practices. The economic squeeze of the recession has resulted in the layoff of many journalists and has further deteriorated the working environment of those who have managed to retain their job. Economic uncertainty makes it increasingly difficult for journalists to maintain their autonomy.

## **Policy recommendations**

### **1. Enhance institutional stability for media policy-making**

Instability has lied at the heart of the institutional set-up for the design and management of the Greek media policy. This is manifested in the evolution of the Secretariat General of Information and Communication-Secretariat General of Mass Media (SGIC-SGMM), the government body that is primarily responsible for formulating media policy, currently assigned to the Minister of State. Changes in government have routinely been followed by a reshuffling of the SGIC-SGMM, its placement under different ministries and the dispersal of its duties without any substantial planning. This has created regulatory uncertainty and often confusion. Relative stability has, in turn, characterised the functions of the Ministry of Infrastructure, Transport and Networks, which is responsible for the electronic communications sector and technical matters related to broadcasting networks.

**Policy makers should enhance the stability of the government bodies entrusted with principal responsibilities for the design of media policy in order to promote regulatory certainty and foster efficiency.** In particular, they should:

- Ensure that any reassignment of media-related competences between government bodies is sufficiently justified on the basis of a concrete media policy strategy with precise objectives and goals.
- Make sure, in any case, that the reshuffling of competences is kept to a minimum and that mandates are properly defined.

### **2. Facilitate participatory and evidence-based media policy-making**

Despite the proliferation of actors and norms within and beyond the state, most notably EU laws and regulations, the design of the Greek media policy remains highly centralised in the hands of the cabinet. A concrete approach to policy-making and the drafting of legislation that would include prior analysis and consultation with stakeholders (i.e. parliamentary committees, independent authorities with a remit in media affairs, media and journalists'

associations, interested individuals, etc.) is limited. This model has allowed successive governments to instil particularistic values in the design of media policy and regulation.

**Policy makers should promote a participatory model of policy-making that minimises the risk of political favouritism and promotes reliability, transparency and accountability.** This could be achieved in the following ways:

- Engage all key stakeholders in policy-making through the establishment of appropriate consultation procedures and structures.
- Support scientific research on media policy issues and media freedom and independence, and generally encourage evidence-based policy-making.
- Provide thorough justification of the policy decisions taken.

### **3. Strengthen the independence of the NCRT**

The wish of political elites to maintain a central role in audiovisual policy decisions is reflected in their unwillingness to strengthen the independence of the NCRT and to upgrade its position in the regulatory system. Although regulatory independence is a pre-requisite for the de-politicisation of media regulation, the legal framework pertaining to the NCRT does not provide sufficient safeguards for the authority's independence. In terms of appointment procedures, the members of the governing body of the NCRT are selected by a 4/5 majority decision of the Conference of Presidents, a cross-party parliamentary college. However, there is no public call for nominations, no hearing and no short-listing of candidates. Moreover, as the qualifications required for membership are determined in broad and general terms, members may be selected primarily on the basis of political criteria rather than on merit. The independent performance of the NCRT is further inhibited by the authority's limited financial and administrative autonomy and the constrained delegation of norm-setting powers. For instance, the NCRT is responsible for licensing the audiovisual sector but the power to determine the licensing requirements and the licence allocation procedures rests with the executive. Due to the state's inaction to adopt these rules, the broadcast media have operated during the past 20 years under a peculiar 'para-legal' status.

**State authorities should guarantee the independence of the NCRT through an appropriate set of rules covering its status, its operational and financial autonomy, and its competences.** This could be achieved in the following ways:

- Create an open and transparent system for the appointment of the members of the NCRT's governing body, and establish specific qualification and media experience requirements for candidates.
- Guarantee that the NCRT enjoys a) financial autonomy by providing it with stable funding; and b) operational autonomy to decide on its human resources and the general organisation of its services.
- Ensure that substantive norm-setting competences are delegated to the NCRT.

#### **4. Regulate the migration to digital terrestrial television (DTT)**

Greece is in a digital switchover process. In April 2012 a new law (Law 4070/2012) laying down provisions, among others, for the definitive passage to DTT was passed. Nevertheless, a set of statutes for the definition of a frequency chart for the broadcast of digital terrestrial signal, the audiovisual licensing criteria and procedures, and the number, type and reach of the licences to be granted is still needed for the definitive migration to DTT. DTT offers an optimum opportunity to break away with the past by remedying the status of semi-legality that has characterised commercial broadcasting in the country. Such a status has placed private operators in an insecure market position, rendering them vulnerable to political pressure, but has also allowed them, in anticipation of positive state coverage, to operate without regarding the rules.

**The government should ensure that the passage to DTT safeguards the independence of the broadcast media as well as citizens' access to accurate, impartial and balanced information.** For that purpose, it should:

- Take swift action for the effective implementation of Law 4070/2012, adopting all pending statutes required for the definite passage to DTT.

#### **5. Ensure that undue media ownership concentration is prevented**

The relaxation of media ownership rules that took place in 2007 (Law 3592/2007), recognising the state's failing policy to restrain mono-media and cross-media ownership, was accompanied by the introduction of a specific media component in the Greek competition law. Specific provisions define the notion of dominant position for the assessment of horizontal and diagonal concentrations between media undertakings that affect the broadcasting market or the circulation markets of newspapers and magazines. Although these provisions were in principle enacted to support pluralism, in practice they have failed to do so. Accounting for this is mainly the broad definition of what the law *a priori* identifies as 'relevant media markets' (television, radio, newspapers and magazines), which, coupled with the relatively high thresholds fixed for market dominance, obstructs the determination of smaller media markets and thus the finding of a dominant position. Concentrations implicating media enterprises with only an online presence do not come within the scope of these provisions.

**Policy makers should ensure that the regulation of the media market by means of competition law prevents undue ownership concentration.** Consideration should be given to reforming the provisions for the assessment of concentrations between media enterprises in the following ways:

- Re-consider the definition of the 'media markets' to be treated in competition analysis, with due consideration given to the converged media environment, and lower the applicable thresholds for the establishment of dominant position.
- Introduce requirements for compliance with company rules and organisational procedures that guarantee the independence of the editorial staff as a prerequisite for

media mergers and acquisitions.

## 6. Promote the independence of public service media

In order to properly perform their role as a source of unbiased and plural information, public service media must be insulated from political influence in their day-to-day operation and overall programme strategy. The laws pertaining to the composition of the executive board of ERT provide opportunities for political interference in ERT's performance. The selection of candidates and the appointment of the board members are made solely by the government, while no rules to protect their personal independence in the execution of their duties have been put in place. In addition, the budget of ERT is subject to approval by the cabinet, which creates potential for undue interference with ERT's activity. Presently, there is much discussion about the need to correct maladministration practices and downsize ERT's costs. However, most of the measures announced have simply focused on reducing the number of ERT's channels and programmes, without being based on substantial planning concerning the ways in which ERT can best perform its public service remit, and offer comprehensive news and information services to the public, including online services.

Of importance is also the limited development of mechanisms to ensure transparency in ERT's decision-making. No meaningful dialogue exists between ERT and its audience concerning the impartiality, accuracy and quality of the services it provides.

**Policy makers should ensure that ERT is in a position to fulfil its statutory public service remit, freed from political and financial constraints. Also, ERT should itself demonstrate its independence to the public on a continuous basis.** The following measures merit attention in this respect:

- Reform the legal framework concerning the governance structure of ERT by introducing safeguards for an open, transparent and depoliticised appointment procedure for the members of the ERT executive board. Particular attention should be given to rules: a) establishing a staggered tenure; b) offering protection against removal from office; c) determining incompatibility with other functions; and d) setting requirements for knowledge and media expertise.
- Ensure that the approval of the ERT budget takes place through transparent procedures, involving recommendations made by an independent advisory body. The involvement of an independent advisory body should also be given consideration in the context of defining the level of the ERT licence fee.
- Establish public accountability mechanisms through the creation of an ERT contact point for comments, the set-up of an internal complaints commission or ombudsman for citizens' complaints, the regular launch of consultations with the audience, and the establishment of an advisory body consisting of representatives of the public to be involved in ERT's programme planning.
- Ensure that oversight over the exercise of ERT's public service remit is carried out by the NCRT and the parliament on the basis of an annual report prepared to that purpose by ERT.

## **7. Redesign the system of press subsidies and public sector advertising channelled to the media**

The Greek print media are supported by various indirect state subsidies in the form of distribution funds, reduced value added tax and preferential rates for telecommunications services. The underlying logic for the award of these subsidies has been to maintain a heterogeneous print media landscape that safeguards the effective exercise of citizens' right to information. However, by being granted to daily and non-daily newspapers and magazines on a non-selective basis, these subsidies have done little to stimulate quality information services, independent news provision and investigative journalism. The financial pressures under which the print media presently operate and the need to adapt the media business to the online environment, have undermined their ability to direct resources to quality journalism and the creation of original media content, calling for a shift in the state's approach to the press subsidy system.

Public sector advertising has been for years a source of lavish revenue for both the press and the broadcast media. The procedure for the allocation of the budgeted advertising expenses of public bodies to traditional media (i.e. newspapers, magazines, radio and television) is set in law and generally favours regional media. The law mandates that public sector advertising should be directed to the most cost-effective media, but no serious oversight mechanism has been put in place. This has enabled the government and public officials to circumvent the rules and selectively channel advertising resources to certain outlets.

**Policy makers should reform the current system of press subsidies in order to create incentives for free and independent media behaviour in the shifting media environment. Also, they should adopt a mechanism for the allocation of public sector advertising that prevents potential abuse of public resources and respects the media's editorial independence.** The following measures could be given consideration in this respect:

- Ensure that press subsidies and public sector advertising are allocated to media outlets that declare commitment to the principle of editorial independence and respect for the public's right to information through appropriate company guidelines and organisational procedures.
- Distribute state subsidies to print media outlets on a project basis for the support of: a) news and information services; b) research and investigative journalism; and c) adjustment to the new digital economy.
- Establish an effective and transparent mechanism for the allocation of press subsidies and public sector advertising, at the same time ensuring effective distribution oversight by an independent agency (i.e. the press council proposed under recommendation 10 for press subsidies; and the NCRT for public sector advertising).
- Ensure timely access to comprehensive information concerning the distribution of public resources to the media; this should go hand in hand with measures guaranteeing transparency in ownership information and the finances of the media overall.

## **8. Remove excessive legal and judicial constraints on what the media can publish**

In Greece criminalisation of defamation persists in provisions that define insult, libel and slanderous defamation as criminal offences which incur penalties such as fines and custodial sentence. The mere existence of these provisions may put a chill on the freedom of expression, inhibit criticism of the powerful and encourage self-censorship among the media.

Further, domestic courts have generally interpreted the freedom of expression restrictively in cases where media content was allegedly libellous or insulting public officials and public figures. The European Court of Human Rights (ECtHR), in particular, has found that the Greek courts do not draw a distinction between fact and value judgment - a distinction that occupies an essential place in the Strasbourg Court's jurisprudence concerning the freedom of expression in the media.

**The legislature and the judiciary should protect the freedom of expression as enshrined in Article 10 of the European Convention on Human Rights and take steps to improve the implementation of ECtHR rulings dealing with the freedom of expression in the media.** Consideration could be given to the following measures:

- Abolish criminal defamation, insult and libel laws.
- Establish a system for systematically reviewing the implementation of ECtHR judgments and assessing the impact of the implementing measures adopted at the national level. The setting up of a parliamentary committee with such tasks could be given particular consideration.
- Make sure that the domestic judiciary is acquainted with ECtHR jurisprudence related to Article 10 ECHR through the provision of training on ECtHR case law to judges of all levels.

## **9. Strengthen journalists' independence and ethical performance**

Research has shown that domestic media ownership patterns, the Greek media's tendency towards populism, and the economic insecurity that characterises the journalistic profession render journalists particularly prone to pressures and self-censorship. The Code of Conduct of Greek Journalists, which is enforced by the journalists' representative associations that also act as trade unions, supports journalistic ethics and journalists' integrity. The code has a binding effect on the members of the associations, who might face disciplinary measures when found to have breached its provisions. One problem here lies in the rigid eligibility requirements to qualify for union membership (such as the existence of a minimum two-year employment relationship with a media house) which do not match the job market situation. Membership requirements prevent many journalists from joining the profession's representative bodies and thus undermine the broad adoption of the code's principles. This said, it is clear that the unions have generally shown insufficient interest in ensuring the code's enforcement, proving to be more concerned about defending their members' working rights, while their dispersed nature has limited their ability to foster a nationwide approach to the challenges facing journalistic autonomy. Further, research has revealed that the Greek media are for the most part unwilling to engage in individualised self-regulation through the adoption of ethical guidelines, professional standards and organisational practices promoting responsible editorial policies.

**Journalists and their representative associations should reform the current system of self-regulation, making sure that it is sufficiently equipped to protect and promote journalists' autonomy and accountability. Efforts to promote ethical practices within individual media organisations should also be deployed.** The following measures could be given consideration in this respect:

- Ensure that journalists' self-regulatory and representative functions are separated. This could be achieved through the establishment of a single self-regulatory body that is responsible for enforcing the Code of Conduct of Greek Journalists across various types of media services (print, broadcasting, online). In addition to dealing with citizens' and journalists' complaints, such a body should also take proactive measures to strengthen journalistic autonomy by participating in media policy development and taking action to raise public awareness of the importance of journalistic independence.
- Guarantee the independence of the self-regulatory body hereby proposed from both the political world and the media industry. Due attention should therefore be given to a) the composition of its decision-making organ (featuring a mix of journalists/ex-journalists and non-journalists, e.g. academics, human rights advocates and lawyers); and b) its funding (coming from diverse sources, such as private and public media enterprises, individual journalists and their representative organisations and public benefit foundations).
- Support the promotion of ethical practices within individual media organisations. The single self-regulatory body hereby suggested could provide incentives to encourage firms to develop responsible editorial policies and journalistic practices (i.e. adopting ethical guidelines and internal codes of conduct, designating specific individuals for monitoring their application, introducing contact points for readers' and viewers' comments; supporting ongoing training, etc.).

## **10. Promote media literacy and education**

Media literacy and education can help citizens access, understand and critically evaluate the news and information provided by the media. However, the Greek state has so far given limited attention to the support of media literacy in general and the pursuit of specific goals linked to the protection of freedom of expression and freedom of information in the context of media education in particular. Presently, there are no state institutions devoted to media literacy and the integration of media education in school curricula. Also, the Hellenic Audiovisual Institute, the state body responsible for the development of media literacy programmes through education, has been recently abolished.

**The government should encourage media literacy and education aimed at enabling citizens to access, understand and critically evaluate the media services they choose.** The following measures could be given attention:

- Convey responsibilities for the development of a media literacy and education policy to a single body (e.g. a specific department within the Ministry of Education, Lifelong Learning and Religious Affairs). The projects developed by this body should take due account of the converged media environment, inform on media regulation and increase awareness of the pressures affecting the media's operation, among others.
- Integrate media education into school curriculums, promote lifelong media education, and involve journalists' professional associations, academics, and human rights NGOs actively in relevant activities.



## **Policy suggestions for free and independent media in Italy**

*Federica Casarosa*

### **Policy summary**

The Italian media policy was analysed in detail in the framework of the MEDIADEM project. In particular the research addressed the policy and regulatory processes that may directly or indirectly affect the development of free and independent media in Italy. The choice of issues selected and developed within the reports produced for the MEDIADEM project reflected this objective. The policy recommendations proposed in this policy paper flow from those reports, selecting the most important challenges for Italy in order to adopt and improve the processes, tools and instruments that can support media freedom and independence. The aim of this document is to provide concrete recommendations for media policy actors, including policy makers, media organisations and media authorities.

The assumption of the project is that the freedom and independence of the media are basic features of any democratic state in order to ensure that citizens receive sufficient and unbiased information, and are able to participate actively in the political and social life of their country. Such a result is envisaged by the important role given to the principle of the freedom of expression among the fundamental rights in the Constitution. As underlined on several occasions by the Constitutional Court, the principle of the freedom of expression and the related principle of the freedom of information are cornerstones of the democratic order and are both essential for the freedoms guaranteed by the Constitution. The press, or more correctly the media, have a particular role in exercising and granting effectiveness to these principles. In other words, the objective of free and independent media is a basis for implementing fully the right to seek, receive and impart information, as enshrined in the principle of the freedom of expression.

The struggle at the policy and regulatory levels to strike the right balance between state and private intervention in the field was not only a purely political matter; it also suffered from constraints flowing from the existing technical framework. The development of technology nowadays allows new forms of communication and new sources of information to emerge, perhaps lifting the previous technical limitations. However, these new forms of communication open up further issues and throw up new questions to be solved. Media policy actors are thus required to address these challenges, adapting everlasting fundamental principles to an ongoing developing framework.

The policy recommendations proposed are the following:

#### **1. Strengthen the independence of the National Communications Authority (AGCOM)**

- **Introduce rules on the designation procedure for the Commissioners and the President of AGCOM, so as to improve citizens' ex ante information and knowledge of candidates, making evident the specific qualifications and media experience requirements that the potential candidates must have.**
- **Introduce the possibility of candidatures for the positions of Commissioner and President of AGCOM also from civil society, leaving the final selection to the Chambers of the Parliament.**

## **2. Safeguard the independence of the public service broadcaster**

- **National legislation should introduce rules for the independence of the governing and management boards of RAI from political bodies. Mechanisms that could improve the level of independence should include open and transparent appointment procedures for all board members, strong rules on incompatibility, criteria for knowledge and media expertise. A further effort to accept self-candidatures could be made, clarifying tools and criteria for selecting among the potential candidates.**
- **The governing body of RAI should develop internal editorial guidelines and statutes setting out editorial independence safeguards.**

## **3. Improve the clarity of the regulatory framework as regards pluralism**

- **AGCOM should provide clear criteria to define which market conditions could lead to prejudice to pluralism, profiting also from the analysis provided by independent studies and from comparison with the experience and activity of other European Union Member States.**

## **4. Safeguard freedom of expression vis-à-vis copyright protection**

- **National legislation should provide for a set of rules updating copyright law to new technologies and introducing enforcement mechanisms that reduce the impact of the unlawful circulation of copyright content. Such an intervention should be coupled with the introduction of legal and technical tools that guarantee the ability of citizens to participate in, and allow the lawful circulation of copyright content among different platforms.**
- **Public actors should enhance the active participation not only of all stakeholders within the supply chain, but also of civil society organisations as representatives of citizens/users, in order to achieve the widest consensus possible over the legal and technical solutions that are implemented.**

## **5. Update the regulation of the journalistic profession and improve journalists' working conditions**

- **National legislation should provide for a wider definition of journalist that also includes new actors such as bloggers, indicating the type of obligations arising from such a role as well as granting corresponding rights. In particular, such regulation should provide a boundary between liability of online users as regards editorial responsibility, should distinguish among different degrees of liability for online users on the basis of their editorial control, which could allow a safe and responsible use of the web and a responsible management of content online.**
- **Self-regulatory bodies should adopt a wider definition of the journalistic profession based on the exercise of a 'public-watchdog activity' rather than on membership to the Journalist Association.**
- **Publishers, commercial and public service broadcasters should allocate**

**sufficient economic resources towards professional journalists (widely defined) so as to grant fair working conditions for employed or free-lance journalists.**

### **Key observations**

The media policy in Italy is characterised by the co-existence of several actors in charge of formulation and implementation at different phases of the policy process, from the definition of the underlying objectives of media policy to enforcement (in the case of a breach of formal rules). One of the most interesting aspects of the Italian media policy is the level of involvement of two actors, namely courts and civil society organisations: the former in terms of intervention in the policy-making activity of political bodies based on the implementation of the principle of the freedom of expression and the linked operative concept of pluralism; the latter due to the lack of any space to participate in policy formulation and implementation, at least in the current institutional setting. If courts' interventions are to be interpreted as a tool for citizens (and obviously media companies) to react to the legislative framework and perhaps through decisions acknowledging a problem, for such a problem to be solved by policy makers at national level, it is clear that **there are few occasions in which civil society can shape and affect the choices of political bodies**, except through the indirect effect of electoral choices. This also affects the level of trust of citizens towards political bodies and traditional media usually affiliated to them, also reducing efforts to participate in the democratic debate.

This should also be linked to the existing **relationship between politics and the media**, which is a longstanding feature of the Italian media framework. It began with the early establishment of local newspapers and the allocation of broadcasting channels during the seventies and eighties, and then took the form of the so-called Italian 'anomaly', where the former Head of Government was also the major shareholder of the first commercial broadcasting group at national level. The development of media policy has been affected by this underlying feature, which has steered on various occasions the choices of political parties on media-related topics, and vice-versa. It has allowed political bodies to interfere both in the decisions of 'independent' institutions, mainly the National Communications Authority and of the public service broadcaster (RAI), and of media outlets in general. This linkage is relevant both where media lobbies exert pressure over political bodies, and where political bodies interfere with the editorial and commercial strategies of media outlets. This situation has been acknowledged also by independent European bodies (such as the Venice Commission already in 2004 and the European Court of Human Rights in the recent decision of the case *Europa 7*) and has raised concerns from a normative perspective, because political interference (from politicians or media owners) may hinder the independence and the freedom of the media.

Moreover, the **Italian media market is characterised by one of the highest levels of concentration in Europe**, both in vertical and in horizontal terms. It is important to note that the current situation is not just the result of natural growth of the media enterprises but the evolution of a market where cross-ownership and also inter-relationships among the companies that provide different services is a common practice. The risks for media freedom and independence in this context are high. First, looking at the high level of horizontal and vertical concentration, the existence of few shareholders controlling the biggest companies in the different media market sectors, and the existence of few shareholders having relevant shareholdings in different companies in the same sector, could affect the level of external pluralism available in each sector as it is difficult for new companies to compete with such strong incumbents. Second, the network of interconnected interests between media companies

and other sectors could also impair the editorial freedom of media outlets as the latter could be used to serve the objectives of other sectors' interests.

The type of professional regulation for journalists is exceptional within the European framework, in particular being one of the few cases in which the delegation of regulatory power is clearly based on a legislative act, and being the only case among the MEDIADEM countries to have a licensing system for journalists. These two features provide both the **strength and the fragility of journalism regulation at national level**: on the one hand, the *Ordine dei Giornalisti* (OdG) provides a very effective system for enforcing self-regulatory norms among the members, safeguarding the values that inform journalistic activity and imposing sanctions on the behaviour of journalists that conflicts with objectivity, independence and credibility. On the other hand, however, the intertwining ties between public and private bodies limit the possibility for the OdG to develop a clear strategy for the use of new communication tools and for the incorporation of new forms of journalistic activity within the legal definition.

## **Policy recommendations**

### **1. Strengthen the independence of the National Communications Authority (AGCOM)**

AGCOM is one of the few convergent regulators present at European level able to shape and steer the organisation of the whole communication sector, being responsible for monitoring the press, broadcasting, new media and electronic communications at a national level. Given this wide remit and the importance that any decision taken by this independent authority would have on the development of the sector, it is crucial that the independence of this body is not merely formal, but real.

In terms of organisational structure, the appointment procedure could be subject to improvement in order to strengthen the independence and autonomy of AGCOM from political power. On the one hand, the selection of potential candidates for the authority's board is neither open to the public nor subject to public scrutiny regarding expertise and independence. The lack of transparency in this case results in having the selection of candidates being based only on political criteria or affiliation, without any relevance of specific (or general) expertise in the sector.

Obviously this perception is linked to the designation procedure. The President of the authority is nominated by the President of the Republic upon a proposal of the Head of Government. The selection of the four Commissioners rests with the two Chambers of the Parliament (two each). If this process was purposely devised to keep an even distribution between the members selected from the majority and the opposition in parliament, it could also lead to the replica of the existing conflicts between the political parties in parliament within the authority.

**Policy makers should introduce rules that strengthen the independence of AGCOM.** This could be achieved in the following ways:

**National legislation should introduce rules on the designation procedure for the Commissioners and President of AGCOM so as to improve citizens' ex ante information**

**and knowledge, making evident the specific qualifications and media experience requirements that the potential candidates must have.**

**National legislation should introduce the possibility of candidatures for the positions of Commissioner and President of AGCOM also from civil society, leaving the final selection to the Chambers of the Parliament.**

## **2. Safeguard the independence of the public service broadcaster**

As has been clearly acknowledged by the Parliamentary Assembly of the Council of Europe in 2004, the public service broadcaster in Italy has been strongly influenced by government and political forces, being ‘the mirror of the political system of the country’. The influence of the political parties led to the concept of ‘lottizzazione’. But, although such process is no longer the practice (at least not so strongly), the level of political interference has not decreased. In 2004, the Gasparri law revised the governance structure providing for a three phase process leading to the envisaged process of privatisation of RAI; however, this objective has never been pursued leaving the governance structure at the initial phase. Apart from one exception, no further attempts at change have been presented in order to strengthen the independence of RAI vis-à-vis the government.

Currently, the Gasparri law stipulates that seven out of nine board members are appointed by the Parliamentary Commission and the other two (including the chairman) by the majority shareholders, i.e. the Ministry of Economic Affairs. Although the law states that only highly qualified, professionally skilled and independent persons are to be appointed as members of the RAI board of administration, those appointed so far have been representatives of political parties or politically engaged journalists. The recent effort to open up the floor to self-candidatures by citizens ended in failure, not for lack of proposals, but because of limited time and interest on the part of the political bodies to evaluate and select those people that could fit for the position.

Instead, the corporate structure and planning should be guided by quality (responding to a public interest objective) and efficiency, replacing control from political bodies. Accountability mechanisms should be kept in the hands of political bodies, but only in the form of guidelines and proposed solutions to certain problems of public opinion. Political bodies should not interfere with the editorial work of the public broadcaster or with the appointment and dismissal of employees.

**Policy makers should strengthen the independence of RAI from the political bodies.** This could be achieved in the following ways:

**National legislation should introduce rules for the independence of the governing and management board of RAI from political bodies. Mechanisms that could improve the level of independence should include open and transparent appointment procedures for all board members, stricter rules on incompatibility, and criteria for knowledge and media expertise. A further effort to accept self-candidatures could be made, clarifying the tools and criteria for selecting among the potential candidates.**

**The RAI governing body should develop internal editorial guidelines and statutes setting out editorial independence safeguards.**

### **3. Improve the clarity of the regulatory framework as regards the relationship between competition and pluralism**

Since the adoption of the Gasparri law in 2004, the rules that apply to safeguard pluralism and achieve a competitive media market have been subject to several criticisms. The adoption of a specific media component with a forward looking perspective towards the convergence of information and communication technologies should not be underestimated; however, the width of the definition of the integrated communication system (SIC) could hinder the achievement of a competitive market, if this is not coordinated with a clear set of rules applied by the independent communication authority. Currently, AGCOM is in charge of verifying whether media companies are in a market position that could be ‘*prejudicial to pluralism*’ (par. 5, Article 43, TUSMAR), having the power to issue sanctions also where such companies comply with anti-trust provisions. The ambiguity of the concept of pluralism and the lack of clear indicators regarding what could be interpreted as prejudicial to it could affect the choices of market actors, leaving to the case-by-case analysis of AGCOM the task of clarifying the situation.

**AGCOM should provide clear criteria to define which market conditions could lead to prejudice to pluralism, profiting also from the analysis provided by independent studies and from the comparison with the experience and the activity of other European Union member states.**

### **4. Safeguard freedom of expression vis-à-vis copyright protection**

Technological developments have affected the way in which citizens obtain information in several ways. On the one hand, they allow citizens to access a far greater amount of information through different sources; on the other, they empower citizens/users to interact and participate in the process of news production.

Under the first perspective, new media have introduced into a previously country-based and selective market, new international and multi-faceted actors, able to provide a wider variety of ways to access and organise news and information. The introduction of these intermediaries into the news supply chain has broken monopolistic and oligopolistic control over distribution mechanisms, shifting both revenues and control over news content distribution, thereby hampering the economic viability of traditional news content producers. The change in the way in which news is produced and distributed has challenged the old regulatory instruments used to protect content producers and content distributors, in particular regarding copyright protection of content available online. The solutions currently presented by the national independent regulatory authority address the issue without a neat and detailed legislative framework that could support regulatory intervention. As a consequence, the proposed regulatory intervention had only a narrow approach, introducing rules to limit availability of content online, rather than proposing positive technical and legal tools to allow the lawful circulation of content online.

Under the second perspective, direct participation of citizens/users in public discourse should not be undermined. The development of user-generated content has changed the position of citizens from passive recipients of information to active providers of information entering into the realm of freedom of expression and, therefore, requiring a sufficient level of protection in terms of access and availability of platforms to exercise their right.

**Policy makers should safeguard freedom of expression vis-à-vis copyright, protection** addressing the following issues:

**National legislation should provide for a set of rules updating copyright law to new technologies and introducing enforcement mechanisms that reduce the impact of the unlawful circulation of copyright content. Such an intervention should be coupled with the introduction of legal and technical tools that guarantee the ability of citizens to participate in, and allow the lawful circulation of copyright content among different platforms.**

**Public actors should enhance the active participation not only of all stakeholders within the supply chain, but also of civil society organisations as representatives of citizens/users, in order to achieve the widest consensus possible over the legal and technical solutions that are implemented.**

### **5. Update the regulation of the journalistic profession and improve journalists' working conditions**

The journalistic profession provides one of the most important sites for the achievement of free and independent media exercising in practice a public-watchdog function. Although digital technologies have undoubtedly contributed to a more effective fulfilment of the principle of the freedom of expression in general, from the perspective of the journalistic profession they have also been perceived as introducing unwelcomed competitors, which are not only subject to fewer obligations and ethical constraints, but are also cheaper, more easily available, and able to divert the investments of publishers from the professional journalist to the citizen journalist. These aspects obviously affect the working conditions of young and freelance journalists. On the one hand, they impose a continuous struggle with increasing numbers of tasks (being digitally active in any new form of communication) and with an increasing amount of information available online waiting to be delivered; and on the other, they shrink progressively the level of their financial earnings.

From a different perspective, journalists must be enrolled in the national register, thereby enjoying a set of exemptions from liability when exercising their professional activity, but this cannot be extended to anyone providing the same activity online without being enrolled in the register. Only through jurisprudential development has a basic level of protection of non-journalists been achieved. In order to overcome this distinction between 'licensed' and non-licensed journalists, public bodies should provide a new definition of journalists. The intervention in this case should not take a reactive approach, setting a boundary between traditional professional journalists and any other news content provider, but rather it should take into account new actors in the news supply chain adopting a graduated allocation of responsibilities depending on the type of activity exercised by each of them.

**In order to update the concept of journalistic activity vis-à-vis new technology and improve the working conditions of journalists in general, policy makers can adopt the following recommendations:**

**National legislation should provide for a wider definition of journalist that includes new actors such as bloggers, indicating the type of obligations arising from such a role as well as granting corresponding rights. In particular, such regulation should provide a boundary between liability of online users as regards editorial responsibility, should distinguish among different degrees of liability for online users on the basis of their editorial control, which could allow a safe and responsible use of the web and responsible management of content online.**

**Self-regulatory bodies should adopt a wider definition of the journalistic profession based on the exercise of a ‘public-watchdog activity’ rather than on membership of the Journalist Association.**

**Publishers, commercial and public service broadcasters should allocate sufficient economic resources towards professional journalists (widely defined), so as to grant fair working conditions for employed or free-lance journalists.**



## Policy suggestions for free and independent media in Romania

*Ioana Avădani*

### Policy summary

Twenty years after overthrowing the Communist regime and despite years of political and economic pressures and harassment, the decreasing editorial quality and the rise of the new communication technologies, the **media remain one of the most trusted institutions** in Romania, with a trust quota of over 60%.

The main pillars of the media policies are the freedom of expression and the freedom of information, duly limited by the values associated to the protection of human dignity and privacy. The Constitution provides for strong protection for these values, as well as for the media industry, consecrating the free entry on the market and the prohibition of any form of censorship. Still, the **media freedom is not valued consistently by the society** or by the **political actors**. **Media campaigns** aiming at state institutions appeared as ‘**state vulnerabilities**’ in the draft National Defence Strategy, marking the lowest point in the relations between the media and the state. Journalists criticising the Government’s decision were accused of tarnishing Romania’s image abroad and harming the national interest. The erosion of the quality of the editorial content, of the social status of journalists and of the audiences of the traditional media are doubled by the virtual lack of any media literacy comprehensive program. Thus, the **role of the media as the fourth estate is weakened, as is their role of watchdog of the democracy**.

The MEDIADDEM project, a European research project on media policy-making processes in EU Member States and candidate countries, seeks to identify which policy processes, tools and instruments can best support the development of free and independent media. The first ‘background information report for Romania’ presented a brief summary of the existing media structures and regulations in Romania which frame public communication. The case study report illustrated current debates and media policy mechanisms in the country. We followed the regulatory framework that designs the enabling environment for the striving of a free and independent media (from both content and an economic point of view), as well as the main stakeholders and the power play that results in policies and practices. We also analysed how both the game and the rules of the game are or may be affected by the advent of the new technologies that ‘democratise’ the public speech but also dilute the professional control over it.

Drawing on the research findings of the two preceding reports (both available at [www.mediadem.eliamep.gr](http://www.mediadem.eliamep.gr)), this policy brief puts forward concrete recommendations for the promotion of media freedom and independence in Romania targeted at policy makers, media organisations and media authorities. These are:

- 1. Ensure a free flow of information**
- 2. Consolidate a balanced dual system**
- 3. Act for a timely and transparent digital switch-over**
- 4. Keep the Internet free and open**
- 5. Secure a stronger professional status of journalists**
- 6. Promote broad media literacy**
- 7. Participate actively in the formulation of the media policies of the EU**

### **Key observations**

The media policy formulation in Romania has a troubled history, going from a liberal, non-interventionist approach to a strong tendency to over-regulate and back.

The first key observation is **the lack of any long term strategy** in shaping-up the media market, starting from the guarantees to freedom of expression, freedom of information and freedom of the media provided by the Romanian Constitution, as well as the international conventions Romania is a signatory of. Most of the decisions in the field of media regulation are taken either as part of the EU harmonisation process or under the pressure of conjectural (and sometimes even personal) facts (such as an upsurge in criticism in the media).

A second observation is that, despite the fact that the media sector is dominated by private actors, **the state authorities have the upper hand in policy formulation**, making or not making certain decisions that affect deeply the business sector. From here, the need of the professional and business groups, as well as civic groups to get more involved in debates pertaining to media freedom. This is especially true for journalists' associations and trade unions that are almost invisible in the public debates, while the discussions within the profession are also very weak. On the other hand, this is a warning for the state authorities to engage in more open and sincere public debates, using *bona fides* the existing consultations tools rather than just going through the motions required by the law.

Thirdly, the Romanian authorities have **a reactive approach to media policy formulation**, looking for legalistic solutions to existing problems rather than creating an enabling environment for media development. This is particularly visible in the process of harmonisation at EU level, where Romania has been just following the EU decisions, and not contributing to them. By defining its own goals, based on the public interest of Romanians, and by formalising them in middle and long-term strategies, the state will gain in predictability, transparency and public participations, all elements of good governance.

### **Policy recommendations**

#### **1. Ensure the free flow of information**

For the purpose of this paper, we will consider in the definition of the free flow of information several domains: access to public information, open government, physical availability of information to all Romanians, free access of journalists to information sources and the existence of multiple and diverse sources of information easily accessible to the public.

There are several pieces of primary or secondary legislation ruling access to information, but some of them are contradictory and not all of them converge to securing a free flow of information.

Media activity was positively impacted in 2001 by the adoption of the Freedom of Information Law (FOIA). The Romanian law followed a US inspired liberal model, under which any information produced, held or regarding a public institution is of public interest, with limited and clear exceptions for accessing sensitive information. The situation worsened, paradoxically enough, by the transposition of the Directive for the reuse of public information, adopted by Romania in 2007 (despite the fact that it had its own better pre-existent, which was more permissive for access to public information). Also, the practice in matters of public access to information held by public authorities eroded in time, turning sometimes in a mere caricature of the initial legal provisions.

Romania joined the Open Government Partnership in September 2011 committing to ‘facilitating access to the information produced by the public sector and to regularly release high-value data sets. These will contribute to enhancing the efficiency of public resource management and the accountability of the authorities to citizens, while also encouraging the use of new technology and entrepreneurial solutions’ (Open Government Partnership, Romania, 2011). The action plan Romania submitted in March 2012 provides for a strategic document meant to increase the access of the public to information, but falls short to provide for a comprehensive approach, limiting itself to e-government measures rather than promoting a genuine open data process.

The same lack of long-term strategy is felt in the telecommunications sector, where the strategy for the digital switch-over has been adopted in 2010 (aiming at a digital switch-off in January 2012) – and abandoned ever since. Even that outdated strategy had more the role to preserve the status quo (and the current structure of the broadcast market) rather than maximize the access of the public to new technologies or the public interest.

**The central state authorities, especially the Presidency and the government, should adopt a national strategy on public access to information that should be based on a nationwide infrastructure network and a comprehensive set of information services (Internet, broadcast, mobile communications). This strategy has to coordinate the state’s effort to promote Open Government with the private actors’ work to create an open public speech environment, in which opinions are freely formed based on a multitude of independent sources. It should be technologically neutral and allow for further development to keep pace with relevant innovation. The strategy should include specific directions to ministries and other executive agencies, parliament, civil society, academia and business, and it should be adopted only after broad public consultations.**

## **2. Consolidate a balanced dual system**

Romania had to switch – actually overnight – from a party-state-controlled media market to a liberal one. Newspapers appeared in the hundreds in the first months after the fall of Communism. Their success led to the disappearance of any state-owned print publication once the only governmental newspaper ‘Vocea Romaniei’ ceased its publication in the mid ’90s. The early ’90s saw the emergence and the stabilisation of the broadcast market, with the apparition of the broadcast regulator CNA in 1992.

In the general democratisation process, the national radio and television stations had to reform, moving from state to public, a process not yet complete. These broadcasters had to face a triple challenge: move from a virtual monopoly to a market philosophy, under the pressure of the newly emerged private broadcasters, move from state-controlled to independent and, over the last years especially, move from a traditional 'one-to-many' platform to new media operations, addressing more demanding and more mobile audiences. Over the last 20 years, the Romanian public broadcasters were the subject of strong political influence and the stake of fierce political negotiations. They have been accused of obedience to the power (whatever party was in power). The boards are appointed by political parties, the President and the Prime Minister, while the employees have two representatives in the 13-strong boards. They have to submit to the parliament their annual reports and, if rejected, the boards are considered dismissed. This mechanism was regularly used to dismiss the boards every time the parliamentary majority changed. Thus, from the adoption of the law, in 1994, none but one board finished a four-year mandate.

Over the last six years, the public television (TVR) accumulated significant debts, both in purchased programmes (Champions League football matches, movies) and in dues to the state budget. These debts have been the result of three consecutive management teams, but also of consecutive legal movements that cut significantly the revenues of the public media. Thus, in 2003, the subscription fee was downsized from 4.5 to 4 RON/month (approx. 0.8 Euro) and has never been updated ever since, despite the inflation and the variations in the exchange rate RON/Euro. In 2005, by Governmental Ordinance (Ordinance on Cinematography no 39/2005), TVR was forced to cede 15% of its advertising revenues to the Romanian Cinematography Fund. In 2010, value added tax (VAT) was increased from 19% to 25%. As a VAT payer, TVR has not the possibility to reclaim it, as do its commercial counterparts.

In May 2012, the fiscal authorities blocked the TVR bank accounts, allowing only employees' salaries to be paid. The move happened only one month after a switch in political balance, and a new government taking over, after a no-confidence motion in the Parliament. It also occurred in the middle of the electoral campaign for the local elections, leaving the public television in the impossibility to properly cover the campaign. According to the Broadcast Law, the public broadcast service (PBS) is the only media obliged to cover the campaigns, while the commercial broadcasters can choose whether they do it or not. The accounts were de-frozen days after a new board has been appointed, in which the parliamentary opposition has no representative. No recovery plan has been presented at that time.

As shown above, the financial deficit of the public television stems not only of questionable or risqués managerial decisions, but also from decisions adopted by the state authorities who put other interests above those of the public broadcast system.

Under these circumstances, **the state should act vigorously to enforce its own commitment to the dual system (as per the Amsterdam Protocol of the EU Treaty), securing the independence of the PBS and a healthy balance between the public and the private sectors.** This could be achieved in the following ways:

**The law governing the public media (radio, television, news agency) has to be reformed, so that it allows for the independence of the boards of the PBS, composed of persons representing the diverse sectors in the society and presenting good professional credentials. The boards should not be dismissed in block over the annual reports, but based on the personal responsibility of each member.**

**The funding of the PBS has to be dimensioned in such a way that allows the PBS to duly perform their public mandate. PBS funding mechanisms (level of subscription fee, collection mechanisms, sanctions for infringements, level and terms for advertising, etc) have to be publicly debated and updated.**

**PBS organisations should be run in a transparent manner, with greater openness toward the public.**

**In order to obtain a balanced dual media system, the Romanian state should also act to bring more transparency in the commercial media market. As revealed by our study, the commercial stakeholders are exclusively profit driven, to the detriment of the public service obligations (inherent in all media services) and to quality journalism. This trend is intensified because of a quite fierce competition, doubled by a ‘dumbing down’ syndrome. The Romanian legislation does not provide for strong anti-monopoly, transparency or limitations to cross-ownership norms that would protect the media pluralism or allow a public oversight over it.**

**The state should create a public service programme fund to be accessed by all corporate and independent producers, to consolidate the public service remit in the media.**

**The Government should (re)introduce specific criteria for the allocation and transparency of state advertising contracts, and strictly limit them to topics of public interest.**

**The media market should be protected from abuses of dominant positions. The media ownership and funding should be more transparent, in order to make publicly available information on media concentration or the direct influence of certain businesses on the media market. Regulatory and self-regulatory measures should be adopted and applied.**

### **3. Act for a timely and transparent digital switch-over<sup>1</sup>**

Romania pledged to the digital switch-off as per January 2012. The legal framework was set as the Audiovisual Media Services (AVMS) Directive has been transposed as early as 2007. Still, no steps of consequence have been made ever since. A strategy has been adopted, based on the 2012 deadline. A first public bid for the allocation of the first two multiplexes has been killed in the middle of the process, in the fall of 2010. No other discussion regarding the transition to the digital terrestrial transmission has been launched and the public is virtually oblivious to the whole process and its consequences. The 2010 strategy is already outdated and its main thesis is the mere preservation of the status quo, without taking advantage of the market opening that may occur with digitisation. There is no public cost estimation and the impact on the access to information programmes of the public is unexplored.

**In order to meet the 2015 global deadline, the Romanian government should begin to implement digital terrestrial switch-over as soon as possible. It should aim for realistic national deadlines and consult with all interested stakeholders, including civil society. Such a strategy should start from the principles of the free flow of information and easy access for all citizens to basic telecommunication and Internet services. First and foremost, the strategy should guarantee access to digital services in areas where the development of infrastructure is not economically viable for companies.**

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<sup>1</sup> Mapping Digital Media, Romanian report, Open Society Foundations.

#### **4. Keep the Internet free and open**

Internet is flourishing in Romania, the country ranging in the world's top 10 countries when it comes to the speed of broadband connections. The speed and the virtually omnipresence of the Internet (especially on mobile devices) forced the traditional media to adjust on the go. The online environment strives on personal initiatives and individuals with little or no journalistic background of ethical sensitivities emerged as opinion leaders. This no-man's-land attitude triggered some legislative reflexes on the part of law makers, who tried to impose licensing for online publications, various rules for Internet users or gate-keeping obligations to ISPs (in matters such as pornography, for example). On the other hand, the ISPs are not held by any net neutrality obligations, but rather to transparency of whatever limitations they impose to the delivery of their services (as, for example, blocking applications such as Skype if they offer their own voice services).

Romania was a signatory of ACTA, although no public mandate has been formulated for the negotiators nor a public debate has been organised before hand. Its ratifications and coming into force was fiercely opposed by Internet users.

**The state should adopt, implement and properly fund measures that lead to the meeting of the Digital Agenda 2020 commitments regarding the accessibility of the Internet infrastructure. Stakeholders should debate and decide on the promotion of the net neutrality principles, as well as on viable solutions to self-regulation of the content that harmonise the guarantees for free expression and the free flow of information with the protection of legitimate rights.**

#### **5. Secure a stronger professional status of journalists**

After over twenty years of democratisation, the media remains one of the most trusted institutions in Romania, with a trust quota of over 60%, but down from the 80% some years ago. The receding trust in the media is also illustrative for the eroding social status of journalism, as profession. This erosion has been produced by many factors: the ever weaker content provided to the public, the un-necessary aggressiveness of some journalists, the consistent verbal attacks of the politicians (the head of state first among them) against journalists and media. But the major drop in media credibility was registered after the electoral campaigns in 2008-2009, due the evident side-taking of the major media TV stations for or against various candidates.

Ethics codes are virtually unknown and not enforced, which creates more and more public outcry and consequently feeds the tendency of law makers to regulate the media content.

The employment conditions for journalists are well regulated by the collective work contract, but this is virtually not implemented. The collective work contract imposes a minimum wage for journalists, additional payments for the extra hours or for weekend working hours, and free time compensation. More importantly, it enshrines the editorial independence and recognises for the media workers the 'clause of conscience' that allows journalists either not to write against their personal convictions or to leave a company with impunity if the editorial line changes dramatically. In some cases filed by trade unions of journalists, the courts have enforced its application.

**The journalists and editors should strengthen their associative life and regain control over the profession. They should adopt and genuinely enforce codes of conducts that would increase the quality of reporting and consolidate the public trust in the role of journalism.**

**The private stakeholders should observe – and the state authorities should enforce the observance of - norms that guarantee decent work conditions for journalists and other media workers. The life-long training of media professionals should be part of any employment package.**

## **6. Promote broad media literacy**

Despite the considerable dimensions of the media field and its puzzling complexity, deciphering media and critically receiving them is not a preoccupation for the state authorities or for the formal education system. There are no permanent state-sponsored programmes to this avail and the only advancement relies on the efforts of media-related NGOs and, to some extent, on some media companies. The most sustained efforts are deployed by media NGOs and some scholar projects, most of them funded with EU money. There are no media literacy programmes available for older ages. The ‘dumbing down’ syndrome is accentuated by the high demand for low quality programmes, which encourages the media outlets to increase the production of such programmes.

Still, the volume of the content generated by users (User Generated Content – UGC) is high and, with the expansion of social media and the availability of the Internet on the rise, it is likely to become a common feature in everybody’s life. Despite IT classes taught in school, the digital literacy of the general population is rather low, as is the critical thinking when it comes to Internet products.

**Sustained and consistent efforts should be put in educating the public by all interested stakeholders. The state should make media literacy a school topic, in cooperation with the organisations with a demonstrated track-record in this respect. Journalists’ professional associations and the NGOs with an interest in democracy and human rights should intensify their media literacy programmes, while the private actors should invest in such programmes.**

## **7. Participate actively in the formulation of the media policies of the EU**

Joining the EU was one strong engine that pushed forward the harmonisation of Romanian laws, regulations and practices. Under the pressure of the ‘EU asked us to do it’ rule, Romania harmonised its broadcasting legislation, secured significant independence for its broadcast and telecommunications regulators and stepped up its anti-corruption mechanisms. Paradoxically enough (but not singularly), the EU accession eased the pressure and some of the old practices have reappeared. Moreover, Romania does not use fully its EU membership and negotiations privileges that come with it and keeps its position as a ‘recipient’ of regulations and policies. For example, Romania transposed the Data Retention Directive for the second time in June 2012, even if it has been already declared anti-constitutional in 2009. It thus responded to the pressures on the part of the European Commission. In relationship with the EU regulations and policies, Romania keeps a reactive, opportunistic position. Romania’s position vis-à-vis the European policies is unknown to the public and has never been a subject of pre-adoption debate.

**Romanian authorities (ministries and broadcast and telecommunications regulators) should produce and make public strategies/policy papers regarding the main topics addressed by the international organisations that could affect the functioning of the media (free and open Internet, data retention, ACTA). Such papers have to be the result of comprehensive and genuine public consultations and should provide the public and the business sector with clear and predictable expectations from the part of the Romanian government in international negotiations.**



## **Policy suggestions for free and independent media in Slovakia<sup>1</sup>**

*Andrej Školkay and Klaudia Lászlóová*

### **Policy Summary**

Our research was done within the framework of the MEDIADEM project and focused on Slovak media policy-making and the implementation of various regulations that influence the development of free and independent media in either a negative or positive manner. The objective of this study was to identify those policy processes, tools and instruments that can encourage media freedom and independence in Slovakia. The research was based on available documents and interviews conducted with experts, journalists and civil servants.

The study disclosed that the Slovak media policy lacked any long-term consistency. Even though there was no complex or premeditated media policy, some common development tendencies are identifiable over the last two decades. These include permanent support for the dual structure of broadcasting and retransmission, protection of the plurality of information sources, balance between freedom and responsibility of the media, and protection of media content consumers, particularly children. The Slovak journalists operate in free and, to a certain degree, under relatively independent conditions.

Based on MEDIADEM's research findings, the following set of concrete policy recommendations for the promotion of media freedom and independence is recommended:

- 1. Ensure consistency in the rulings of the Supreme Court**
- 2. Guarantee appropriate levels of reimbursement of damages**
- 3. Focus on the specialisation of judges/courts**
- 4. Enable greater freedom of speech**
- 5. Strengthen the role of local media**
- 6. Give support to freelance journalism**

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## Key Observations

In the course of this study it was found that a free and independent media is not a priority of the Slovak media policy makers. Instead, the Slovak media policy focuses on balancing a number of contradictory fundamental human values, both in the shaping and in the implementation of media policy. The Constitutional Court (CC) represents the sole exception. In a long-term perspective, it advocates a relatively consistent and increasingly liberal attitude towards the freedom of expression of the media and the accessibility of information in Slovakia. The European Court of Human Rights (ECtHR) plays an indirect role as it is responsible for establishing the basic European norms on these issues. The main domestic regulatory body, i.e. the Council for Broadcasting and Retransmission (RVR), follows a more restrictive approach to media freedom, as it emphasises protection of individual and group rights and a strictly imposed political plurality vis-à-vis the structure of programmes and participants in programmes that have a political and public current affairs content.

The Slovak broadcast media are not restricted by any major or unusual regulatory issues except the inconsistency of rulings of the Supreme Court on regulatory issues decided by the RVR.

Several measures have been adopted in order to ensure plurality of content regulations. These measures are properly planned and support the diversification of media content in Slovakia. The role of political, corporate, economic and other interested parties in shaping and implementing media policy, especially in the print media sector, is rather limited, and largely depends on the ruling government's intentions. A stronger impact of major private television broadcasters has been noted in some content and distribution-related issues.

The judiciary plays an important, albeit controversial role. Lower court rulings on defamation cases often lack logic and reasonable arguments supported by facts are asymmetrical or even missing, especially concerning the arguments on awarding non-pecuniary damages. However, it is necessary to point out that the high non-pecuniary damages awarded do not pose any existential threat to the major media (and media groups). More alarming is the fact that the senates and the advisory body of the Supreme Court (SC), although obliged by law to balance the quality and consistency of the various rulings of lower courts, do not respect each other's rulings on regulatory issues. Strangely, the senates of the SC do not give any explanation as to why they ignore the rulings of other senates – although these cases are very similar.

The main factors influencing the freedom of journalists in Slovakia on a macro level are the economic and, to a lesser extent, the political interests of media owners and sponsors, especially in regional and local media. Furthermore, the quality of journalism is marred by the low professional level of the young generation of journalists, by the hesitation of the public authorities and/or the inability of municipalities to give accurate information in time or at all, as well as by the increasingly stressful working conditions for journalists. The main factor influencing the freedom of journalists on a micro level, i.e. in their everyday work, are threats from those who have been criticised in the media – mostly local and municipal politicians. The self-regulatory mechanism appears to be a weak tool to impose existing norms and rules related to journalistic work.

The MEDIADDEM case study for Slovakia shows that there are two trends that threaten media policy in the long term. On the one hand, a positive factor is that the state (the government), the municipalities and private owners do not interfere greatly in the media sphere. While this trend is laudable, it can turn into a problem if these players do not deal with the policy issues related to the media at all. This lack of interest can result in several negative effects on the workings of a free and independent media. Sporadic and hazardous interference

in the media sphere – with no interest in setting long-term media policy goals – might be the worst case scenario. This was seen over two decades in the case of public television (today’s public service media). Also, very little attention is given to the development of regional media in Slovakia.

## **Policy Recommendations**

### **1. Ensure consistency in the rulings of the Supreme Court**

Research has disclosed that several rulings of the Supreme Court pertaining to the regulation of electronic/digital media are identical in the substance of the dispute but differ in their conclusions. Therefore, they address neither the required preventive nor penal function. These differences are not explained in all the rulings. As a consequence, the broadcasters and even the RVR, the body that is responsible for the supervision of electronic and digital media, are unsure as to how to set binding rules of conduct for the digital/electronic media. The Supreme Court is obliged by law to consolidate the jurisdiction of lower courts; thus, the requirement of consistent and accurate rulings (bearing in mind changes in society) is legitimate.

**The Supreme Court should ensure that its rulings in the area of media regulation (as an appeal court for the RVR and for regional court decisions related to the RVR), are consistent.**

**Should there be any substantial inconsistency in the SC’s rulings, the Supreme Court should clearly explain why its subsequent decisions differ from previous ones on the same issue.**

### **2. Guarantee appropriate levels of reimbursement of damages**

The judiciary, particularly in the case of the lower courts, is largely arbitrary when it comes to the amount of compensation it offers for non-pecuniary damages in libel and defamation cases. The non-pecuniary damages awarded can be in the range of tens of thousands of euros. Despite the prevailing trend in the ECtHR jurisdiction, public figures are awarded much higher non-pecuniary damages than ordinary citizens. In addition, damages are often awarded without proper argumentation, or through unconvincing argumentation.

**The amount of non-pecuniary damages for violation of individual rights by the media should, in each case, be assessed carefully and supported with clear argumentation by courts at all levels, especially county courts, which are particularly weak or inconsistent in their argumentation.**

### **3. Focus on the specialisation of judges/courts**

Lower general courts endanger the exercise of justice in cases of individual rights protection. County courts are generally not capable of balancing the justifiable requirements of people for the protection of their reputation, on the one hand, and the right of the media – within reasonable limits – to simplify issues and to be allowed to make a tolerable level of mistakes in fulfilling their role as the watchdog of liberal democracy, on the other. The inability of

lower courts to draw a balance between competing rights is primarily due to the fact that they deal with a very wide range of cases, and secondly due to the low professional confidence of sole judges. The argumentation in the rulings is often self-excusing. Slovakia's brief experience with specialised courts resulted in a remarkable rise in the professionalism and in the quality of the rulings in these cases.

**The state and the Ministry of Justice should consider the establishment of specialised courts (selected sole judges and senates) or identify special courts in the judicial system, which could be entitled to decide cases of individual rights protection, especially in relation to the media.**

#### **4. Enable greater freedom of speech**

Research shows that in general, the RVR favours individual and collective rights and values at the expense of freedom of expression and, in fact, also at the expense of the public interest. The decision-making practice of the RVR is sometimes contrary to the jurisdiction of the Constitutional Court and of the ECtHR. In this context it might be useful to consider the instrument of 'the empty chair', which means that if an invited participant does not show interest, his absence is announced on air and should be seen as a legitimate reason for the lack of a balanced discussion. The RVR should also reassess its over-conservative and selective attitude towards news and current affairs discussions, where some individual quotes raised by participants are generalised and can lead to a negative evaluation of the whole programme. In other words, less regulatory attention should be paid to the statements (a few words or a sentence) made by participants in news and current affairs discussion programmes. Alternatively, political parties should consider the appointment of less conservative individuals to the board of the RVR, and take into account their knowledge of journalists' work in electronic/digital media. What is lacking is sufficient experience on the part of the members of the RVR about how the media work.

**The RVR should consider a more liberal attitude towards the regulation of the content of political and social debates dealing with issues, which are bound to be controversial.**

#### **5. Strengthen the role of local media**

The financing of local media is largely underestimated by local and regional politicians today. Local media are often directly or indirectly influenced by local political subjects and enterprises, or suffer from negative self-regulation (normative self-censorship) typical for the environment in a small community. Their watchdog role in relation to politics and the society as a whole is of little importance. In Slovakia, local (regional) media are in fact in a position to become players in encouraging civil activism and the revitalisation of society and its values. More specific propositions concerning this basic idea go beyond the scope of this policy brief as they would require more detailed analysis and consultation with the institutions involved. However, it is important to mention that various journalistic competitions and grants represent an important tool, which could not only give financial support to journalists and the local (regional) media, but could also promote the diversification of local (regional) media content and could support quality (although short term).

**Local (regional) media or the local (regional) editions of national media should be supported by both direct and indirect financial means in order to fulfil their potentially important role of watchdogs in a democratic society.**

#### **6. Give support to freelance journalism**

As a result of the digital revolution, the scope of public journalism and freelance journalism is expanding by leaps and bounds. However, to ensure its positive impact on society, it needs institutional organisation and financial support to coordinate the diverse efforts, so that the quality and visibility of cooperative or single public and freelance journalism efforts is reinforced. This type of independent journalism (from traditional institutions) or journalists specialising in some issues being hired by the media, could increase the diversity of the media content, enabling a rise in quality and the setting of higher standards of journalistic work. This is simply the result of more competition in the market of ideas not influenced by vested or typical commercial interests. This type of journalism could lead to the formation of a group of journalists, independent from actual political, commercial or other interests because they do not depend on a single employer. It could also help in the development of journalistic genres and themes, which attract only a small segment of consumers in a small market of this kind.

**Independent journalistic work for the media (or journalists specialising in some issues being hired by the media or working independently) should be supported by direct and indirect means in order to achieve and sustain plurality of professional opinions and information.**

## **Policy suggestions for free and independent media in Spain**

*Juan Luis Manfredi and Ana López Cepeda*

### **Policy Summary**

The research performed in Spain in the frame of the MEDIADEM project shows that there is a widespread link between political and media power – they are extensively connected. This also influenced the way policy-making developed. The objective of the research has been to identify the policy processes, tools and instruments that can best support media freedom and independence within the country and to propose specific recommendations. The consecutive parliament majorities (absolute or simple) have caused a deficient legislative activity in the communication policies domain. Poor quality, in turn, has roused new problems. In this sense, the delay in the implementation of the existing legislation (e.g. the creation of the State Council for Audiovisual Media) and the expected problems at different competence levels are objective indicators of poor regulatory quality. These conflicts of interest slow down the pace of policy development, generate legal uncertainty, and increase unfair competition between administrations. Finally, regarding journalistic companies' management, poor regulation reduces the competitiveness and breaks the unity of the market.

Even though the freedom of expression is taken for granted in the constitutional order, it is not the cornerstone of the Spanish legislation. Other values such as pluralism and cultural or linguistic diversity are more relevant when developing media law. In telecommunications, the liberalisation process has not had a clear pattern. To sum up, the family business model has declined giving way to quoted companies (IPO or publicly owned). The change in ownership has been a top priority in the operations and the economic results over journalism. As a result, in the last years, the number of redundancies in enterprises has increased (about 8,000 layoffs) and various media at the local level have closed down.

On the basis of MEDIADEM's research findings, this policy brief puts forward policy recommendations for the promotion of media freedom and independence in Spain. The recommendations are addressed to state and non-state stakeholders active in the field of media policy. In summary, the challenges for media freedom and independence are: (1) the digitisation of production processes as well as distribution, (2) the generation of a quality and secure legal environment, (3) overcoming the economic crisis through new business models, and (4) improving accountability systems. Our recommendations include the following:

- 1. Enhance the quality of the legal framework through better instruments adapted to the digital society and more transparency in the process of law development**
- 2. Create a single public body to supervise media activities (from economy to media diversity)**
- 3. Ensure greater independence of public service media**
- 4. Create a strategic plan for public service media in the digital environment**
- 5. Increase social participation in the public media spaces and institutions**
- 6. Endorse industrial restructuring and entrepreneurial journalism**
- 7. Promote network neutrality, liberalise digital services and create a public Chief Technology Officer**

## Key observations

The degree of freedom and independence of the Spanish media is conditioned by certain factors affecting the market structure, the working conditions of journalists, and the legal system. The structure of Spanish media has some inconsistencies that undermine freedom and media independence.

In the legal sphere, there is a lack of quality in legislation. Even though we find laws on the audiovisual and telecommunications industries, information society, e-services, e-government, competitiveness and other relevant issues, the current legal design presents two major regulation fails. The first one is a conceptual error. The legislation is designed to help in the process of digitisation of analogue broadcasters. As a result, we find transposing concepts and ideas that have no application in the digital world. The second weakness is the lack of transversal legislative programmes. Following the aforementioned first mistake, industries are legislated individually as if there were no correlation between media platforms, technologies and content. A good example of these two serious shortcomings is the current intellectual property law, which does not solve the current problems of the digital market. One more recent example is the increase in the value added tax (VAT) on digital services and products while taxes for 'traditional' products/services are lower. The government, for instance, applies a VAT of 8% to newspapers and 21% to eBooks (general VAT type). This is a clear demonstration of the lack of vision over the path that the cultural industry in general and the media industry in particular are following.

Because of the current tendency to maintain the analogue system, there is a delay in the industrial transformation and restructuring. Journalistic enterprises are suffocating due to less advertising, fewer sales and the lack of innovation. This scenario is detrimental to the freedom of the media, which in Spain are more devoted to maintaining the system than innovating.

Apart from this, there is an excessive weight of political interests in institutional development. The representatives of the major parties and the unions monopolise management of public bodies in order to monitor and control the media. The problem may be related to the way in which the members of these public institutions are elected. The institutions respond to the variable geometry of the Parliament without any other criteria. There is a competitive and open election, but candidates are chosen by the ruling party.

The last organisational change in the Spanish Radio and Television (RTVE) by means of a decree aggravates this problem. According to the law (Law 17/2006, article 11.1) the board of directors of the RTVE should be composed of twelve members. Currently, this number has been reduced to nine by law (Royal Decree-Law 15/2012, provided in Law 17/2006, article 1.two). The reduction of three members responds to the necessity of reducing fixed costs. Five out of the nine members are elected by the Congress and the other four members by the Senate. These members are selected after public hearings, so that the Congress and the Senate can prove the suitability of the candidates for the position (Law 17/2006, article 11.3). Usually, in Spain, 100% of candidates achieve this suitability. The candidates need two-thirds of the votes to be elected. However, if there is no agreement within 24 hours, the candidates shall be elected by both the Congress and the Senate by absolute majority (Law 17/2006, article 11.3). In addition, the modification of the law has also removed the possibility for the labour unions or any other representative groups to propose candidates for the board of directors.

Another issue relates to the fact that the new President of the RTVE is also its CEO. The process established by law is the same as in the election of the board of directors and it is carried out by the Congress. The candidates need two-thirds of votes to be elected. However,

if there is no agreement, after 24 hours, the candidates shall be elected by absolute majority (Law 17/2006, article 11.4).

The underlying problem is the assignment of such positions (representation and management), since civil society and members of professional associations or other interest groups cannot contribute their ideas to the debate. The combination of these problems may generate some institutional paralysis. The most recent example is the failure in the creation of the CEMA (State Audiovisual Council) due to the inactivity of the outgoing and incoming governments. In this context, it is important to highlight the work of the courts as stakeholders promoting freedom and media independence, especially the Constitutional Court.

The audiovisual market structure is inefficient to maintain diversity. The liberalisation of services has not led to a more competitive environment, but to a more concentrated one. In practice, this leads to a situation in which most markets are arranged in the form of oligopolies (free TV and pay-per-view TV). With respect to radio, concentration is the main characteristic. The top five radio stations account for 96% of the audience and advertising. There is no defined public policy, nor is there any space for community radio. Also, there is no perception of digital advantages because the digital system created is just an imitation of the analogue system. It is important to mention here that radio companies would rather keep on broadcasting analogically instead of digitally because of the lack of audience. Digital radio stations operate for the last eleven years almost without any listeners.

As regards television, the crisis has intensified two structural problems. On the one hand, it has favoured advertising concentration. Mergers have created two private groups, which account for more than 85% of the advertising market. This is the highest concentration rate in Europe. On the other hand, the public television model is not defined. Spanish Radio and Television (RTVE) renounced to attract advertising investments, while some regional television stations maintain the double funding. Due to the crisis, budgets have been reduced and the continuation of some services has been placed in jeopardy. Without a model, it is complicated to define any project.

The stakeholders have preferred state regulation than self-regulation or co-regulation. In most cases, legislation is the result of European guidelines. There is no specific legislation on cross-ownership or new media. Unless otherwise provided (e.g. CEMA), competition is controlled by the National Council of Competency (CNC). There was a bill mandating the creation of a regulatory body for all economic activity, regardless of the field or industry, but it has been contested by institutional actors.

Regarding content, media companies prefer self-regulation but the result of the self-regulatory approach so far has been poor. There have been numerous complaints about sensationalism and also about the lack of protection of minors in the media. Looking at the positive side of it, the promotion of cultural and linguistic diversity is remarkable. Audiovisual policies have promoted co-official languages. For instance, the Catalan Public Television (TVC) has committed 72 million Euros in order to buy and co-produce Catalan audiovisual contents during the period 2010-2014.

It is noteworthy that the journalistic profession has no specific legal corpus, but merely the general labour legislation. The status of journalists has been discussed periodically but without consensus. The main subject of discussion is the limit for exercising the right to inform: Who decides who is a journalist? A college degree? A professional? Another subject to be considered is the definition of media companies. In reference to ethical issues, the professional association of journalists has created a complaints commission. Its influence however is limited. Also in the last ten years, working conditions for journalists have worsened. The structural transformation of the industry, especially of newspapers, has



devalued the work of the journalist, has worsened the quality of jobs, has weakened the newsroom and has created new barriers for free and independent media.

Finally, there is little tradition of transparency. There are three main lobbies recognised as partners, but few data exist on the corporate governance of companies. Various media literacy projects have been adopted with different degrees of success.

## **Policy recommendations**

### **1. Enhance the quality of the legal framework**

MEDIADEM research findings confirm the low quality of Spanish media legislation. There are important gaps in the legislation as well as little consensus. For instance, since 2006, there have been continual and contradictory changes in the audiovisual landscape. Public service media (the RTVE and public regional broadcasters), for example, enjoy no clear remit nor finance methods. Currently, the RTVE is the main player, so its influence is decisive to set the standard. The current situation is deficient.

**The government should ensure the creation of a quality legal framework and properly select legislative instruments in an environment of transparency. Legal reform has to be connected with two areas of expansion of freedom of the media.** This could be achieved in the following ways:

- By updating and amending the copyright law to adapt it to the digital environment, including journalists' rights protection.
- By pushing reforms and boosting the digital services industry as an alternative to analogue industries.
- By regulating state aids for the support of small and medium enterprises (SMEs) and the local nature of the media.
- By creating a space for dialogue among stakeholders.

### **2. Create a single public body to supervise media activities**

The creation of an independent authority has been debated by various political parties. The debate has been led, inter alia, by the continuing recommendations of the European Union. In 2010, the new audiovisual Law (Law 7/2010 General Audiovisual Communication) established the creation of such a public body. However, this legal provision has not yet materialised, due to the poor quality of domestic communication policies. In spite of this, some regional governments such as the Catalanian and the Andalusian have created their own audiovisual bodies. The audiovisual authority of Navarre was abolished in 2011 due to the economic crisis and the need to rationalise public administration, while in other communities such as the Canary Islands, Castilla-León, Galicia, or the Balearic Islands laws providing for the establishment of such authorities have been passed.

**The government should establish a unique independent authority to supervise all media activities.** The following measures could be given consideration in this respect:

- Make sure that the members of this body are elected for a period of time that exceeds the length of legislature and that they are appointed after a public hearing, so that their expertise and qualifications can be ensured. The activity of the board should be transparent to the society.
- Give to the body real sanctioning powers.
- Promote the body's good governance through transparency in the process and law-making.

### 3. Ensure greater independence of public service media

Public service media in Spain have always been under the suspicion of major dependence on government and parliamentary groups. The fact that for many years the management bodies of both the state and the regional public service media (radio and television) were elected by the government on a proposal of parliamentary groups for a period coincident with that of the legislature, allowed for partisan political control. This scheme still applies for some public radio and television channels.

After the approval of the Audiovisual Media Services Directive some European public service broadcasters (PSB), such as the BBC in the UK or the ARD in Germany, have changed their management systems. Both countries have developed the so-called Public Value Test (PVT) as a mechanism to evaluate the societal value and market impact of PSBs' new services, based on the idea that any public service should provide added value to the audience. Such a test can ensure that PSBs do not to produce contents well covered by the market, and that media diversity is attended and protected. The control can be implemented before or after receipt of public funding.

Although the PVT system is not perfect nor directly exportable to the Spanish political culture, it highlights the need for providing new instruments for public management.

**Policy makers should ensure greater independence of public service media.** In order to enhance the independence of public service media the following measures should be taken into account:

- Professionalise the management of public service media.
- Separate functions: political control of budget and purpose vs. professional execution.
- Create a different regulatory system for the election of board members, including of the general management.
- Increase the legal requirements (public hearings, qualifications, suitability) for elected board members.

### 4. Create a strategic plan for public service media in the digital environment

Public media is still necessary to promote plurality and endorse diversity. However, it is obliged to adapt to the new competitive environment and repurpose its mission to achieve

social objectives, including political journalism in democratic societies. The Spanish current scenario is the result of bad public policy. The lack of mission, vision, objectives or professional management means a non-sense project.

**Policy makers should create a strategic plan for the public service media in the digital environment defining the objectives to be pursued, the resources to be allocated for production (internal and external), financial aspects, methods of control, and other elements related to good governance.** The following measures should be taken into consideration in this respect:

- Underline the journalistic function of public media giving more resources to news production.
- Promote standard procedures, consequent responsibility, common plans, and programmes relating to the media.

### **5. Promote social participation in media institutions**

MEDIADEM research for Spain shows that the political class has occupied the position of representation and management of public service media. At the same time, it has influenced the private media landscape through legislative decisions (e.g. competition). The reform of Law 17/2006 on the RTVE that the government has passed deepens the gap, since it eliminates the directors elected by the unions. The representatives' parliamentarism leads to institutional paralysis.

**The government should promote social representation in media institutions.** The following measures could be given consideration in this respect:

- Increase and diversify social representation regarding professionals, journalists, university, content producers, and other stakeholders.
- Increase public interest in news media production.

### **6. Endorse industrial restructuring and entrepreneurial journalism**

The situation of the Spanish media industry is complicated. It is in perfect storm: economic crisis (and consumption), decline in advertising spending, few models of business success, undefined mission of professional journalism, and other constraints. The current media system has fuelled the crisis: there are many content producers and business information services that only look after their own benefit. The system is also a monocultural one: many media companies depend on institutional advertising and other subsidies or on a single public television. Monoculture entails a serious problem: social capital erodes and deteriorates the quality of journalism. From the business perspective, strategic rationality is eliminated (and innovation and openness to the outside) for the benefit of patronage.

**Policy makers should promote industrial restructuring.** Three steps are specifically recommended:

- The opening of new lines of funding to facilitate conversion.
- The development of a catalogue of conditions of employment in information services. It is important to have this catalogue to promote transparency and business efficiency.
- Support for entrepreneurial journalism. This requires specific measures of protection.

### **7. Promote network neutrality, liberalise digital services and create a public Chief Technology Officer**

With the aim of ensuring diversity it is necessary to **protect net neutrality**. Otherwise, imbalances will be created in the digital environment. For example, the lack of neutrality can undermine the generation of new radio or television services, which have the potential to support pluralism and diversity. If the incumbent operators can support or reject new projects or digital services, it may be difficult to promote competitiveness. Network neutrality may also be an opportunity for public television to develop more functional and lower cost public services.

The following measures will be important in this respect:

- Liberalise digital services in order to increase competition and reduce the costs of bandwidth.
- Guarantee universal access to every home to the new digital services even by paying.
- Develop digital fluency to promote digital entrepreneurship and digital citizenship.
- Create a Chief Technology Officer, concerned with long perspectives, major trends and innovation.

## Policy suggestions for free and independent media in Turkey

*Dilek Kurban*

### Policy summary

Research carried out in Turkey in the frame of the MEDIADEM project, which seeks to identify the policy processes, tools and instruments that can best support media freedom and independence in the country, showed that the media in Turkey has always been in a relationship of interdependence with political power. The state has maintained a tight grip over the press through political pressure and has successfully created a proponent media through practices of political favouritism and financial nepotism. The fear of state oppression, the absence of a culture of independent journalism and economic dependence on state support caused the media to align itself with political power, even after the end of single party rule and transition to multi-party democracy. The authoritarian regime established by the military junta that staged the 1980 coup d'état disabled the media from covering political issues, which resulted in the production of tabloid news. The rapid processes of economic liberalisation and globalisation after transition to civilian rule in mid-1980s led to the ending of state monopoly over broadcasting and the privatisation of the media. The ensuing rapid proliferation of private broadcasting companies did not bring about greater media independence or content quality. To the contrary, privatisation without regulation further increased tabloidisation in the media, while economic liberalisation without democratisation enabled the state to preserve its control over the sector. Big conglomerates entered the sector as the new media owners, expanding through mergers and dominating the sector in a short period. The inability and unwillingness of the state to regulate the market to prevent media owners from participating in public tenders in sectors of the economy where they had large investments, as well as effective lobbying by media companies against any state attempts to impose such restrictions, resulted in high concentration in the media market. There was a tacit understanding that the free hand the conglomerates were given was contingent on their continued loyalty to official ideology. The implication of the state's *laissez faire* policies for journalists and other media employees was an unregulated labour market on the one hand and a repressive legal regime restricting freedom of expression and press freedom on the other. The combination of political pressure by the state and economic exploitation by media owners further repressed an already weak journalistic profession.

The 2001 economic crisis, which resulted in the withdrawal of some of the biggest players from the media, resulted in the restructuring of the sector. The processes of globalisation, the advancements in information technology, the growth of the economy and the prospect of stability offered by the EU candidacy rendered the media in Turkey an attractive sector for foreign investors and generated a need for further structural reform. The outcome of these developments has been an extremely complex regulatory framework, which continues to be reshaped and redesigned, causing tremendous uncertainty for both the players and the wider public. In the meantime, despite some progress in the initial years of the EU accession process, there remain significant legal restrictions on freedom of expression and media, which cause hundreds of human rights activists and journalists to be prosecuted for lawful political activities. In light of the domination of the media by corporations which refrain from building adversarial relations with the state and the existence of an authoritarian legal framework which penalizes critical media coverage of sensitive political issues, the emergence and survival of an independent media proves extremely difficult. In recent years, the Justice and Development Party government's successive victories over military tutelage

have not only consolidated, but also monopolised its political power. The lack of a strong and pro-democracy political opposition has facilitated and furthered this process. The transfer of media ownership from companies which backed the military against the government to those who are unconditional proponents of the government has enabled the grip of the executive over the media. The imposition of criminal and fiscal sanctions against the remaining opponent media complemented these developments, exacerbating the culture of censorship and self-censorship that has ruled the media ever since its establishment in Turkey.

On the basis of MEDIADEM's research findings, this report puts forth a set of policy recommendations for the enhancement of media freedom and independence in Turkey. These are:

- 1. Democratise media policy-making**
- 2. Safeguard the independence of media regulatory agencies**
- 3. Ensure media freedom and freedom of expression**
- 4. Prevent unfair competition in the media market**

#### **Key observations**

As in all other areas, **media regulation in Turkey is a centralised and bureaucratic process** where priorities are set by the executive. The parliament's minimal role in lawmaking has been further restricted by the Justice and Development Party (JDP) government's recent strategy to make legislative amendments through executive decrees adopted by the cabinet, as opposed to laws enacted by the parliament. One aim and outcome of this strategy has been the limitation of the autonomy of independent regulatory agencies, including those in charge of the media. For example, an executive decree adopted on 17 August 2011 authorises the Ministry of the EU Affairs to monitor and inspect the activities and transactions of autonomous regulatory agencies.

Various **agencies regulating the media sector suffer from lack of ideological and institutional independence from the state**. Rather than being tasked with enhancing media freedom and freedom of expression and ensuring fair competition, they are required to police the media by sanctioning content violating the constitutionally protected principles of territorial integrity, national unity and general morality. **The High Council of Radio and Television (*Radyo ve Televizyon Üst Kurulu - RTÜK*) has broad powers to sanction** media organisations which it deems to have violated 'general morality,' 'the protection of the family,' and 'the national and moral values of society'. The agency frequently resorts to these powers by issuing warnings, imposing monetary and administrative sanctions, and suspending or revoking licences of media companies. **Authorities frequently block access to Internet sites** on grounds of protecting children and youth, family values, general morality and state interests. Among the blocked sites are news websites reporting on sensitive political issues such as the Kurdish question, LGBT websites and websites on sexuality. On many occasions, authorities go well beyond their powers by issuing blocking orders on grounds that do not exist under the Internet Law. Authorities also censor the Internet by prohibiting the use of words they deem to be inappropriate (such as the word 'gay') and by attempting to filter the Internet on the pretext of protecting children.

The media market is highly concentrated due to the domination of the sector by a handful large conglomerates which have investments in various other areas of the economy. There are insufficient legal barriers to prevent these companies from making cross-mergers and entering into public tenders. **The preoccupation of media owners with profit maximisation not only renders them susceptible to political pressure but also causes them to exert political pressure themselves** by using their power in the media against governments.

Despite a number of improvements introduced under the new broadcasting law of February 2011, there remain barriers to entry into the media market. As a result of the liberalisation of laws governing media ownership, of the increasing attractiveness of the Turkish media market for foreign investors and of the withdrawal from the market of companies where the political gains they drive through the media no longer offset their financial losses, the sale of media organs is a recurring phenomenon. **The absence of legal safeguards for editorial independence frequently causes mass layoffs as a result of media sales.**

**There is insufficient competition in the media market in Turkey, owing to the domination of the sector by a few companies.** The advertising pie is almost entirely divided between the big media groups in nearly all of the subsectors of the media. While the Competition Authority is rested with wide powers under the Competition Law, the agency in many cases fails to sanction anti-competition.

In the absence of direct subsidies for commercial media, official advertisements and announcements are important sources of revenue for small, independent and local press outlets, which are economically vulnerable vis-à-vis the existing media market structure. While local media, minority media and dissident media have had unequal access to this state aid, in recent years efforts have been made to strengthen the local media through increasing their share of official advertisements. Also, under the new broadcasting law of March 2012, three per cent of the contributions that RTÜK collects from commercial broadcasting companies will be allocated to the local press.

Despite being relatively improved through the EU process, **laws governing media content still contain restrictions on freedom of expression and media freedom.** While these laws pay lip service to fundamental rights and liberties, they treat rights secondary to the protection of the founding principles of the state such as national unity, national security, and the reforms and principles of Atatürk. **The principal obstacles to freedom of the press and freedom of expression in Turkey stem from the criminal legal system,** specifically the Penal Code and the Anti-Terror Law. Prosecutors are making increasing use of these laws to censor the media by penalizing them for reporting on sensitive political issues. In civil cases, high courts tend to rule in favour of plaintiffs who bring defamation cases against intellectuals and public personalities. In criminal cases, they are heavy-handed against individuals who are convicted for merely expressing non-violent dissenting opinions and/or reporting on political issues deemed to be against state interests. *Journalists are routinely prosecuted on charges of terrorism and treated as 'terrorists' simply for having performed their duties to provide the public with information. Journalists, like other defendants, are detained on remand for such lengthy periods that detention time turns into punishment.* Journalists are often convicted for multiple offences with extremely heavy sentences, facing life sentences without parole.

The European Court of Human Rights issued critical judgments against Turkey. The Court found that the warnings and licence suspensions issued against media organs, the banning of the future publications of newspapers whose content was yet unknown and the sentencing for defamation of journalists criticizing the Prime Minister violated freedom of

expression. The **European Court's judgments are routinely disregarded by regulatory agencies, the government and the judiciary.**

While these laws and policies have a censorship effect on the media, **journalists also exercise self-censorship for fear of hurting the economic and political interests of their patrons, losing their job or being prosecuted.** The historical weakness of trade unions in Turkey, the high level of unemployment among journalists, the high turnover rate in the sector and the deep divisions among journalists due to ideological differences make it very difficult for media employees to engage in a unified struggle against their employers and the state.

## **Policy recommendations**

### **1. Democratise media policy-making processes**

As in all other sectors, regulation in the media in Turkey is a highly centralised bureaucratic process where priorities are exclusively set by the executive and the parliament practically acts as rubber-stamp. Little discussion takes place in the parliament on substantive issues; and where it does, such discussion is extremely partisan and exclusive. In rare cases where non-governmental actors are invited to participate in and provide input to the lawmaking process, they are limited to the associations of broadcasters, advertising agencies, TV producers and media owners. Considered within the rubric of 'civil society', these actors are allowed the political platform to lobby the parliament in accordance with their financial interests. Journalist associations, trade unions and human rights organisations, on the other hand, are excluded from parliamentary deliberations concerning freedom of expression and media freedom.

The values and principles guiding media policy-making in Turkey exhibit a duality. While the constitutional and legislative framework contains formal commitments to rights and liberties, including freedom of expression, freedom of the press and freedom of information, what lies beyond this seemingly liberal facade is a framework where nationalism, statism and cultural conservatism are the supreme values looming over individual rights. The constitution and the laws governing the media are written with an authoritarian, paternalistic and conservative spirit, making the exercise of freedom of expression and media freedom prohibitively difficult due to expansive restrictions. The marginal space left in laws for the exercise of these freedoms is restricted further with media regulatory agencies, which are equipped with extensive sanctioning powers. The principal role designed for these agencies in Turkey is not policy-making for the media but rather policing, which they successfully perform.

**Policy makers should ensure that media policy and media regulation processes are rendered democratic by enabling the open and effective representation of journalist associations, media representatives and academics.**



## 2. Safeguard the independence of the media regulatory agencies

The selection and appointment of the members of media regulatory bodies such as the RTÜK, the Information and Communication Technologies Authority (*Bilgi Teknolojileri ve İletişim Kurulu - BTK*) and the Telecommunications Communication Presidency (*Telekomünikasyon İletişim Başkanlığı - TİB*) are not transparent processes, owing to the absence of meaningful public debate and the exclusion of the parliament altogether where the appointment of BTK and TİB members are concerned. Furthermore, the involvement of the parliament in the appointment of members of some of these agencies does not necessarily render the process democratic given the fact that parliamentarians vote in line with party politics. The authoritarian mandates and wide sanctioning powers of agencies regulating the broadcasting media and the Internet pose a fundamental challenge to freedom of press and expression. Where these agencies have powers to protect media freedom through, for example, sanctioning anti-competition, they rarely exercise these powers.

In recent years, the government has developed a clear strategy of bypassing the parliament in the lawmaking process and ruling by decree. The most significant outcome of this phenomenon for the media sector has been the adoption of Executive Decree no. 649 on 17 August 2011. In authorising the Ministry of the EU Affairs to monitor and inspect the activities and transactions of media regulatory agencies, the decree has effectively put an end to the autonomy of these agencies.

**Media policy makers should strengthen the independence of RTÜK, TİB and BTK.** This could be achieved in the following ways:

- Executive decree no. 649 of 14 August 2011, which brought an end to the autonomy of media regulatory agencies, should be repealed.
- Media regulatory agencies should be redesigned to create independent, competent and neutral bodies with effective powers to sanction hate speech, discriminatory content, labour exploitation and unfair competition in the media.
- All legal, political and administrative attempts to undermine the autonomy of media regulatory agencies should cease.

## 3. Ensure media freedom and freedom of expression

Ever since the establishment of the press, the media freedom has never been fully ensured in Turkey - in laws or in practice. Authoritarianism, statism and conservatism is prevalent in the text and the spirit of the constitution, the laws governing the media and criminal laws, which deem the protection of state interests above that of rights and liberties. The ambiguous and over-inclusive definitions of crimes and their broad interpretation by judicial authorities as well as the lack of consideration for the public interest in truth result in the prosecution of journalists for simply covering politically sensitive issues and/or expressing dissenting views. A further restraint on media freedom is the executive branch. Government officials, first and foremost the Prime Minister, frequently target dissident journalists through making public statements portraying them as sympathisers of terrorism and bringing defamation lawsuits. The combination of these legal and political factors creates an environment of fear and intimidation, deterring journalists from critical news coverage.

While dissident and minority media have always been the target of state oppression and political pressure, in recent years, mainstream media organisations have also been subject to political pressure in retaliation for their critical coverage of government policies. For example, the Doğan media group was imposed a disproportionately heavy fine for tax fraud after it has supported the military in the latter’s rift with the government.

Since it lost its autonomy in 1971, the Turkish Radio Television Corporation (*Türkiye Radyo ve Televizyon Kurumu - TRT*) has functioned as a state owned institution propagating official ideology and government policies rather than as a public service broadcaster. The members of its administrative board are appointed by the executive among the candidates nominated by RTÜK, which itself is a dependent regulatory body.

The Directorate General of Press and Information under the Office of the Prime Ministry is tasked with the issuance and dissemination of press cards, which enables the executive to exert political control and pressure over the media. This goes against established practices in democratic societies where press cards are issued by independent organs.

**Policy makers should support freedom of the press and freedom of the media in laws and in practice.** Consideration could be given to the following:

- Media regulation should be redesigned in a holistic manner and with the cooperation of civil society and journalist associations to eliminate all restrictions on freedom of expression, media freedom and equal access to the media market.
- The parliament and the executive must adopt political, legal and administrative measures to ensure government’s neutrality and equal distance towards all media, including public service broadcasting.
- The composition of the TRT should be changed so as to include among its members representatives of universities, civil society and professional media organisations.
- The Anti-Terror Law must be repealed. All journalists detained on remand must be immediately released.
- Legal, political and administrative measures must be adopted to put an end to Internet censorship through arbitrary, broad and unlawful access bans and restrictions.
- All branches of the government must fulfil their obligations to execute the judgments of the European Court of Human Rights and implement the recommendations of the Council of Europe and the European Union.
- Government officials should refrain from all actions and statements that have or can be deemed to have censorship effect on the media.
- Government should respect the principles of neutrality and objectivity in enforcing tax laws, social security laws and other relevant laws against all media groups.
- Press cards must be issued and disseminated by an independent body constituted of representatives of journalists’ unions and associations.

#### **4. Prevent unfair competition in the media market**

The legal framework in Turkey does not have media specific competition rules; rather, general rules of competition law apply to the media sector. This is a significant problem, in light of the fact that media pluralism – in the sense of multiplicity of viewpoints not that of ownership – is a precondition for media freedom. The Competition Law confers on the Competition Authority sanctioning powers against the violation of basic competition rules and the abuse of dominant position in the market. While the Authority in recent years issued extremely high pecuniary fines against big media conglomerates, it has refrained from resorting to its sanctioning powers against *Türk Telekom*, which advertises widely in all forms of media despite its clear dominant position in the telecommunications market, in contravention of the Competition Law.

Despite a series of EU-induced harmonisation reforms in the media sector, there remain significant restrictions on media ownership. Not only political parties, trade unions, local administrations, co-ops and associations continue to be prohibited from establishing radio and televisions, but the new law of March 2012 also extended this ban to universities, preventing communication faculties from running broadcasting companies for educational purposes.

**Legal, political and administrative measures must be adopted to ensure free and fair competition in the media.** Consideration could be given to the following:

- The Competition Authority should enforce the terms of the Competition Law in a fair, neutral and equal manner against all companies which abuse their dominant positions in the media sector. In addition, separate competition rules could be developed for the media - and a special agency could be established to enforce such rules.
- The restrictions on media ownership must be eased to allow universities, political parties, local administrations and professional media associations and unions to own and run radio and televisions.

## Policy suggestions for free and independent media in the United Kingdom

*Yolande Stolte and Rachael Craufurd Smith*

### Policy Summary

In the UK both the political establishment and the courts recognise that the media play an essential role in the democratic process. Freedom of expression is afforded specific protection through the Human Rights Act 1998 and the UK is a signatory to the European Convention on Human Rights and a member of the European Union, which affirms in article 11 of the Charter of Fundamental Rights of the EU the importance of freedom of expression and media pluralism. A central question, therefore, is whether the media in the UK are able to perform, and are in fact performing, the democratic and social functions ascribed to them. On the one hand, the phone-hacking scandal has revealed that certain sections of the media have failed to respect fundamental journalistic standards. On the other, the costs of litigation, coupled with patchy recognition of press interests in legislation, the common law and prosecution practice, can chill legitimate investigative reporting. The existing regulatory framework for the media has also failed to keep pace with convergence and is increasingly complex, creating uncertainty for industry and citizens.

Media law and regulation in the UK is thus in a state of flux, with the Communications and Human Rights Acts, defamation law, prosecution practice regarding the press, media ownership controls and press self-regulation all currently under review by a variety of policy actors.

This paper draws on a number of recent policy documents published by civil society organisations, such as the Media Standards Trust and the Co-ordinating Committee for Media Reform, as well as reports by academic, regulatory and state bodies, such as the Reuters Institute for the Study of Journalism and House of Lords Select Committee on Communications. In particular, it builds on two reports, and the underlying research for those reports, prepared for the MEDIADEM project. The reports, published on the MEDIADEM website, examine political, economic, social and legal factors that either support or constrain media freedom and independence in the UK.

Below we set out a number of key recommendations that we consider merit further examination and that we hope will feed into the current debates about media law reform. In particular, we recommend:

- 1. The introduction of a self or co-regulatory cross-media regulatory framework that is both suitable for a converged media environment and capable of commanding the trust and support of the public, journalists and editors.**
- 2. Government and Parliament should consider how the state can help to address the economic pressures on quality journalism, for example, through targeted tax relief or charitable status for specific types of media organisation, as well as through subsidies, possibly supported by a tax on those parts of the communications sector that profit from, but do relatively little to create, original media content, such as search engines or ISPs.**
- 3. Concrete steps should be taken by industry to promote ethical practices within individual media organisations. These steps could be required as a membership condition of any new self or co-regulatory body, discussed in recommendation 1 above.**

Improvements could include the designation of a specific individual to be responsible for monitoring editorial policies and journalistic practices in each firm; the appointment of reader's editors; enhanced involvement of journalists in key strategic decisions, such as the appointment and dismissal of editors; the introduction of 'conscience clauses' to protect staff from undue editorial pressure; and ongoing training.

4. Procedures should be put in place to ensure that the public interest in press freedom is 'mainstreamed' and consistently recognised in all legislation affecting the media, as well as by prosecuting authorities, courts and regulators. Clear and coherent guidelines regarding the public interest in press reporting should be developed and consideration given to enshrining key rights and responsibilities of the media in primary legislation as has been done in Luxembourg.

5. Although the current system for appointing media regulators is a relatively open one, certain appointments remain subject to government influence. We thus recommend a greater role for Parliamentary oversight, with key regulatory posts subject to approval by a cross-party Parliamentary committee after a public hearing. The appointment of members to represent the devolved nations should be subject to similar review by the relevant devolved institutions. To avoid the (appearance of) political bias, past as well as serving politicians should be precluded from holding such offices and in making appointments the primary emphasis should be on relevant experience in the media sector.

6. In order to ensure the continuing independence of the BBC, the level of funding should be fixed on the basis of a transparent process incorporating an independent advisory body as in Germany. The process should allow time for public debate and consultation with interested bodies, before approval by Parliament. We recommend that the licence fee be solely used to fund the BBC to keep a clear link in the public's mind between the fee and the services they receive from the Corporation. Funds, once designated, should not be subject to subsequent alteration. Modifications to the way in which the licence fee is levied may now be required to take into account the different ways that individuals access media content.

7. We support the present review of media ownership rules and recommend that Government and Parliament consider re-introducing fixed ownership limits in order to create certainty for industry and reduce the risk of agency capture. Oversight of individual cases and general trends should be vested in an independent media authority such as Ofcom, with no scope for government intervention. Consideration should also be given to establishing a 'converged' competition regulator for the communications sector, able to monitor and review the actions of increasingly powerful online operators.

8. We recommend the introduction of a legal requirement that media firms, established and operating in the UK, should publish ownership details. The information should be readily accessible, for instance, on the media organisation's website, in order to enable citizens to make informed choices about the media they use.

9. Transparency should similarly be required in relation to any vested interests that editors, publishers and journalists may have in specific content, and any payments made or benefits in kind provided for content. As a condition of membership of any future self or co-regulatory regime, media organisations should be required to disclose such interests to the public in a timely, relevant and accessible fashion.

10. In order to render the law more accessible for the public, we recommend that related media acts should be consolidated and that every effort is made to ensure that future

**legislation is comprehensible, taking into account the technical nature of the field. Given the cross border nature of many communication services we also suggest that where there are proposals for reform in areas affecting the media in one jurisdiction, for instance regarding defamation, co-ordination takes place with relevant legislative, regulatory or judicial bodies in the other UK jurisdictions to facilitate, where appropriate, a consistent approach to law reform.**

### **Key observations**

Existing regulatory provisions, notably the 2003 Communications Act, have been criticised for not recognizing the primary importance of the interests of citizens in a free, independent and diverse media environment. Given the role of the media in democratic societies, clear priority should be given in any future regulatory system to the interests of citizens over those of consumers and industry. Effective procedures should also be put in place to ensure that those interests are properly identified, either through specific representation, consultation or independent research. Similarly, the importance of press freedom has received patchy recognition in legislation and the degree of protection offered the press from prosecution, or in the form of defences in civil or criminal proceedings, is not always clear. Consistent ‘mainstreaming’ of, and clarification regarding, press interests are thus desirable.

At present, the law relating to the media is spread across a number of acts and amending provisions. Although the Internet facilitates access to updated legislation, it remains difficult for journalists and the public to understand what the law provides. Consideration should thus be given to formal consolidation of related media acts in a single legislative provision and how best future legislation can be made comprehensible to the public, albeit in a technical field.

The present regulatory environment is complex and has not kept pace with convergence. Fragmentation of regulation according to media type is unlikely to be sustainable and can lead to confusion amongst consumers and citizens. For example, on-demand audiovisual media services are subject to a limited but effective co-regulatory regime, while similar video-content posted by newspapers on their websites is subject to a more exacting set of standards but implemented through a self-regulatory system with limited sanctions and partial industry coverage. We suggest that it is now necessary to re-examine the case for separate regulation of the press from other media sectors, taking into account the experience of successful cross-sector self-regulatory schemes in other European countries such as Finland.

Absent effective regulation, whether state, co- or self-regulation (wealthy) individuals will turn to the courts for redress. In the UK, the risk of legal proceedings and legal costs can have a chilling effect on the media. It is thus important that any future regulatory system that replaces the now discredited Press Complaints Commission is impartial, effective, low cost and able to command both the trust of the public and the media. Suggestions for a new system of adjudication in media cases warrant further consideration.

Media consolidation is also a current concern in the UK. Powerful media interests may be able to distort or suppress information and exclude alternative voices from the market. Deregulation has resulted in a case by case process of merger review that has proved lengthy, uncertain and open to government manipulation. We thus suggest that consideration should be given to the reintroduction of fixed ownership limits, both mono and cross media, overseen by an independent regulator, with no scope for government intervention. In addition, individuals

need to know who owns the media they access and the existence of any conflicts of interest or payments that could affect the content of specific reports.

The current economic pressures on newspapers, but also on other media players, pose a significant risk to the future of a free and independent media sector in the UK. The loss of advertising revenue has had a marked effect on newspapers, which in turn has placed greater pressure on journalists to produce content, limiting the time that can be allocated to investigations and increasing the reliance on pre-packaged content. While the quality of top level journalism in the UK is very high, there is a risk that investigative journalism becomes too expensive to be maintained.

One of the key characteristics of the UK media market is the strong public service sector operating alongside a well developed commercial sector, providing a varied media environment for citizens. The distinct public service models in operation help to support provision of a wide range of content, while early adoption of independent programme quotas has led to a strong and diverse independent sector. The willingness of governments in the past to support the adoption by public service broadcasters of new technologies and their entrance into new media markets has enhanced the consumer experience and the contribution of public service media to the public sphere. The value for citizens of a strong, independent and institutionally varied public service media sector should not be underestimated and should continue to receive support, even when under pressure from commercial interests and allied political groups.

Although there has been a strong emphasis in the UK on professional, independent regulators, government still plays a role in the appointment of key personnel and in fixing the terms of operation of the BBC and level of the licence fee. Consideration should be given to how the independence of regulators and public service media can be further guaranteed and, in particular, whether greater involvement of parliament would reduce the risk of partisan pressure or, alternatively, would further politicise these institutions.

## **Policy recommendations**

### **1. Creating a regulatory framework for the converged media environment**

The current regulatory framework employed in the UK was largely created when different types of media (video, audio, text) were easily identifiable and linked to specific methods of distribution. In the light of convergence this is no longer the case and the existing regulatory framework is increasingly complex. Thus, while the Editor's Code of Practice (PCC Code) enforced by the (caretaker) Press Complaints Commission applies to audiovisual media content on newspaper websites, the Authority for Television on Demand (ATVOD) regulates on-demand audiovisual media content elsewhere. Given the significant differences between the two regulatory codes, this may lead to consumer confusion. Moreover, the very limited substantive scope of ATVOD's jurisdiction, could push individuals to rely on the courts to resolve disputes, which can be both expensive and time consuming.

A new regulatory framework is thus needed. Two approaches in particular merit further consideration. The first would be to create a **self-regulatory framework open to all media sectors and players**. As the PCC Code is substantively quite close to the content codes applicable to broadcast television, a framework broadly based on the PCC Code could be extended across all sectors, video, audio and text, to create a more coherent framework. The more detailed provisions in the broadcasting codes could, where relevant, be drawn on to

develop standards further. Such a regime could be open to all content providers in the UK, though organisations subject to specific public service codes would be exempt. Consideration should here to be given to:

- Encouraging the **broadest possible engagement by industry** with the system. Access to speedy, alternative dispute resolution procedures is likely to be a significant attraction. Adjudication could offer significant advantages but would require an element of statutory underpinning if necessitating a stay of legal proceedings. Participating firms could also be offered certain fiscal advantages on the basis that they are less likely to make use of the courts and thus call on public resources.
- **Involving journalists** as well as members of the public in all aspects of the regulatory body’s work. This should provide better safeguards for editorial integrity and enhance public trust in the organisation, no longer seen as primarily acting in the interests of editors or proprietors.
- The imposition of **sanctions beyond an apology or correction**, for example, an increase in the annual levy on firms found to have breached the code and/or compensation for victims subject to a cap.
- Expanding the **remit and powers** of the body to facilitate own-initiative investigations and a more overt role in promoting ethical practices, rather than simply responding to complaints.

Given the UK’s obligations under the EU Audiovisual Media Services Directive, it would be necessary to maintain legal enforcement of the directive’s basic provisions relating to on-demand video services, either by ATVOD or through statutory provision.

Alternatively, the existing **co-regulatory mechanism** employed in relation to ATVOD could be extended both as to scope, so that it covers providers of text and audio as well as video content, off as well as online, and to standards, to cover the areas included in the PCC Code. This would ensure that all relevant firms participate in the scheme but for this reason would require a problematic demarcation to be drawn between those firms and individuals covered and those that are not. Similarly, although co-regulation would enable a potentially more exacting enforcement system, backed ultimately by fines, to be put in place, there would be considerable potential for evasion by relocation outside the UK. As above, bodies subject to an alternative regulatory code, such as the BBC, would be exempt.

**We recommend the introduction of a cross-sector, cross platform, self or co-regulatory framework, suitable for a converged media environment that will command the trust and support of the public, journalists and editors. Participating firms should be expected to formally commit to the promotion of ethical practices in their media organisation as discussed in recommendation 3.**

**2. Further state support to relieve the economic pressures on journalism**

News publications, particularly the quality ‘broadsheets’, are currently facing serious economic pressures due to a loss of advertising revenue and the currently unstable business model, as well as declining readership. This pressure is often passed on to journalists, who are



under enormous pressure to produce more copy, in less time, with fewer resources. This has led to heavy use of news agency copy, PR material and the copying of third party content, which is arguably less valuable to the public than investigative journalism that provides information not previously available. Consideration should be given to how the state can help to alleviate these pressures, which could, in the long term, damage the viability of the press sector in the UK.

**Consideration should be given to how the state itself can address some of the economic pressures on quality journalism, for example through various forms of tax relief, the award of charitable status for certain types of organisation, and the imposition of a levy on those parts of the communications sector that profit from, but do little to create, original media content, notably search engines or ISPs, with the revenue redistributed to support investigative journalism.**

### **3. Further industry support for ethical journalism**

As noted above, journalists are under increasing pressure, which may lead them to resort to unethical practices. There are several ways to alleviate some of these pressures. Firstly, firms participating in any future self or co-regulatory regime could be required to designate a specific official with responsibility to monitor and report regularly on ethical practices in the firm. Firms could also be required to draw-up and publish a document setting out their level of commitment to ethical practices, adherence to specific regulatory regimes and how they intend to implement specific ethical commitments. Encouragement could similarly be given to the appointment of readers, listeners or viewers' editors, either for a single firm or group of companies to help cover the additional cost.

Secondly, participating firms could be required to implement a conscience clause, as proposed by the National Union for Journalists, offering protection to journalists from being fired for refusing to partake in unethical journalism. While the actual effect of such a clause would be difficult to predict it would at least formally recognise that journalists should be able to stand up to their editor without the immediate fear of being fired. Journalists could also be more closely involved in key decisions relating to the firm, in particular, regarding editorial appointments.

Thirdly, it is important that journalists stay up-to-date with developments given the rapidly changing media environment. Thought should be given to developing and funding a framework for ongoing professional training offered to all journalists during working hours. Costs could be kept down by providing online training courses.

**Industry should be encouraged or required to take measures designed to promote ethical practices within their own firms. These could include: the designation of a specific individual responsible for monitoring editorial policies and journalistic practices; the adoption and publication of a document detailing the firm's commitment to promoting ethical practices; the appointment of 'reader's editors'; adoption of a conscience clause to protect journalists; greater involvement of journalists in key decisions relating to the firm; and enhanced professional training.**

#### **4. Clarification of the public interest in investigative journalism**

Investigative journalism plays a vital role in the democratic process but may impact on the rights of others or contravene the criminal law. Despite formal recognition of the importance of a free press in section 12 of the Human Rights Act, not all statutory provisions that affect the media include a public interest defence. Moreover, the relevance of such considerations on prosecutors has not been clear (though guidelines have now been proposed in England) and courts have not always afforded sufficient weight to media freedom, notably in relation to the protection of sources. This creates considerable uncertainty for the media and may chill legitimate investigative reporting.

**To enhance certainty for the press, coherent guidelines regarding the public interest in press reporting should be developed. This public interest should also be ‘mainstreamed’ to ensure that it is consistently recognised in all legislation affecting the media, by prosecuting authorities, courts and regulators. Consideration should be given to the adoption of legislation setting out key rights and responsibilities of the media as has been done in Luxembourg.**

#### **5. Creation of an open and transparent appointment system for key board members of Ofcom and the BBC Trust**

While important measures have been put in place to protect the independence of media regulators, there remains concern that indirect influence could be exerted by government through its control over the appointment of key board members. We suggest that such appointments should be approved by a cross-party committee of both Houses of Parliament after a public hearing designed to enhance public transparency and accountability.

**The appointment of key board members to media regulatory bodies should be approved by a representative political body drawn from the various parties in Parliament, after a public hearing. Board members representing the devolved nations should be subject to similar review by the relevant devolved institutions. To reduce the risk, or appearance, of potential political bias both past as well as present members of Parliament should be excluded from holding such posts, which should be awarded primarily on the basis of the candidate’s expertise in the media field.**

#### **6. Secure funding for the BBC**

While political influence can be exerted through appointments, it can similarly be exerted through the ability to control the level of funding made available to regulatory bodies and public service broadcasters. The 2010 licence fee settlement significantly reduced the BBC’s budget, yet took place with little transparency and no parliamentary oversight, leaving the process open to undue political pressure.

Another concern is that the licence fee is currently being used to finance several services not directly linked to the BBC, such as the roll-out of broadband. The method of levying the fee may also no longer be in keeping with current media consumption patterns. Levying the licence fee solely from those who watch or listen to the BBC ‘live’ fails to recognise the increasing number of citizens who access the BBC on-demand through online viewing (or time-shifting through digital recorders). Certain European countries have now

moved to levy the licence fee on a per household basis or, as in Finland, through a hypothecated tax that is levied both on individuals and companies.

**In order to ensure the continuing independence of the BBC, the level of funding should be fixed on the basis of a transparent process incorporating an independent advisory body such as the Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten (KEF) in Germany. The process should allow time for public debate and the recommendations of the advisory body should then be put to Parliament for approval. Where Parliament diverges from the recommended allocation, clear and convincing reasons need to be given. The licence fee should be solely used to fund the BBC to keep a clear link in the public's mind between the fee and the services they receive. This would not preclude alternative funding streams for other purposes. Funds, once designated, should not be subject to subsequent alteration. Modifications to the way in which the licence fee is levied may be required to take into account the different ways individuals now access media content.**

#### **7. Clear and effective control of media ownership concentration by an independent media authority**

At present the government has discretion as to whether or not to trigger a specific public interest investigation under s58 of the Enterprise Act 2002 where media mergers are involved. Application of the present rules is time consuming and has created considerable uncertainty for industry. In particular, the integrity of the system has been brought into question by revelations regarding potential biases or inappropriate practices in the consideration of the News Corporation/BSkyB proposed merger last year. Moreover, the media specific merger rules do not cover online media services nor do they deal with cases of organic growth, which can be equally damaging to media plurality. The Internet has led to the development of new platforms, aggregators and search engines that exert considerable control over the flow of information but do not necessarily contribute to production of content.

**Consideration should be given to the reintroduction of fixed media ownership limits to protect citizens and the democratic process, create certainty for industry and reduce the scope for agency capture. Oversight of media concentration, both in relation to individual cases and general trends, should be vested in an independent media authority such as Ofcom. The government should not be involved in such investigations. Media concentration rules should take into account both online and traditional broadcast and press services. Consideration should also be given to establishing a 'converged' competition regulator for the communications sector, able to monitor and review the actions of increasingly powerful online operators.**

#### **8. Disclosure of ownership information**

Providing the public with clear and easily accessible media ownership information allows them to judge the source from which they are receiving information. Especially in sectors where news is not regulated for impartiality, for example in newspapers and most online news provision, it is important that the public can evaluate and judge information independently.

**To protect the interest of citizens in a pluralist media environment, media firms established and operating in the UK should be required to publish ownership information. As most publications have their own websites this information could easily be included online, for example on a separate page, but could also helpfully be collated in a central register.**

#### **9. Disclosure of vested interests in content by editors, publishers and journalists**

To enable the public to evaluate information conveyed by the media, editors and journalists should disclose any financial, or other, interests they may have in published content. Where money or goods have been received in return for publication of material this should be noted in, or at the end of, the story. Vested interests in companies, through, for example, the holding of shares, or political affiliations should also be disclosed to allow the public to evaluate and judge the information provided. As noted, this could also be indicated at the end of a programme or report or included alongside ownership information on a separate (web) page of the publication.

**Vested interests that editors, publishers and journalists may have in specific content, and any payments made or benefits in kind provided for content, should be disclosed and rendered readily accessible to the public.**

#### **10. Consolidation and clarification of existing media legislation and further co-ordination in developing the law and best practice relating to the media across England and Wales and the devolved nations.**

At present the law relating to the media is spread across a number of acts and amending provisions. It is thus difficult for journalists and the public to understand what the law provides. The law should be written as clearly as possible in a field that is extremely technical and all related provisions consolidated in a single, up to date and readable piece of legislation. The UK includes a number of distinct legal jurisdictions and, as a result, there are a number of differences in the law affecting the media across the state. In the past, for example, Scottish and English courts have taken different approaches in contempt cases and it is notable that although guidelines for prosecuting the press and a new defamation act have been proposed for England, similar steps have not yet been taken for Scotland.

**The law relating to the media should be consolidated where possible into a single, readable piece of legislation. Given the increasingly international nature of the press we would encourage co-operation across England and Wales and the devolved nations to ensure that wherever possible a consistent approach to law reform is undertaken.**

## **II. Policy recommendations addressing the European Union and the Council of Europe**

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

*Fabrizio Cafaggi, Federica Casarosa, Tony Prosser, Andrea Renda and Rosa Castro*

### **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](http://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 Školokay 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 propretisation. 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.

### **III. Regulatory matrix**

## **Regulatory matrix**

*Fabrizio Cafaggi, Federica Casarosa, Tony Prosser*

### **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 MEDIADDEM 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*

<b>Type of activity / type of media</b>		<b>Rule making</b>	<b>Monitoring</b>	<b>Enforcement</b>
<i>Press</i>		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
<i>Broadcasting</i>		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
<i>New media</i>	<i>e-versions of traditional media</i>	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
	<i>media with online presence only</i>	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.

### **2.3 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

	<b>Self-regulation</b>	<b>Delegated self-regulation</b>	<b>Ex post recognised self-regulation</b>	<b>Co-regulation</b>
<i>Belgium</i>	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.
<i>Bulgaria</i>		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.
<i>Croatia</i>	Journalists association			
<i>Denmark</i>	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.		
<i>Estonia</i>	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).		
<i>Finland</i>	Press Council Self-regulation by main Finnish broadcasters			The Finnish Communication Authority applies the self-regulatory code of main Finnish broadcasters to all Finnish television companies.
<i>Germany</i>	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.
<i>Greece</i>	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. <i>Ethics committees</i> , 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.	
<i>Italy</i>	Self regulation of advertising standards	Law delegates self-regulatory power to the Journalist Association,		<p>Coordination between the Data Protection Authority and the Journalist Association with regard to privacy protection in journalistic activity</p> <p>Co-regulation (adopted in statutory law) concerning minors protection issues in broadcasting</p> <p>Failed attempts of state steered self-regulation regarding the protection of dignity online</p>
<i>Romania</i>	<p>Press council for industry and journalists</p> <p>Romanian Advertising Council</p> <p>Romanian Audiovisual Communication Association</p>			<p>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.</p>
<i>Slovakia</i>	Journalist and industry self-regulation			
<i>Spain</i>	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.
<i>Turkey</i>	Journalists association			
<i>UK</i>	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.